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Shoba Sivaprasad Wadhia
Editor-in-Chief

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Letter From the Editor-in-Chief

Shoba Sivaprasad Wadhia

I write this letter days after the fall of Afghanistan's government and return of the Taliban. Immigration attorneys around the country are taking calls from clients and individuals through "WhatsApp" and using every legal tool in the toolbox to help Afghan nationals leave Afghanistan for the United States or a third country. The world is on fire and the flames are burning as we enter the twentieth anniversary of the terrorist attacks on September 11, 2001—an event that has had lasting impacts on immigration law that appear in sometimes subtle and often significant ways.

The Talmud states, "Do not be daunted by the enormity of the world's grief. Do justly now, love mercy now, walk humbly now. You are not obligated to complete the work, but neither are you free to abandon it." These are the words that ring in my ears as I showcase the articles in this volume of the *AILA Law Journal*. Each of our authors, undaunted, provide the reader with the deep thinking and practical tools for helping immigrants who are vulnerable or stuck in a limbo.

Sasha Kaskel offers real-time strategies on the "EB-1A" or "Extraordinary Ability" category in immigration law by summarizing the favorable decisions from a unit in U.S. Citizenship and Immigration Services known as the Administrative Appeals Office, or AAO. Kaskel seamlessly applies the facts of winning AAO cases to the regulations governing the EB-1A criteria. For example, she documents how a judo coach who won several first-place medals at competitions satisfied the awards requirement of the EB-1A category. Peter Choi examines a term in immigration law called "automatic revalidation," which refers to a rule that automatically extends the period of an expired visa and, in certain instances, converts the visa's nonimmigrant classification. Choi offers high-quality writing and understanding in describing the automatic revalidation process and the ordinary and less conventional cases. Choi proposes a reformulation of the rule that is both modest in change and significant in its impact.

Mara Weisman sheds light on the understudied but compelling topic of international adoptees who may have resided in the United States for most of their lives, but who are vulnerable to immigration enforcement because of limitations in the law. Weisman showcases these limitations through case studies and also discusses the language and history of the Child Citizenship Act of 2000 and the importance of legislation to provide citizenship for adoptees. In his piece, "Deferring the Dream," Paúl A. Pirela provides a tour of the Deferred Action for Childhood Arrivals, or DACA, program, with a specific analysis on the litigation challenging the attempted rescission of DACA in 2017, as

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well as the lawsuit challenging the underlying legality of DACA. Pirela argues that Congress should act to protect "Dreamers" through legislation so they can live in the United States with legal status and greater security.

Angela Landa, in her piece "The Civil Penalty of Deportation," argues that immigration law should be purely civil and that deportation should be used as a civil penalty. Landa references of the work of several immigration law scholars to support her thesis and reveal the complexities between immigration law and criminal law. Focusing on clients who are in immigration detention, author Matthew Boles provides a primer on seeking bond "redetermination." A bond redetermination request requires the attorney or client to show that there has been a "material change of circumstances" to warrant a subsequent hearing. Boles walks through the case law on the meaning of "materiality" and leaves the reader more prepared for seeking these requests.

Each of our authors provides a way to do justly now. I am grateful to them, to my right hand (literally and figuratively) managing editor Danielle Polen, editor Richard Link, publisher Morgan Morrissette Wright of Full Court Press, and our wondrous editorial board for helping to select or edit articles for this volume during busy and uncertain times. Our next volume will celebrate the seventy-fifth anniversary of AILA. We hope you will consider writing and submitting your work for this special issue.

Shoba Sivaprasad Wadhia, Esq.
Editor-in-Chief

Strategizing EB-1A Extraordinary Ability Petitions

Drawing From Favorable AAO Decisions

Sasha Kaskel*

Abstract: The Immigration and Nationality Act provides for the issuance of immigrant visas to foreign nationals with extraordinary ability in the fields of science, business, art, education, or athletics. Extraordinary ability is proven by demonstrating three out of a possible ten criteria listed in the Code of Federal Regulations. The USCIS Administrative Appeals Office (AAO) has issued probative decisions sustaining appeals and approving petitions to classify beneficiaries as aliens with extraordinary ability. This paper highlights favorable AAO decisions made on EB-1A petitions and the reasoning elaborated for reaching their conclusions. While nonprecedent AAO decisions are nonbinding, the reasoning supporting favorable holdings may shed powerful light on strategic approaches to satisfying the extraordinary-ability criteria.

EB-1A Extraordinary-Ability Criteria

Under the Immigration and Nationality Act, a petitioner may petition for a beneficiary to be classified as an alien with extraordinary ability by filing Form I-140, Petition for Immigrant Worker.[1] "Extraordinary ability" means a level of expertise indicating that the individual is "one of that small percentage who have risen to the very top of the field of endeavor."[2] Qualifying for this classification requires showing that the foreign national (1) holds extraordinary ability, (2) will continue working in the field of expertise, and (3) will substantially benefit the United States. Extraordinary ability is proven by demonstrating either "a one-time achievement (that is, a major, international recognized award);"[3] or at least three of the following criteria:

- The foreign national has received nationally or internationally recognized prizes or awards for excellence in the field of expertise.[4]
- The foreign national has held membership in associations within the field of expertise that require outstanding achievements of their members, as judged by recognized national or international experts in the field.[5]
- Materials about the foreign national's work in the field of expertise have been published by "professional or major trade publications or other major media."[6]

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- The foreign national has participated as a judge of others' work in the field of expertise or an allied field.[7]
- The foreign national has made "original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field."[8]
- The foreign national has authored scholarly articles in the field, "in professional or other major media trade publications or other major media."[9]
- The foreign national's work in the field has been displayed "at artistic exhibitions or showcases."[10]
- The foreign national "has performed in a leading or critical role for organizations or establishments that have a distinguished reputation."[11]
- The foreign national "has commanded a high salary or other significantly high remuneration for services, in relation to others in the field."[12]
- The foreign national has earned "commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales."[13]

The Doctrine of Comparable Evidence

Providing a final opportunity to demonstrate qualification, documentation may be submitted as "comparable evidence to establish the beneficiary's eligibility" for classification as an alien with extraordinary ability.[14] A 2010 United States Citizenship and Immigration Services (USCIS) policy memorandum explains: "This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if it is determined that the [regulatory] standards … do not readily apply to the alien's occupation. When evaluating such 'comparable evidence,' consider whether the [regulatory criteria] do not readily apply to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation. General assertions that any of the ten objective criteria … do not readily apply … should be discounted."[15] This language may be interpreted as requiring proof that none of the ten criteria apply to the beneficiary's occupation in order for comparable evidence to be considered. However, AAO decisions have concluded that beneficiaries satisfied a criterion through comparable evidence, while simultaneously considering documentation that they met other of the ten criteria.[16] Drawn from favorable decisions, the AAO's reasoning for accepting comparable evidence in lieu of regulatory criteria is detailed below.

Considerations for Extraordinary Ability in Athletics

Several criteria demonstrating extraordinary ability are readily applicable to beneficiaries specializing in athletics, whose achievements may include winning medals and publication by the media. Considering athletes' frequent career change to coaching, the job title sought by a beneficiary is a crucial consideration that may fundamentally dictate the strategic approaches to demonstrating satisfaction of the criterion. The three major job title options for a beneficiary who has earned achievements both as an athlete and coach are (1) athlete or competitor, (2) coach, or (3) [name of sport] specialist, expert, or professional. The third option implies a "hybrid" between the first two, consisting of both athletic and coaching duties.[17] A beneficiary's proposed job title should be carefully considered in light of the possibility that USCIS may interpret past athletic achievements as less relevant, or even inapplicable, to the regulatory criteria where he or she seeks employment as a coach.

Where the beneficiary seeks employment as a coach, some AAO decisions have considered that only coaching achievements were capable of satisfying the regulatory criteria.[18] However, other decisions accepted that a coach's past athletic achievements satisfied the criteria, and subsequently performed an overall analysis to determine whether the beneficiary's expertise expanded to coaching.[19] Both approaches taken by the AAO are analyzed below, pinpointing the specific reasoning and case facts that supported favorable decisions.

Considering Whether Coaching Is Within the Beneficiary's Area of Expertise

In *Matter of K–S–Y–*, the AAO held that the petitioner, who sought employment as a judo coach, "established his extraordinary ability in judo" by meeting three regulatory criteria.[20] The petitioner satisfied the (1) "awards or prizes," (2) "membership," and (3) "published materials" criteria based on his athletic achievements.[21] Yet the petitioner was not "off the hook" in proving that coaching fell within his area of expertise.[22] The AAO explained: "We may conclude that coaching is within an athlete's area of expertise . . . if (1) the individual's national or international athletic acclaim was recent; and (2) he or she sustained that acclaim upon transition to coaching at a national level."[23] Applied to the petitioner, the AAO observed that (1) "the record demonstrates the Petitioner's recent athletic acclaim," and (2) there was "no appreciable lapse between his days of competing as an athlete and coaching at the national level . . . . These considerations support a finding that the Petitioner's extraordinary ability and sustained acclaim as a judo athlete . . . extend to his work as a judo coach."[24] Supporting this favorable decision, the record also showed a "progression of education, experience, and licensing that has

positioned the Petitioner to continue in his area of expertise as a judo coach .... These preparatory steps taken ... throughout his career as an athlete further support a finding that coaching is within his area of expertise."[25]

Prior to *K–S–Y–*, decisions already utilized an analogous framework to analyze whether the foreign nationals' area of expertise encompassed coaching, where the regulatory criteria were satisfied based on their athletic achievements and they sought employment as a coach. In 2008, an AAO decision sustained the appeal and approved the petition for a figure skating coach where the director had already expressly concluded that the petitioner qualified as a competitive skater of extraordinary ability. Thus, the only issue on appeal was whether the petitioner had demonstrated that coaching fell within his area of expertise.[26] The AAO explained: "While a figure skater and a coach certainly share knowledge of ice-skating, the two rely on very different sets of basic skills. Thus, we will not presume that coaching necessarily falls within the same area of expertise as competitive athletics .... In a case where [1] an alien has clearly achieved national or international acclaim as an athlete; and [2] has sustained that acclaim in the field of coaching at a national level, we can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability, such that we can conclude that coaching is within the petitioner's area of expertise. Specifically, in such a case, we will consider the level at which the alien acts as a coach. A coach who has an established successful history of coaching athletes who compete regularly at the national level has a credible claim."[27]

As detailed above, *Matter of K–S–Y–* outlines a framework to demonstrate that a foreign national who seeks employment as a coach, yet satisfies the regulatory criteria based on athletic achievements, will "enter the United States to continue to work in his area of extraordinary ability."[28] However, a presupposition that USCIS will analyze evidence in strict accordance with *Matter of K–S–Y–*, a nonprecedent decision, need not be considered the sole strategy in preparing an EB-1A extraordinary-ability petition. Other favorable AAO decisions, approving petitions for foreign nationals seeking employment as a coach, emphasized whether *coaching* achievements satisfied at least three regulatory criteria, as detailed below.

Receipt of Nationally or Internationally Recognized Awards or Prizes for Excellence

In *Matter of K–G–*, the AAO concluded that a journalist satisfied the "awards or prizes" criterion where her "award was given ... 'based upon her exemplary' work 'using her pen against violence,'" and the granting "organization 'provide[d] a national award every three years for the excellent women journalist[s] focusing their work in the field of women empowerment at the national level.'"[29] The record also contained information on the judges who determined award winners, and evidence that the petitioner's "receipt of these awards was covered in several national daily newspapers."[30] This decision

demonstrates the benefits of submitting documentation (1) regarding the respective judges, (2) showing media coverage on the foreign national's receipt of the award, and (3) detailing the underlying achievements for which the award was granted.

"Awards or Prizes" Criterion Satisfied Where the Granting Organization Was the Sport's Official Sanctioning Body

In 2005, the AAO concluded that the "awards or prizes" criterion was met by the beneficiary's receipt of "three PSA tour titles and the 2003 U.S. National Men's 30-plus Championship."[31] The AAO reasoned that the award-granting organization, PSA (Professional Squash Association), was "the official sanctioning and membership body for the men's World Rankings and … operates a World Tour and numerous other international squash tournaments"—documented by "a printout from the PSA website."[32] This decision highlights the potential advantage of demonstrating that the award-granting organization is the sport's official sanctioning and membership body.

One Award or Prize May Be Enough

While extraordinary talent may be proven by "evidence of a one-time achievement (that is, a major, international recognized award)," *K–S–Y–* and *Buletini v. INS* affirmed that one award satisfied the "lesser nationally or internationally recognized prizes or awards for excellence," notwithstanding the regulation's reference to "awards" in plural.[33] In *Matter of K–S–Y–*, the AAO cited *Buletini* in stating that a "single award satisfies [the] 'prizes or awards' criterion."[34] In *Buletini*, the U.S. District Court for the Eastern District of Michigan granted the plaintiff's motion for summary judgment, concluding that the denial of his extraordinary ability petition constituted an abuse of discretion.[35] The court in *Buletini* concluded that a doctor of extraordinary ability in technical and scientific research satisfied the criterion based on one single award, given in recognition of his work in compiling the history of public health, which also appeared to be a medal honoring him for his continual service as a doctor.[36] The court in *Buletini* also clarified that "the award need not have significance outside of one country. National recognition of the award is sufficient."[37]

Split Decisions Where the Beneficiary Seeks Employment as a Coach

Where the beneficiary seeks employment as a coach, AAO decisions have taken conflicting stances as to whether awards won by the beneficiary

as an athlete can satisfy the "awards or prizes" criterion. The AAO has also considered documentation that the beneficiary has coached athletes to win awards as "comparable evidence" for this criterion. In *Matter of K–S–Y–*, the AAO held that a judo *coach* satisfied the "awards or prizes" criterion based on his first-place medals won as an athletic competitor.[38] In contrast, in a 2007 decision, the AAO took the firm stance that the beneficiary's awards won "as a gymnast cannot serve to meet this criterion" where he sought employment as a gymnastics coach.[39] The AAO instead concluded that the gymnastics coach satisfied the "awards or prizes" criterion based on letters from athletes attesting that he coached them to win "at the national and international level," submitted as comparable evidence.[40]

In a 2005 decision, the AAO analyzed whether a beneficiary's awards won as an athlete satisfied this criterion, where his proposed job title was listed as "squash professional."[41] The AAO reasoned: "The beneficiary's receipt of three PSA tour titles and the 2003 U.S. National Men's 30-plus Championship constitute lesser internationally and nationally recognized prizes for excellence in professional squash *playing*."[42] However, the beneficiary's proposed job title of squash professional "require[d] skills as *both* a squash player and a squash coach."[43] Accordingly, the AAO also evaluated awards won by athletes under the beneficiary's tutelage in concluding that this criterion was satisfied. The AAO explained: "[T]he beneficiary has coached students who have won national and international tournaments. Such prizes can be considered as comparable evidence for this criterion."[44] Evidence included "[l]etters from . . . athletes attest[ing] that their success was directly attributable to the beneficiary's coaching."[45]

Membership in Associations That Require Outstanding Achievements

In a 2007 decision, the AAO concluded that the petitioner, a gymnastics coach, satisfied the "membership" criterion. The record contained evidence showing that the petitioner was a member of the United States Elite Coaches Association for men's gymnastics. The evidence also indicated that membership was open to coaches who were current in dues and had placed a gymnast in the U.S. Gymnastics Championships any one of the two previous years, plus coaches of any petitioned gymnasts to the national team.[46]

AAO decisions have often taken a critical stance on whether achievements earned as an athlete may satisfy regulatory criteria where the beneficiary seeks employment as a coach. Although the beneficiary in *Matter of K–S–Y–* was a judo *coach*, the AAO concluded that he nonetheless met the "membership" criterion through his "position on the national judo team" as an *athlete*, evidently finding a sufficient nexus between the athletic and coaching fields.[47]

High-Ranking Membership Level May Qualify

In a 2015 decision, the AAO concluded that a professor and researcher who primarily studied avian brood parasites, that is, birds that lay their eggs in the nests of other bird species, satisfied this criterion where he held "a special membership category above general membership."[48] The AAO reasoned: "The bylaws of the [redacted organization] confirm that Elective Membership is a special membership category above general membership and these members 'shall be chosen for significant contributions to [redacted].' Current elective members vote on new candidates and the [redacted organization] publishes a list of newly elected members. A list of the [redacted organization's] elected members reveals that the limited number of members is consistent with an exclusive level of membership that requires outstanding achievements of its members."[49] This decision exemplifies satisfaction of the "membership" criterion where the beneficiary (1) was elected by peers (2) based on merit (3) to hold a "special membership category above general membership" in the association.[50]

USCIS's 2010 policy memorandum explains: "Associations may have multiple levels of membership. The level of membership afforded to the alien must show that, in order to obtain that level of membership, the alien was judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought."[51] Therefore, even where an association does not require *all* members to have earned outstanding achievements, the memorandum suggests that this criterion may be met by showing that the foreign national holds a high-ranking membership *level* therein.

Raising the Comparable Evidence Provision: An Option, Not a Necessity

USCIS's 2010 policy memorandum also discusses submission of comparable evidence for the "membership" criterion, stating: "Election to a national all-star or Olympic team might serve as comparable evidence for evidence of memberships."[52] However, arguing that such evidence is comparable may be unnecessary, as AAO decisions have concluded that beneficiaries satisfied this criterion due to their membership on a national athletic team, without discussion of the comparable-evidence provision. The AAO in *Matter of K–S–Y–* held: "We agree with the Petitioner that his membership on the Korean national team is, in effect, an association membership that requires outstanding achievements, as judged by national experts in judo .... Only those with the highest level of performance made the team, and that selection was performed by judo judges at the national level."[53]

In a 2007 decision, the AAO considered "a coaching credential" held by "an equestrian show jumper—trainer and rider" as comparable evidence for this criterion.[54] The beneficiary held a "credential as a Grade IV Show Jumping International Expert issued by the New Zealand Equestrian Federation."[55] The AAO concluded: "We are persuaded that nomination for, and receipt of, this coaching credential is comparable to an exclusive membership."[56] This decision demonstrates the possibility that a merit-based credential may constitute comparable evidence to satisfy this criterion, where such is granted only to an elite few within the field.

One Single Association Has Satisfied the "Membership" Criterion

While the regulation expressly references a plurality of "associations in the field which require outstanding achievements of their members,[57] the AAO has construed this criterion broadly as inclusive of a singular association.[58] The AAO reasoned: "A narrower interpretation could preclude individuals, who in fact clearly have extraordinary ability in their field, from establishing eligibility if their field is one in which only a single such association, no matter how distinguished, exists."[59]

Published Material in Major Media About the Beneficiary's Work in the Field

In *Matter of K–S–Y–*, the AAO concluded that the petitioner, a judo coach, met the "published materials" criterion because the article submitted was (1) about him, and (2) "from a 'major' medium."[60] The AAO observed: "The piece features a large picture of the Petitioner clenching his fists in victory and describes his performance in the various rounds of the tournament. The Petitioner is clearly the article's focus."[61] In concluding the "major media" requirement had been met, the AAO reasoned that the article was published by "Korea's largest news organization with over 500 journalists" that "provides news to 78 foreign agencies."[62] Contrastingly, in a 2005 decision, the AAO concluded that the beneficiary, a squash professional, failed to meet the "published material" criterion because the record contained no evidence that a website discussing his competitive matches was a professional or major media publication, and the articles only "briefly mention[ed] the beneficiary."[63] These contrasting decisions highlight the benefits of submitting detailed information about the publications, particularly when circulation data shows a broad reach.

Notably, in *Matter of K–S–Y–*, the AAO concluded that the "published material" criterion was met by an article describing tournament rounds in which the beneficiary, a coach, had participated as a competitor.[64] This result demonstrates the possibility that articles about the beneficiary's *athletic*

achievements may satisfy the criterion, even where he or she seeks employment as a *coach*.

Participation as a Judge of Others' Work in the Same or Allied Field

USCIS's 2010 policy memorandum provides the following examples of a beneficiary's achievements that may satisfy this criterion: "Peer reviewing for a scholarly journal, as evidenced by a request from the journal to the alien to do the review, accompanied by proof that the review was actually completed"; and "Serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether an individual candidate's body of work satisfies the requirements for a doctoral degree, as evidenced by departmental records."[65] In a 2014 decision, the AAO concluded that the beneficiary, "an expert in the area of tuberculosis prevention, diagnosis, and treatment," met the "judge of others" criterion.[66] The record included email correspondence showing that he had served as a reviewer of a periodical and editor of a "health magazine."[67] Evidence showed that the beneficiary also contributed to a journal by advising in the selection of appropriate articles to be published, especially in the area of tuberculosis.[68] This decision demonstrates the possibility that a beneficiary's contribution as a journal editor or peer reviewer may satisfy the "judge of others" criterion.

Judging Athletic Competitions

In *Matter of X–N–*, the AAO held that the petitioner, a gymnastics coach, met the "judge of others" criterion by submitting a letter from an organization president listing six national competitions at which he served as a judge.[69] The AAO appears not to have taken issue with the fact that the petitioner had judged the work of athletes, rather than the work of other coaches. As gymnastics, like ice skating, is a judged sport, submitting documentation on how the respective sport is judged may be beneficial.

Selecting Team Members

In a 2007 decision, the AAO concluded that "an equestrian show jumper—trainer and rider" satisfied the "judge of others" criterion because he had been "chosen by the New Zealand Olympic Selection Committee to be the only North American selector for riders to represent New Zealand in international competitions."[70] This decision exemplifies satisfaction of the "judge of others"

criterion where the foreign national was invited to select individuals for membership on an elite athletic team.

Display of Work at Artistic Showcases or Exhibitions: Satisfaction Based on Comparable Evidence

In a 2015 decision, the AAO clarified: "[T]his criterion clearly applies to those in the visual arts. Nonetheless, where a criterion does not readily apply, a petitioner may submit comparable evidence."[71] As a result, the AAO determined that the petitioner, a "Music Director/Pianist/Vocal Coach," met this criterion because programs and fliers revealed that he had performed at "exclusive showcases of opera and other music."[72] Although the AAO has held that the "display of work" criterion is limited to the visual arts, this decision reveals the possibility for performing artists' work to be considered as comparable evidence.

Critical or Leading Role for Distinguished Organizations

According to the AAO, "[a] leading role should be apparent by its position in the overall organizational hierarchy and the role's matching duties. A critical role is evident from the [foreign national's] impact on the organization or the establishment's activities."[73] In a 2015 decision, the AAO concluded that a graphic and fashion designer satisfied this criterion through her work providing "web design and administrative services for 'prominent businesses and charitable organizations.'"[74] The AAO reasoned that her "design has worked to upscale the [company's] brand image value and has attracted a larger number of individual and organizational clients who have accessed the website internationally."[75] Letters of support described the foreign national's creation of a company website that "resulted in an improvement of their brand image," asserted that she was "responsible for the company's substantial rise in the industry and recognition" of a label, and detailed her "recruiting, marketing, and managing responsibilities."[76]

In a 2005 decision, the AAO concluded that the beneficiary, a squash professional, "perform[ed] a leading role" as "one of two full-time employees of the Dayton Squash Center," which had "gained a distinguished reputation by virtue of [his] accomplishments."[77] The petitioner had submitted employment contract and letters verifying that the beneficiary was in charge of directing the entire squash program, including coaching, organizing and managing tournaments, supervising support staff, and maintaining his status as a professional squash player through frequent participation in competitions.[78] Letters asserted that the beneficiary was "simply irreplaceable," and that he had "single-handedly put the Dayton Squash Center on the nationwide squash map through performances [and] results in prestigious squash tournaments

around the nation."[79] The letters (1) pinpointed specific achievements that advanced the organization's status in the field, (2) detailed the beneficiary's precise duties, and (3) were supported by corroborating evidence. Apparently interpreting that a critical or leading role for a single organization may satisfy the criterion, the AAO stated: "Because we find that the beneficiary meets this criterion through his position at DSC, we need not address counsel's far less convincing claim regarding the beneficiary's coaching of the U.S. National Men's Under 19 Squash Team."[80]

In *Matter of X–N–*, the AAO concluded that the petitioner had "played a critical role as . . . one of four head gymnastics coaches" for "one of China's national key sports institutions."[81] Evidence reflected that "production of successful athletes" was the institution's "first priority," and gymnastics was "central to the institution and its reputation."[82] Achieving these institutional goals, the petitioner had recruited and developed "the school's best gymnastics talent."[83] This decision exemplifies satisfaction of the "critical role" criterion where the foreign national's work resulted in an organization advancing its goals or earned achievements central to its reputation. In a 2007 decision, without further elaborating its reasoning, the AAO concluded that the petitioner likewise satisfied the "critical role" criterion as a coach of "elite gymnasts" at a gymnastics academy.[84]

In *Matter of B–A–S–T–LLC*, the AAO sustained the appeal, approving an I-129 petition for a nonimmigrant worker seeking "to classify the Beneficiary as an alien of extraordinary ability in athletics."[85] Several of the regulatory criteria demonstrating extraordinary ability for purposes of an O-1A nonimmigrant visa are identical to the requirements for eligibility for an EB-1A immigrant visa.[86] In *Matter of B–A–S–T–LLC*, the AAO concluded that the beneficiary, a director of coaching, had held a critical or essential[87] role as "the head coach for three age groups" of an athletic club, and was "responsible for their training content."[88] Letters addressed the importance of scouting for the club, noting that the beneficiary spotted and recruited top talent, then prepared them for national competition. His work had assisted the club's players in securing high-paying contracts with professional teams, portions of which helped fund the club.[89] The letters (1) discussed the beneficiary's tangible impact on the organization, (2) distinguished his work as compared to others, and (3) detailed his specific contributions that enabled the organization to achieve overall success.

Original Contribution of Major Significance

Perhaps the most enigmatic criterion is that requiring an original contribution of major significance. "To meet this criterion, a petitioner must demonstrate that [the foreign national's] contributions are both original and of major significance . . . . Contributions of major significance connotes that

[the foreign national's] work has already significantly impacted the field."[90] In a 2011 decision, the AAO concluded that the petitioner, "an atomic physics researcher," met the "original contribution of major significance" criterion.[91] The AAO reasoned: "The petitioner submitted letters of support from experts in the field discussing the significance of his original research contributions .... The experts' statements do *not* merely reiterate the regulatory language of th[e] criterion, [but] they clearly describe how the petitioner's scientific contributions are both original and of major significance in the field."[92] Therefore, expert opinion letters may be most probative where they explain specific effects of the beneficiary's work within the field.

The AAO in *Matter of B–A–S–T–LLC* concluded that the beneficiary, a director of coaching, had made an original contribution of major significance, explaining that the beneficiary's scouting and mentoring had produced notable results in Serbian soccer. Several references emphasized his efforts as a youth coach for a major soccer club.[93] Letters advised that the beneficiary had "prepared several boys for the club's senior squad, mentored players of various ages on the youth national teams, and scouted players from all over Serbia" and had "prepared his own program based on club philosophy, which have been used by other coaches within" the club.[94] A letter also discussed the beneficiary's training of an athlete to break "a record as the youngest goal scorer in a competition match in the club's history."[95] While some of these achievements may appear more probative of the "critical role" criterion, documentation showed that "the Beneficiary organized three coaching education sessions in different cities in Serbia that were attended by over 100 coaches" and "expanded the number of training camps in Serbia."[96]

The AAO in *Matter of C–T–* concluded that the petitioner, a jewelry designer, satisfied the "original contribution" criterion based on letters of support attesting that she "was one of the first, and is still one of the extremely few, jewelry designers ... able to use the unique light and color possibilities of [Ammolite, a] relatively rare and new material[,] to create effects that can be found in few, if any, other types of jewelry."[97] Letters explained that she "does this through [certain] design techniques and methods, using special customized tools which she created specifically for designing Ammolite jewelry, and which are now used by all other designers working in this field."[98] Letters also attested that the beneficiary "created Ammolite pliers, a new industry tool," "designed and built Ammolite bezels that other designers have used," and that her "innovation 'has vastly influenced and improved today's international jewelry design industry.'"[99] Letters explained that the beneficiary's "jewelry [had] evolve[d] into some of the most original work out there today," and that there existed "numerous designers who are quite obviously being influenced by [the Petitioner's] work and through her concepts and creations are having a strong impact on other artists."[100] The letters (1) highlighted the petitioner's influence on the field, (2) showed that others utilize her developments, and (3) demonstrated that peers consider her work important.

In a 2014 decision, the AAO concluded that the petitioner, "an expert in the area of tuberculosis prevention, diagnosis, and treatment," had made an original contribution of major significance.[101] "As supporting evidence of his contributions, the petitioner points to reference letters; the publication of his scholarly articles; citations to his articles; his participation in conferences, meetings, and training; his involvement in consortium and working groups; his authorship of a manual; and his involvement in a television program."[102] The AAO explained: "The petitioner's evidence shows that he has made original contributions of major significance in the field. Specifically, the evidence . . . shows that the petitioner has initiated certain [tuberculosis treatment] models in India and a treatment program . . . that were later adopted on a national and international level . . . numerous reference letters . . . affirm that . . . the petitioner has impacted the field at a level consistent with original contributions of major significance in the field . . . . The evidence in the record supports the assertions in the letters."[103] This decision exemplifies satisfaction of the "original contribution" criterion where the foreign national's work (1) "received attention from the field," (2) "garnered a high number of citations," and (3) was relied on "to train and lead other" professionals.

Contribution to an Authoritative Book Satisfied the "Original Contribution" Criterion

In *Matter of X–N–*, the AAO concluded that the petitioner, a gymnastics coach, satisfied this criterion based on his contribution to a published book, which encompassed a gymnastics program intended "to develop an organized mechanism for training youth and keeping the dominant position of the Chinese in international competition."[104] The AAO reasoned: "Due to the authority of the publication in China, the Petitioner's contribution to the syllabus constitutes an athletic contribution of major significance in the field of gymnastics."[105]

Development of Unpublished Coaching Course Materials Satisfied the "Original Contribution" Criterion

In a 2007 decision, the AAO concluded that a badminton coach satisfied this criterion where he was "the creator or co-creator of development plans and coaching course materials for major international associations that aim[ed] to improve badminton coaching through training better badminton coaches."[106] These development plans were "unpublished course materials" that the beneficiary authored for the petitioner.[107] "[L]etters from the top experts in badminton around the world" attested that the beneficiary had "personally trained top-level coaches around the world."[108] The AAO reasoned:

"The beneficiary's work would appear to have impacted badminton coaches all over the world at the highest levels."[109] This decision exemplifies satisfaction of the "original contribution" criterion where the foreign national's work (1) impacted the field at the highest levels, (2) had international repercussions, and (3) garnered attention from industry experts.

Authorship of Scholarly Articles in the Field

Although the 2007 decision discussed above held that the beneficiary, a badminton coach, made an original contribution of major significance, the AAO concluded that his "internal development plans and unpublished course materials" could not serve to meet the authorship of scholarly articles criterion.[110] The AAO reasoned: "Evidence that the scholarly articles appeared in professional or major trade publications or other major media should be apparent from the article itself."[111]

USCIS's 2010 policy memorandum provides guidance on distinguishing an article as scholarly: "As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. In general, it should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. For other fields, a scholarly article should be written for learned persons in that field. ('Learned' is defined as 'having or demonstrating profound knowledge or scholarship'). Learned persons include all persons having profound knowledge of a field."[112]

Presentations at Major Seminars and Conferences as Comparable Evidence for the "Authorship of Scholarly Articles" Criterion

Uniquely, in a 2007 decision regarding a badminton coach, the AAO considered "presentations as major seminars and conferences" as comparable evidence for this criterion.[113] The AAO reasoned: "[P]resenting one's work at a major seminar or conference is not inherent to the occupation of [a] badminton coach. Thus, we find that the beneficiary's presentations may serve to meet this criterion."[114]

Conclusion

The regulatory criteria demonstrating extraordinary ability for purposes of an EB-1A employment-based immigrant visa may be viewed as puzzlingly cryptic or permissively inclusive. While inevitably ambiguous, the imprecision

may support innovative opportunities to persuasively demonstrate foreign nationals' qualification for this classification based on their wide-ranging achievements.

Notes

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1. 8 CFR § 204.5(a), (h)(1).
2. 8 CFR § 204.5(h)(2).
3. 8 CFR § 204.5(h)(1)
4. 8 CFR § 204.5(h)(3)(i).
5. 8 CFR § 204.5(h)(3)(ii).
6. 8 CFR § 204.5(h)(3)(iii).
7. 8 CFR § 204.5(h)(3)(iv).
8. 8 CFR § 204.5(h)(3)(v).
9. 8 CFR § 204.5(h)(3)(vi).
10. 8 CFR § 204.5(h)(3)(vii).
11. 8 CFR § 204.5(h)(3)(viii).
12. 8 CFR § 204.5(h)(3)(ix).
13. 8 CFR § 204.5(h)(3)(x).
14. 8 CFR § 204.5(h)(4).
15. USCIS Policy Memorandum, *Evaluation of Evidence Submitted With Certain Form I-140 Petitions* (Dec. 22, 2010), at 12, AILA Doc. No. 11020231. While nonbinding, USCIS policy memoranda are probative in demonstrating how evidence may be considered in the adjudication of immigrant petitions. *See Matter of Arrabelly & Yerrabelly*, 25 I&N 771, 776 n.4 (BIA 2012) (Statutory interpretation "embodied in internal DHS memoranda rather than in regulations . . . has the 'power to persuade,' but it is not binding.").
16. *See Matter of [name redacted]*, LIN 06 113 51230 (AAO June 14, 2007), at 4, 7 (concluding that the beneficiary, a gymnastics coach, satisfied the "awards or prizes" criterion based on "evidence reflecting that he coached Belarusian National Team members who competed successfully at the national and international level," in addition to meeting the "membership and "critical role" criteria).
17. *See Matter of [name redacted]*, LIN 03 264 50779 (AAO June 10, 2005), at 3 ("The record establishes that the position of a squash professional is inextricably linked to the professional's abilities as both a squash player and coach.")
18. *See Matter of [name redacted]*, LIN 06 113 51230 (AAO June 14, 2007), at 4 ("[T]he petitioner's awards demonstrating his record of success as a gymnast cannot serve to meet th[e] 'awards or prizes' criterion," where he sought employment as a coach.).
19. *Matter of [name redacted]*, LIN 07 003 52327 (AAO June 2, 2008), at 3 ("In a case where an alien has clearly achieved national or international acclaim as an

athlete and has sustained that acclaim in the field of coaching at a national level, we can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that we can conclude that coaching is within the petitioner's area of expertise.").

20. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 5.
21. *Id.* at 2–3.
22. *Id.* at 5 ("Though he demonstrated extraordinary ability as a judo athlete, the Petitioner listed on the Form I-140, Immigrant Petition for Alien Worker, his proposed employment in the United States as judo coach.").
23. *Id.* at 6.
24. *Id.*
25. *Id.*
26. *Matter of [name redacted]*, LIN 07 003 52327 (AAO June 2, 2008), at 3–4.
27. *Id.*
28. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 7 ("We may conclude that coaching is within an athlete's area of expertise . . . if (1) the individual's national or international athletic acclaim was recent, and (2) he or she sustained that acclaim upon transition to coaching at a national level.").
29. *Matter of K–G–*, ID# 595327 (AAO Nov. 16, 2017), at 3.
30. *Id.*
31. *Matter of [name redacted]*, LIN 03 264 50779 (AAO June 10, 2005), at 2, 4 ("The beneficiary's receipt of three PSA tour titles and the 2003 U.S. National Men's 30-plus Championship constitute lesser internationally and nationally recognized prizes for excellence.").
32. *Id.*
33. 8 CFR § 204.5(h)(3)(i).
34. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 3 n.2; *see also* Buletini v. I.N.S., 860 F. Supp. 1222, 1230–31 (E.D. Mich. 1994).
35. *Buletini*, 860 F. Supp. at 1230.
36. *Id.* at 1225, 1230.
37. *Id.* at 1231.
38. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 2.
39. *Matter of [name redacted]*, LIN 06 113 51230 (AAO June 14, 2007), at 4.
40. *Id.* at 4–5.
41. *Matter of [name redacted]*, LIN 03 264 50779 (AAO June 10, 2005), at 4.
42. *Id.* (emphasis added).
43. *Id.* at 2, 4 (emphasis added).
44. *Id.*
45. *Id.*
46. *Matter of [name redacted]*, LIN 06 113 51230 (AAO June 14, 2007), at 7.
47. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 3.
48. *Matter of [name and file number redacted]* (AAO Mar. 27, 2015), at 7, www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2015/MAR272015_01B2203.pdf.
49. *Id.*
50. *Id.*
51. USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions* (Dec. 22, 2010), at 7, AILA Doc. No. 11020231.

52. *Id.* at 12.
53. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 3.
54. *Matter of [name redacted]*, WAC 06 127 52482 (AAO Mar. 8, 2007), at 3, 6–7 ("While a coaching credential may not be a membership in an association, it would seem that this criterion is not applicable to the petitioner's field. Thus, we can consider comparable evidence to meet this criterion.").
55. *Id.* at 6.
56. *Id.* at 6–7.
57. 8 CFR § 204.5(h)(3)(ii).
58. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 3 n.2; *see also Matter of [name and file number redacted]* (AAO Mar. 27, 2015), at 7 (professor and researcher), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2015/MAR272015_01B2203.pdf.
59. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 3 n.2; *see also Matter of [name and file number redacted]* (AAO Mar. 27, 2015), at 7 (professor and researcher), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2015/MAR272015_01B2203.pdf.
60. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 3.
61. *Id.*
62. *Id.*
63. *Matter of [name redacted]*, LIN 03 264 50779 (AAO June 10, 2005), at 6.
64. *Matter of K–S–Y–*, ID# 14269 (AAO Mar. 9, 2016), at 3, 5.
65. USCIS Policy Memorandum, *Evaluation of Evidence Submitted With Certain Form I-140 Petitions* (Dec. 22, 2010), at 8, AILA Doc. No. 11020231.
66. *Matter of [name and file number redacted]* (AAO Dec. 1, 2014), at 3, www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2014/DEC012014_01B2203.pdf.
67. *Id.*
68. *Id.*
69. *Matter of X–N–*, ID# 15507 (AAO Apr. 20, 2016), at 3.
70. *Matter of [name redacted]*, WAC 06 127 52482 (AAO Mar. 8, 2007), at 7.
71. *Matter of [name redacted]*, EAC 03 112 51446 (AAO Dec. 22, 2005), at 4.
72. *Id.*
73. *Matter of [name and file number redacted]* (AAO Aug. 27, 2015), at 4, www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2015/AUG272015_01B2203.pdf.
74. *Id.*
75. *Id.*
76. *Id.* at 4–5.
77. *Matter of [name redacted]*, LIN 03 264 50779 (AAO June 10, 2005), at 9.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Matter of X–N–*, ID# 15507 (AAO Apr. 20, 2016), at 4.
82. *Id.*
83. *Id.*
84. *Matter of [name redacted]*, LIN 06 113 51230 (AAO June 14, 2007), at 7.
85. *Matter of B–A–S–T–LLC*, ID# 660539 (AAO June 7, 2017), at 1.

86. 8 CFR § 204.5(h)(3); 8 CFR § 214.2(o)(3)(iii)(B).

87. 8 CFR § 214.2(o)(3)(iii)(B) requires employment "in a critical or essential capacity," while 8 CFR § 204.5(h)(3)(viii) requires performance "in a leading or critical role."

88. *Matter of B–A–S–T–LLC*, ID# 660539 (AAO June 7, 2017), at 3.

89. *Id.* at 4.

90. *Matter of C–T–*, ID# 12391 (AAO Nov. 19, 2015), at 4 (jewelry designer).

91. *Matter of [name redacted]*, SRC 09 198 52069 (Apr. 1, 2011), at 5.

92. *Id.* at 2, 5 (emphasis added).

93. *Matter of B–A–S–T–LLC*, ID# 660539 (AAO June 7, 2017), at 2–3.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Matter of C–T–*, ID# 12391 (AAO Nov. 19, 2015), at 4 (alteration in original).

98. *Id.* (alteration in original).

99. *Id.*

100. *Id.* at 5 (alteration in original).

101. *Matter of [name and file number redacted]* (AAO Dec. 1, 2014), at 4, www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2014/DEC012014_01B2203.pdf.

102. *Id.*

103. *Id.* ("According to [a letter,] the petitioner's articles helped countries and organizations advocate for [tuberculosis treatment] approaches and seek funding for [treatment], contributed to the development of [treatment] policies … and informed policy decisions in India.").

104. *Matter of X–N–*, ID# 15507 (AAO Apr. 20, 2016), at 3.

105. *Id.*

106. *Matter of [name redacted]*, LIN 05 235 52728 (July 25, 2007), at 4.

107. *Id.*

108. *Id.* at 4–5.

109. *Id.* at 5.

110. *Id.* at 4.

111. *Id.*

112. USCIS Policy Memorandum, *Evaluation of Evidence Submitted With Certain Form I-140 Petitions* (Dec. 22, 2010), at 9, AILA Doc. No. 11020231.

113. *Matter of [name redacted]*, LIN 05 235 52728 (July 25, 2007), at 4.

114. *Id.*

Examining Automatic Revalidation

Peter Choi*

Abstract: If a nonimmigrant with an expired visa returns to an American port of entry to seek readmission after a departure from the United States, the rule of automatic revalidation allows for the automatic extension of the validity period of the expired visa, and if needed, an automatic conversion of the visa's nonimmigrant classification, subject to certain conditions. Because of the rule's intricacies, questions of whether and how the rule applies to a variety of scenarios have served as a frequent topic of discussion between immigration attorneys and federal officials over the years. Identifying notable points from these discussions, this article offers a pair of observations on how the rule is administered in an effort to improve clarity on the rule and its practical application. The article also contends, however, that a clearer understanding of the rule may ultimately be better facilitated by a reformulation of it as one that abandons its focus on nonimmigrant visas altogether and provides instead for the revalidation, expressly and exclusively, of nonimmigrant status.

Introduction

This article examines the rule of automatic revalidation. If a nonimmigrant with an expired visa returns to an American port of entry to seek readmission after a departure from the United States, the rule of automatic revalidation allows for the automatic extension of the validity period of the expired visa, and if needed, an automatic conversion of the visa's nonimmigrant classification, subject to certain conditions. The article begins by providing an overview of the rule, codified at 22 CFR § 41.112(d). It then explores how the rule and its variations, formalized elsewhere in the law or borne out by government policy, apply to a variety of both conventional and unconventional situations. In doing so, the article identifies notable points from discussions about the rule that have taken place between immigration attorneys and federal officials over the years. The article then culminates with two insights. First, it offers a pair of observations on how the rule is administered in an effort to improve clarity on the rule and its practical application. Second, however, the article contends that a clearer understanding of the rule may ultimately be better facilitated by a reformulation of it as one that abandons its focus on nonimmigrant visas altogether and provides instead for the revalidation, expressly and exclusively, of nonimmigrant status.

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The Rule of Automatic Revalidation: An Overview

Under 22 CFR § 41.112, titled "Validity of Visa," the rule of automatic revalidation can be found at subsection (d), titled "Automatic Extension of Validity at Ports of Entry." The rule states that provided the requisite conditions are met, "[t]he validity of an expired nonimmigrant visa issued under INA 101(a)(15) may be considered to be automatically extended to the date of application for readmission."[1] If between initial admission on the visa and the departure, the nonimmigrant is granted a change from status under the classification notated on the visa to status under a different nonimmigrant classification, the rule elaborates that upon return to the port of entry after the departure, "the visa may be converted as necessary to that changed classification."[2] The rule then proceeds to list the conditions that must be met for automatic revalidation to apply.[3] Namely, automatic revalidation is conditioned on the returning nonimmigrant:

- possessing an unexpired Form I-94 (or if the nonimmigrant is a student or exchange visitor, an unexpired Form I-20 or Form DS-2019,[4] together with a Form I-94 issued for duration of status);[5]
- returning from a trip of 30 days or less solely to a territory contiguous[6] to the United States (or if the nonimmigrant is a student or exchange visitor, to a territory contiguous, or an island adjacent,[7] to the United States);
- having maintained nonimmigrant status;
- returning to resume nonimmigrant status;
- possessing a valid passport;
- not requiring a waiver of inadmissibility under section 212(d)(3) of the Immigration and Nationality Act (INA);[8]
- not having applied for a new visa while abroad; and
- not being a national of a country identified by the Department of State (DOS) as a state sponsor of terrorism.[9]

Automatic revalidation originates from a DOS final rule titled "Automatic Revalidation of Nonimmigrant Visas in Certain Cases," published on November 13, 1969.[10] Originally codified at 22 CFR § 41.125(f) and reorganized under 22 CFR § 41.112(d) on November 5, 1987,[11] that final rule was promulgated without notice and comment and became effective immediately upon publication under the foreign affairs exception to the Administrative Procedure Act's rulemaking requirements.[12] All of the requisite conditions that must currently be met for automatic revalidation to apply can be found in the originally published version of the rule, except for the conditions that the returning nonimmigrant not have applied for a new visa while abroad and not be a national of a country designated as a state sponsor of terrorism. Those two conditions were added as national security measures in the aftermath of the terrorist attacks of September 11, 2001, through an interim

final rule of DOS that was published on March 7, 2002, and that went into effect on April 1, 2002.[13]

In addition to its codification at 22 CFR § 41.112(d), the rule of automatic revalidation as applied specifically to students and exchange visitors can be found at 8 CFR § 214.1(b). A variation of the rule adapted to nonimmigrants admitted under the Visa Waiver Program (VWP), discussed in greater detail below, can also be found at 8 CFR § 217.3(b).

Conventional Cases

"Conventional" cases, as described in this article, are those that conform neatly to the terms of the rule of automatic revalidation as codified at 22 CFR § 41.112(d). They involve situations in which a visa-holding nonimmigrant seeks readmission after a departure from the United States. The nonimmigrant may be seeking readmission under the same nonimmigrant classification as that which is notated on their visa pursuant to 22 CFR § 41.112(d)(1)(i) or a different nonimmigrant classification pursuant to 22 CFR § 41.112(d)(1)(ii).

Readmission Under the Same Nonimmigrant Classification as Classification Notated on Visa

A conventional case in which automatic revalidation applies involves a situation in which a nonimmigrant who, after departing the United States, returns to an American port of entry seeking readmission under the same classification as that which is notated on their visa. Consider the following hypothetical:

- A Nigerian H-1B worker is first admitted to the United States on October 1, 2018, to take on employment in Buffalo.
- The worker is admitted pursuant to an H-1B petition approval notice valid for three years from October 1, 2018, through September 30, 2021, and a corresponding H-1B visa valid for two years from September 1, 2018, through August 31, 2020.
- Upon admission, the worker is issued a Form I-94 valid from October 1, 2018, through October 10, 2021.
- Maintaining H-1B status for the next two years, the worker departs the United States on October 1, 2020, when they cross into Canada via the Peace Bridge landport for a three-day visit to Toronto.
- On October 4, 2020, the worker returns to Peace Bridge, seeking to cross back into the United States to resume their H-1B employment.

Assuming the worker has a valid passport, does not require a waiver of inadmissibility under INA § 212(d)(3), and did not apply for a new visa while in Toronto, their expired H-1B visa may be considered automatically extended through October 3, 2020, under 22 CFR § 41.112(d)(1)(i), thereby allowing them to be readmitted to the United States in H-1B status. Under the policy of U.S. Customs and Border Protection (CBP) in administering the rule of automatic revalidation, the worker would not be issued a new Form I-94 upon their readmission.[14]

Readmission Under a Different Nonimmigrant Classification Than Classification Notated on Visa

Another conventional case in which automatic revalidation applies involves a situation in which a nonimmigrant who, after departing the United States, returns to an American port of entry to seek readmission under a *different* classification than that which is notated on their visa. Consider the following hypothetical:

- A Chinese L-1B worker is first admitted to the United States on October 1, 2018, to take on employment in San Diego.
- The worker is admitted pursuant to an L-1B petition approval notice valid for three years from October 1, 2018, through September 30, 2021, and a corresponding L-1 visa valid for two years from September 1, 2018, through August 31, 2020.
- Upon admission, the worker is issued a Form I-94 valid from October 1, 2018, through October 10, 2021.
- The worker maintains L-1B status for the next one-and-a-half years, after which their employer files a petition with U.S. Citizenship and Immigration Services (USCIS) to classify them as an H-1B worker and to request a corresponding change of their status and an extension of their stay. Accordingly, the worker is granted H-1B classification, as well as the requested change of status and extension of stay as evidenced by an H-1B petition approval notice valid from October 1, 2020, through September 30, 2023, affixed with an extended Form I-94 valid from October 1, 2020, through October 10, 2023.
- The worker continues to maintain L-1B status through September 30, 2020, and H-1B status from October 1, 2020, through October 2, 2020, when they depart the United States by crossing into Mexico via the San Ysidro landport for a three-day visit to Tijuana.
- On October 5, 2020, the worker returns to San Ysidro, seeking to cross back into the United States to resume their H-1B employment.

Assuming the worker has a valid passport, does not require a waiver of inadmissibility under INA § 212(d)(3), and did not apply for a new visa while in Tijuana, their expired L-1 visa may be considered automatically extended through October 5, 2020, under 22 CFR § 41.112(d)(1)(i), *and automatically converted to an H-1B visa* under 22 CFR § 41.112(d)(1)(ii), thereby allowing him to be readmitted to the United States in H-1B status. As mentioned above, the worker would not be issued a new Form I-94 upon their readmission under CBP policy.

Unconventional Cases

Also helpful in understanding automatic revalidation is an examination of how not only the rule itself, but also its variations either formalized elsewhere in the law or borne out by government policy, are (or are not) applicable to cases that do not fall as neatly within the bounds of 22 CFR § 41.112(d) as the cases described above. This article refers to cases that do not fall as neatly within these regulatory bounds as "unconventional." The situations in which unconventional cases arise often involve some combination of nonimmigrants who are of certain nationalities, hold certain classifications, or are permanent residents of certain countries or territories. But these situations all have a factor in common: the nonimmigrant does not have any visa to revalidate. Examined below are some unconventional cases that have been discussed between immigration attorneys and federal officials on various occasions over the years.

Visa-Exempt Canadians

Pursuant to INA § 212(d)(4) and implementing regulations at 22 CFR § 41.2(a) and 8 CFR § 212.1(a)(1), Canadians, by mere reason of their nationality, are exempt in most instances from the general requirement of INA § 212(a)(7)(B)(i) that a valid visa be presented to CBP for admission to the United States as a nonimmigrant.[15] This means that in most instances, Canadian nonimmigrants returning to the United States after a temporary departure do not have any visa to revalidate under 22 CFR § 41.112(d). But as if to suggest that some adaptation of the rule of automatic revalidation is applicable nonetheless, Canadian nonimmigrants returning to the United States from a trip to a contiguous territory or adjacent island of 30 days or less,[16] like returning nonimmigrants who fall within the scope of 22 CFR § 41.112(d), generally are not issued new Forms I-94 upon readmission under CBP policy. Consider the following hypothetical:

- A Canadian TN worker is first admitted to the United States on October 1, 2018, to take on employment in Washington, DC.

- As TN classification is a visa-exempt classification for Canadians and does not require a formal petition to be filed by the employer, the worker is simply issued a Form I-94 valid from October 1, 2018, through October 10, 2021, upon their admission.
- Maintaining TN status for the next two years, the worker departs the United States on October 1, 2020, when they fly from Dulles International Airport to Trudeau International Airport for a three-day visit to Montreal.
- On October 4, 2020, the worker returns to Trudeau International Airport seeking to cross back into the United States at the airport's CBP preclearance station to resume their TN employment.[17]

Under CBP policy, the worker may be readmitted pursuant to a reinstatement of the Form I-94 they were issued on October 1, 2018, assuming, presumably, in accordance with terms mirroring those listed at 22 CFR § 41.112(d)(2), that they have a valid passport, does not require a waiver of inadmissibility under INA § 212(d)(3), and did not apply for a visa while in Montreal. As a TN nonimmigrant, they would not be issued a new Form I-94 unless they were returning from a place outside of a territory contiguous to the United States or making a new application for admission as a nonimmigrant based, for example, on a change of their job, employer, or nonimmigrant classification.

CBP's practice of reinstating the unexpired, most recently issued Form I-94 to readmit a visa-exempt Canadian nonimmigrant returning to an American port of entry after a trip of 30 days or less to a contiguous territory or adjacent island suggests that in this situation, CBP adheres to a policy resembling the rule of automatic revalidation under 22 CFR § 41.112(d) despite the fact the rule itself is inapplicable. This practice is not formalized in another section of the CFR, the INA, or another source of law, but rather is carried out pursuant to an exercise of CBP's discretionary authority to determine lengths of admission at ports of entry subject to statutory and regulatory limitations and in accordance with internal agency policy.[18] CBP spoke about this policy and its discretionary authority at an October 8, 2015, meeting between its Office of Field Operations and the CBP Liaison Committee of the American Immigration Lawyers Association (AILA).[19] The committee noted that some Canadian nonimmigrants returning to the United States after a trip of 30 days or less to Canada (such as those returning to their winter vacation home in Orlando after a holiday trip home to Toronto) were reporting that they were being readmitted pursuant to their most recently issued Form I-94 for the time remaining thereon, rather than being issued a new Form I-94 granting a new, full period of admission. When asked to confirm if CBP should be granting these Canadian nonimmigrants a new period of admission since the rule of automatic revalidation does not apply, CBP's Office of Field Operations provided the following response:

> CBP has discretion to determine the length of admission at each entry but Canadian "snowbirds" can get a full six months after returning to Canada for less than 30 days if they request it and are able to prove temporary intent (i.e., still have a home in Canada, etc.). If it appears that a visitor has immigrant intent and does not overcome INA § 214(b) admission as a visitor may be denied. CBP may exercise discretion to shorten the authorized period of admission to less than six months, commensurate with the visitor's stated activities and to reinforce nonimmigrant intent requirements.[20]

In other words, CBP may exercise its discretionary authority either way: by granting readmission pursuant to the Canadian nonimmigrant's most recently issued Form I-94 for the time remaining thereon or by newly granting a full six-month period of admission pursuant to the issuance of a new Form I-94. But as the grant of a new, full period of admission seems to be conditioned on the nonimmigrant affirmatively requesting it and reestablishing the required nonimmigrant intent, the apparent presumption is that if permitted to cross back into the United States, the nonimmigrant will be readmitted pursuant to the most recently issued Form I-94 for the time remaining thereon.[21]

Canadian Treaty Traders and Treaty Investors

Despite being generally visa-exempt, Canadians seeking admission to the United States in E status, whether as an E-1 treaty trader or an E-2 treaty investor, are required to present a corresponding E visa to CBP at the time of application of admission.[22] Consistent with a technical assistance letter from the Immigration and Naturalization Service (INS) dated November 2, 2001, CBP's long-standing position has been that Canadian nationals are eligible for readmission in E status pursuant to 22 CFR § 41.112(d) only after they have already been once admitted in that status in reliance on a valid E visa.[23] As such, even if a Canadian is admitted to the United States in a different nonimmigrant status, and subsequently has their status changed to E status through a petition filed with USCIS, they would not be eligible to then depart the United States and seek readmission under 22 CFR § 41.112(d) without first obtaining an E visa at an American consular post. Consider the following hypothetical:

- A Canadian TN worker is admitted to the United States on October 1, 2018, to take on employment in San Francisco.
- As TN classification is a visa-exempt classification for Canadians and does not require a formal petition to be filed by the employer, the worker is simply issued a Form I-94 valid from October 1, 2018, through October 10, 2021, upon their admission.

- The worker maintains TN status for the next one-and-a-half years, after which a new employer files a petition with USCIS to classify him as an E-2 worker and to request a corresponding change of their status and an extension of their stay. Accordingly, the worker is granted E-2 classification, as well as the requested change of status and extension of stay as evidenced by an E-2 petition approval notice valid from October 1, 2020, through September 30, 2022, affixed with an extended Form I-94 valid from October 1, 2020, through October 10, 2022.
- The worker continues to maintain TN status through September 30, 2020, and E-2 status from October 1, 2020, until their flight on October 2, 2020, from San Francisco International Airport to Vancouver International Airport for a three-day visit to Vancouver.
- On October 5, 2020, the worker returns to Vancouver International Airport seeking to cross back into the United States at the airport's CBP preclearance station to resume their E-2 employment.

Even if this worker has a valid passport, does not require a waiver of inadmissibility under INA § 212(d)(3), and did not apply for a new visa while in Vancouver, they would not be eligible for readmission in E-2 status under the automatic revalidation provision of 22 CFR § 41.112(d). In fact, they would be *required* to apply for an E-2 visa to be able to return to the United States in E-2 status.

As the aforementioned INS technical assistance letter explains, "[w]henever an alien changes to E status from within the United States and the alien departs, that alien must have a valid, unexpired E visa from a U.S. consular officer prior to reentry."[24] The letter cites 8 CFR § 212.1(*l*), which provides that "[n]otwithstanding any of the provisions of this part, an alien seeking admission as a treaty trader or investor under the provisions of Chapter 16 of the North America Free Trade Agreement (NAFTA) pursuant to section 101(a)(15)(E) of the Act, shall be in possession of a nonimmigrant visa issued by an American consular officer classifying the alien under that section."[25] The letter elaborates, however, that "[i]f an alien was admitted to the United States on the basis of an E visa that subsequently expired, that alien should be able to reenter the United States after a temporary visit to Canada or Mexico as long as the trip was less than thirty days, and the alien is in possession of a valid passport and unexpired I-94 Departure Record."[26]

Thus, for the worker in the aforementioned hypothetical to be eligible for readmission in E-2 status upon their arrival at CBP preclearance at Vancouver International Airport, they would need to first go through the highly involved process of applying for an E-2 visa at an American consular post—despite having gone through a similar process with USCIS some months earlier, compiling and submitting largely the same required documents—to obtain the E-2 status they already held at the time of their departure for Vancouver.[27] Only then,

upon return to an American port of entry from a *subsequent* departure falling within the scope of 22 CFR § 41.112(d), may the worker seek automatic revalidation and readmission in E-2 status. Again, CBP, under its policy, would not issue a new Form I-94 to the worker upon their readmission.

Certain Permanent Residents of Canada and Bermuda

Intended to enhance national security in the aftermath of the terrorist attacks of September 11, 2001, a joint interim final rule of INS and DOS titled "Removal of Visa and Passport Waiver for Certain Permanent Residents of Canada and Bermuda" was published on January 31, 2003, and went into effect on March 17, 2003.[28] This rule amended existing regulations by providing that outside of the VWP,[29] permanent residents of Canada and Bermuda who are nationals of Ireland or the Commonwealth countries[30] are required to present a valid passport and visa when applying for admission to the United States. Formerly, these persons had been passport- and visa-exempt.[31]

The promulgation of this rule raised the question of whether permanent residents of Canada and Bermuda who are nationals of Ireland or the Commonwealth countries, and had already been admitted to the United States under the former passport and visa exemption, could take advantage of automatic revalidation under 22 CFR § 41.112(d). DOS confirmed to the AILA DOS Liaison Committee that they could not.[32] Applying a rationale resembling that of INS's technical assistance letter concerning automatic revalidation in relation to Canadians and E-2 visas, DOS, as per AILA, advised that "because they do not have a visa, there is nothing to revalidate."[33]

Visa Waiver Program

Under the VWP of INA § 217 and implementing regulations at 8 CFR Part 217 and 22 CFR § 41.2(k), authorized nationals of countries designated by the Department of Homeland Security (DHS) and DOS as meeting certain security qualifications, and who are otherwise visa-subject, may be admitted to the United States as visitors for pleasure or business for up to 90 days without a visa.[34] Because visitors admitted under the VWP, like the aforementioned E-2 workers of Canadian nationality and permanent residents of Canada and Bermuda of Irish or Commonwealth nationality, do not have any visas to revalidate, they do not qualify for readmission as visitors after a trip abroad under 22 CFR § 41.112(d).

Importantly, however, *unlike* these E-2 workers of Canadian nationality and permanent residents of Canada and Bermuda of Irish or Commonwealth nationality, visitors under the VWP are not required to present a visa for admission in the first place and are able to rely on a separate variation of

the rule of automatic revalidation that is adapted to their particular situation. Codified at 8 CFR § 217.3(b), this variation provides that "[a]n alien admitted to the United States under this part [i.e., 8 CFR Part 217, dealing with the VWP] may be readmitted to the United States after a departure to foreign contiguous territory or adjacent island for the balance of his or her original Visa Waiver Pilot Program admission period if he or she is otherwise admissible and meets all the conditions of this part with the exception of arrival on a signatory carrier." Accordingly, for example, an Australian visitor for pleasure admitted to the United States at San Francisco International Airport for 90 days under the VWP for a connecting flight to Montana to carry out a mountaineering expedition in Glacier National Park, and who, on day 45, crosses into Canada via the Piegan-Carway landport for an intervening 15-day excursion in Banff National Park, is eligible for readmission to the United States as a visitor for pleasure for the 30 days remaining in their initial 90-day admission period.

Unlike automatic revalidation under 22 CFR § 41.112(d), readmission under 8 CFR § 217.3(b) is not conditioned on the duration of the trip to a foreign contiguous territory or adjacent island being 30 days or less.[35] As long as the visitor returns to an American port of entry within their initial period of admission, they may be readmitted for the time remaining in that period.[36] In CBP's discretion, the returning visitor may also be permitted to cross back into the United States under a new period of admission of up to 90 days, assuming all other requirements for admission under the VWP are met.[37]

Visa Revocation

Although visa revocations do not necessarily involve the physical removal or cancellation of the visa foil imprinted in the holder's passport, they can be considered, for automatic revalidation purposes, as having the legal effect of nullifying the visa's existence altogether. For example, DOS's Visa Office and the visa-issuing consular post maintain joint authority to prudentially revoke the visa of a nonimmigrant in the United States who is arrested for, or convicted of, an offense involving driving under the influence.[38] If their visa is in fact revoked, the nonimmigrant is ineligible for readmission under 22 CFR § 41.112(d), according to a statement of the CBP's Office of Field Operations during a meeting with AILA's CBP Liaison Committee on April 6, 2016.[39] CBP cited INA § 212(a)(7), which provides that "[i]n general, any nonimmigrant who … is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, is inadmissible."[40] The inference is that when a visa is revoked, there is no longer a visa to revalidate under 22 CFR § 41.112(d).

Insights

Observations: Application of the Rule in Its Current Formulation

Two key observations can be drawn from a review of the conventional and unconventional cases discussed above. First, if a nonimmigrant who seeks readmission to the United States does not have a visa to present at the port of entry, then they may not rely on automatic revalidation under 22 CFR § 41.112(d), since there is no visa to revalidate. This is why the rule does not apply to the nonimmigrants in the unconventional cases discussed above, namely, visa-exempt Canadians, Canadians granted an inland change of status to that of a treaty trader/investor but who have not been admitted on an E visa, certain permanent residents of Canada and Bermuda, VWP nonimmigrants, and nonimmigrants who have had their visas revoked. Because 22 CFR § 41.112(d) provides for the revalidation of *visas*, which these nonimmigrants do not have, they may not be readmitted to the United States under the rule of automatic revalidation.

Second, however, if the reason the nonimmigrant does not have a visa to revalidate is that initial admission in the status in which they seek to be readmitted does not require them to have a visa in the first place, then readmission is permitted under a variation of the rule of automatic revalidation either formalized elsewhere in the law or borne out by government policy. This is why readmission may be granted to visa-exempt Canadians and VWP nonimmigrants, but not to Canadians granted an inland change of status to that of a treaty trader/investor but who have not been admitted on an E visa, certain permanent residents of Canada and Bermuda, and nonimmigrants who have had their visas revoked. Neither visa-exempt Canadians nor VWP nonimmigrants have visas to revalidate under 22 CFR § 41.112(d). But because they are not required to have one in the first place and have separate grounds for readmission—CBP policy in the case of visa-exempt Canadians and 8 CFR § 217.3(b) in the case of VWP nonimmigrants—they may nonetheless be readmitted after a qualifying departure. Contrarily, no separate grounds for readmission exists for Canadians granted an inland change of status to that of a treaty trader/investor but who have not been admitted on an E visa, certain permanent residents of Canada and Bermuda, and nonimmigrants who have had their visas revoked. These nonimmigrants do not have the visa that is required for initial admission in the status they most recently held before their departure, and, correspondingly, may not be readmitted in that status under the rule of automatic revalidation or a variation thereof.

Reformulating Automatic Revalidation

But whatever value may lie in the observations above in elucidating the rule of automatic revalidation and how it is administered, a clearer understanding of the rule may ultimately be better facilitated by a reformulation of it as one that abandons its focus on nonimmigrant visas altogether and provides instead for the revalidation, expressly and exclusively, of nonimmigrant status, which is governed by Form I-94.[41] Promulgated by DOS, the rule in its current formulation is explicitly grounded in the regulation of visas, appearing in the "Visas" subchapter of title 22 of the Code of Federal Regulations. More specifically, 22 CFR § 41.112 is titled "Validity of *Visa*" and subsection (d), where the rule itself is codified, accordingly refers to the automatic extension of "the validity period of an expired nonimmigrant *visa*," and how "the *visa* may be converted as necessary to the changed classification." (Emphases added.) Nonimmigrant *status*, on the other hand, is conditioned on physical presence in the United States and is documented by Form I-94.[42] In other words, a person can have nonimmigrant status, and an active Form I-94, only if physically present in the United States. This means that once a nonimmigrant physically departs the United States, their nonimmigrant status is relinquished and their Form I-94 is, in effect, invalidated.[43]

It is fair to note that the rule as currently formulated does not wholly disregard the concept of status, requiring that the returning nonimmigrant be in possession of a Form I-94 (and, if applicable, an underlying Form DS-2019 or Form I-20) showing an "unexpired period of initial admission or extension of stay" and be seeking readmission within this period.[44] CBP does not issue a new Form I-94 when permitting nonimmigrants to cross back into the United States under the rule, on the presumptive logic that they are not being newly admitted, but merely readmitted to resume the same status, for the same period of admission, that they held before their departure. Competing interpretations notwithstanding,[45] this policy reflects a reasonable construction of the rule's conditions that a nonimmigrant possess an unexpired Form I-94 (and, if applicable, Form DS-2019 or Form I-20) and apply for readmission within the authorized period of initial admission or extension of stay specified on the form. Nonetheless, as suggested by numerous discussions between immigration attorneys and federal officials over the years revolving around "the difference between automatic visa revalidation under 22 CFR § 41.112(d) (visa revalidation) and revalidation of a recently issued I-94 on a subsequent entry (I-94 [status] revalidation),"[46] it is the rule's formulation as one that centers on the revalidation of visas, rather than solely and more simply on the revalidation of status, that lies at the heart of the confusion about the rule.

As noted above, the rule of automatic revalidation at 22 CFR § 41.112(d) is conditioned, among other things, on the returning nonimmigrant possessing an unexpired Form I-94 (and, if applicable, Form DS-2019 or Form I-20) and applying for readmission within the authorized period of initial admission

or extension of stay specified on the form. These two conditions, together with CBP's policy under the rule of not issuing a new Form I-94 upon the nonimmigrant's readmission, support an understanding of the rule in which the nonimmigrant is treated, in a *legal* sense, as having never departed the United States to take the trip from which they are returning. The issuance of a Form I-94 containing a unique I-94 number when a nonimmigrant enters the United States serves as documentation of the nonimmigrant's status, their arrival, and the grant of admission or parole pursuant to which they have entered. Just as inland changes of status and extensions of stay granted by USCIS do not result in the issuance of a new I-94 number because they are neither arrivals nor admissions, CBP's policy under the rule of automatic revalidation of not issuing a new Form I-94 suggests that a nonimmigrant's return and readmission pursuant to the rule is likewise not a new arrival or admission. Instead, CBP's policy of revalidating the returning nonimmigrant's previously invalidated Form I-94 suggests that the status the nonimmigrant most recently held before departing is simply being reinstated. This understanding of how the rule is administered is supported by statements CBP has made in discussions with immigration attorneys on various occasions. For example, CBP has stated that nonimmigrant visas issued for only a limited number of entries may nonetheless be eligible for automatic revalidation after the number of entries has been exhausted,[47] that a single-entry K-1 visa holder may take advantage of automatic revalidation "because it is not considered a departure,"[48] and that "[a]utomatic visa revalidation is not considered entry on a visa."[49] In other words, readmission under the rule of automatic revalidation does not appear, in a legal sense, to be an entry, and thus, does not appear to be an admission.[50]

Unless visa exempt or granted a waiver under INA § 212(d)(4) of documentation requirements, a nonimmigrant, to be admitted, must present a valid nonimmigrant visa at the time of application for admission.[51] But if readmission under 22 CFR § 41.112(d) is not an admission, then a visa should not be required, rendering it a superfluous exercise of imagination to automatically extend the validity period of a nonimmigrant visa and, if applicable, convert the visa's nonimmigrant classification, to grant the readmission. The rule of automatic revalidation does not involve the issuance of a new visa foil reflecting a new validity period or, if applicable, a change in nonimmigrant classification. In other words, automatic revalidation is imaginary in the sense that it is purely a legal abstraction. And although abstractions are not problematic per se, the rule of automatic revalidation is overcomplicated by the redundancy involved in revalidating a visa that, by the rule's own logic, should not be required in the first place. The fact that the rule also involves no revalidation of the physical visa foil only exacerbates the rule's abstruseness.

As a result, the rule of automatic revalidation in its current formulation prompts unnecessary confusion among not only immigration attorneys and nonimmigrants seeking to rely on the rule, but also the federal officials

responsible for administering it. CBP itself has acknowledged that the automatic revalidation process under 22 CFR § 41.112(d) can be confusing to its officers because it is contrary to their general training that travelers are supposed to present valid visa foils, not facially expired ones that officers can deem automatically extended or converted.[52] This confusion may be alleviated by reformulating the rule as one that abandons its focus on nonimmigrant visas altogether and provides instead for the reinstatement, expressly and exclusively, of nonimmigrant status by revalidating Forms I-94. Emulating the exclusive focus on admission periods found in 8 CFR § 217.3(b) governing the readmission of VWP nonimmigrants, the proposed reformulation of the rule of automatic revalidation would provide that subject to the same conditions as those currently listed under 22 CFR § 41.112(d)(2), nonimmigrants admitted to the United States who subsequently depart and then seek readmission may be readmitted based on a revalidation of the same Form I-94 that was valid prior to their departure for the balance of the admission period specified thereon.[53] Such a reformulation would strengthen the rule's cogency by making explicit that the rule provides for the revalidation of the returning nonimmigrant's Form I-94, that is, status, and carving out a bright-line exemption from the visa requirement of INA § 212(a)(7)(B)(i), rather than requiring an imaginary visa extension or conversion to ensure the requirement is met. By explicitly *not* requiring a visa, the proposed reformulation may facilitate a clearer understanding of, and more consistent adherence to, the rule by the officials responsible for administering it. This, in turn, may reduce the frequency with which both CBP must send reminders on the subject to its field officers[54] and with which nonimmigrants seeking automatic revalidation are subjected to undue scrutiny at ports of entry.[55]

Importantly, the proposed reformulation, which applies only to nonimmigrants seeking readmission pursuant to the rule, would not preclude them from applying for a new period of admission and being granted a new Form I-94—a situation that falls outside the scope of the rule. The rule of automatic revalidation, neither as currently formulated at 22 CFR § 41.112(d) nor as reformulated according to this article's proposal, *requires* readmission pursuant to the rule whenever a nonimmigrant who returns to an American port of entry after a departure meets all of the conditions listed at 22 CFR § 41.112(d)(2). The provisions of the rule only "apply to nonimmigrants *seeking* readmission" per 22 CFR § 41.112(d)(1) (emphasis added), and, as discussed above, the rule distinguishes "readmission" from "admission." The reformulation of the rule proposed by this article would be worded similarly, but with greater emphasis, on providing for the revalidation of nonimmigrant status, only if *readmission* is *sought*. Accordingly, when a returning nonimmigrant who is eligible for readmission under the rule would nonetheless benefit from a new period of *admission*, the proposed reformulation would, very clearly, neither prevent them from requesting such an admission nor prevent CBP from granting it. Therefore, under the proposed reformulation, petition-based

nonimmigrants, for example, who manifest their desire for new admission by presenting a valid visa matching the classification of the petition, and whose most recent period of admission was "shorted" to the expiration date of their prior passport,[56] may be granted a new and lengthened period of admission by returning from a brief trip to a contiguous territory with a renewed passport.[57] This would avoid the need for these nonimmigrants, should it be more pragmatic to take the brief trip, to obtain an inland extension of stay through a redundant petition filed by their employer with USCIS to address a "shorted" period of admission attributable to nothing more than a passport expiration date. Strictly speaking, the nonimmigrants in this example are also not precluded by the *current* formulation of the rule from seeking a new admission, because this formulation, as mentioned above, already renders the rule applicable only to nonimmigrants "seeking readmission." Moreover, it applies only to nonimmigrants with a visa that is *expired* or requires a *conversion* of its nonimmigrant classification. In practice, however, nonimmigrants who face situations illustrated in the above example are regularly *readmitted* pursuant to a reinstatement of their previously issued, "shorted" I-94. This practice may be based ostensibly on a legitimate exercise of CBP discretion, but in fact is based more plausibly on a misapplication of the rule of automatic revalidation, as supported by CBP's own account of the rule's confusing nature.[58] By removing visas from the rule and firmly emphasizing that it applies only if readmission is affirmatively sought, the proposed reformulation may minimize, if not eliminate, conflation by CBP of its misapplications of the rule with exercises of its discretionary authority.[59]

The proposed reformulation of the rule would, in large part, merely formalize CBP's stated position that automatic revalidation is not considered an entry on a visa. By removing visas from the automatic revalidation process and focusing instead on the revalidation, expressly and exclusively, of nonimmigrant status, the proposed reformulation would crystallize CBP's existing policy under the rule of reinstating the Form I-94 that a returning nonimmigrant held prior to departing rather than issuing a new one. By not requiring a visa, the proposed reformulation would provide a conceptually sounder rule with the potential to more clearly delineate when it does and does not apply, while also making it more accessible to Canadians granted an inland change to E status but who have not been admitted on an E visa, any remaining permanent residents of Canada and Bermuda in the United States impacted by the 2003 joint interim final rule who have not already been admitted on a nonimmigrant visa, nonimmigrants who have had their visas revoked,[60] and other narrow classes of nonimmigrants who may have already been granted status that would be eligible for reinstatement under the rule's current formulation but for their lack of a required visa.[61] The proposed reformulation would introduce this modest expansion concomitantly with the potential for substantial gains in clarity and consistency in the understanding and application of the rule. It would do so while continuing to respect national

security concerns and the integrity of the American immigration system more broadly by being conditioned on the same terms that currently exist under the rule at 22 CFR § 41.112(d)(2).

Conclusion

A close examination of the rule of automatic revalidation and how it is administered leads to some key observations that provide insight into the visa-centric logic and application of the rule. Ultimately, however, a clearer understanding of the rule may be better facilitated by improvements to the coherence of the rule's logic and the reliability of the rule's application than by observations about the rule as currently structured and administered. A reformulation of the rule as one that abandons its focus on nonimmigrant visas and provides instead for the revalidation, expressly and exclusively, of nonimmigrant status may help foster these improvements.

Notes

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1. 22 CFR § 41.112(d)(1)(i).
2. 22 CFR § 41.112(d)(1)(ii).
3. 22 CFR § 41.112(d)(2).
4. The text of 22 CFR § 41.112(d)(2)(i) reads "Form IAP-66," but Form IAP-66 was replaced by Form DS-2019 after the publication of the regulation.
5. Nonimmigrant students and exchange visitors are admitted for "duration of status" and thus are not issued Forms I-94 that grant admission until a specified date. Rather, their Forms I-94 specify that they have been admitted "D/S" or for "duration of status," which lasts until the expiration date of their Form I-20, Certificate of Eligibility for Nonimmigrant Student Status or Form DS-2019, Certificate of Eligibility for Exchange Visitor Status, not counting any applicable grace period.
6. "Contiguous territory" refers to Canada or Mexico.
7. "Adjacent island" means Bermuda and the islands located in the Caribbean Sea, except Cuba. 22 CFR § 41.0.
8. INA § 212(d)(3) provides for a waiver of most grounds of inadmissibility, as enumerated in INA § 212(a), including, but not limited to, various grounds related to health, criminality, security, public charge, and immigration violations. Factors relevant to whether a nonimmigrant qualifies for a waiver under INA § 212(d)(3) include, but are not limited to, (1) the recency and seriousness of the activity or condition causing inadmissibility; (2) the reasons for the proposed travel to the United States; (3) the positive or negative effect, if any, of the planned travel on U.S. public interests; (4) whether the incident in question is isolated or there is a pattern of misconduct; and (5) evidence of

reformation or rehabilitation. *See* AILA DOS Liaison Committee, *Practice Pointer: Validity of Visas and INA § 212(d)(3)(A) Waivers* (Apr. 10, 2018), AILA Doc. No. 18041030.

9. At the time of this writing, there are four countries designated by DOS as a state sponsor of terrorism: Cuba, North Korea, Iran, and Syria. *See* DOS, Bureau of Counterterrorism, State Sponsors of Terrorism, www.state.gov/state-sponsors-of-terrorism/.

10. 34 Fed. Reg. 18161 (Nov. 13, 1969).

11. 52 Fed. Reg. 42590, 42610 (Nov. 5, 1987).

12. 34 Fed. Reg. 18161, 18162 (Nov. 13, 1969).

13. 67 Fed. Reg. 10322 (Mar. 7, 2002).

14. *See* Minutes from AILA CBP OFO Liaison Committee Meeting (Nov. 4, 2016), at 11, AILA Doc. No. 17010304 ("Automatic visa revalidation does not provide any grounds for extension of an I-94. The alien must retain the I-94 that he or she had at the time of departure and present it for readmission when returning to the US. CBP will not issue a new I-94 to an applicant using automatic visa revalidation.").

15. There are classes of persons other than Canadian citizens who are exempt from the visa requirement for admission as a nonimmigrant, subject to varying conditions. For example, citizens of Bermuda, like citizens of Canada, are exempt from the visa requirement for admission as a nonimmigrant, other than in E, K, S, or V classification. Nationals of the Bahamas, British subjects resident in the Bahamas, and nationals of the British Virgin Islands are also exempt from the visa requirement for admission as a nonimmigrant, subject to a mix of conditions related to embarking location, arriving location, and verification of the absence of a criminal record, among other things. *See* 8 CFR § 212.1(a)(2)–(4), (b); 22 CFR § 41.2(b)–(e). This article focuses on visa-exempt Canadians, as they have been at the center of numerous discussions between immigration attorneys and federal officials about automatic revalidation over the years given the frequency with which they travel in and out of the United States compared to other classes of visa-exempt persons.

16. *See* AILA, Practice Pointer: Admission Issues for Canadian Visitors (Dec. 30, 2016), AILA Doc. No. 16123072.

17. When departing for the United States from foreign airports with a CBP preclearance station, admission (or readmission) to the United States may be granted at the station prior to boarding.

18. *See, e.g.*, CBP Directive No. 3340-043, *The Exercise of Discretionary Authority* (Sept. 3, 2008), AILA Doc. No. 13091940; CBP Memorandum, *Exercise of Discretion—Additional Guidance* (July 20, 2004), AILA Doc. No. 13091941.

19. Minutes from AILA National Liaison Meeting with CBP Office of Field Operations (Oct. 8, 2015), AILA Doc. 16031104.

20. *Id.*, response to question 8.

21. CBP's exercise of discretionary authority also supports the same presumption with respect to nonimmigrants who are not visa-exempt and return to an American port of entry after a trip to a contiguous territory for 30 days or less. Take, for example, a nonimmigrant admitted to the United States as a pleasure visitor on a B-1/B-2 visa who then departs for Canada for a trip of 30 days or less. If upon return to an American port of entry (or CBP preclearance station in Canada) the nonimmigrant is in possession of their B-1/B-2 visa and it has not expired, they would be ineligible for readmission as a pleasure visitor under the rule of automatic revalidation, because the rule is applicable only if a nonimmigrant visa has expired or is of a classification different from that in which reentry is sought. One might assume, therefore, that supposing they are

admissible, this non-Canadian would be admitted by CBP for a full six-month period pursuant to a newly issued Form I-94. Under prevailing CBP practice, however, they would merely be readmitted based on their most recent previously issued Form I-94 for the time remaining thereon.

22. 8 CFR § 212.1(*l*); 22 CFR § 41.2(*l*). E-1 treaty traders and E-2 treaty investors are not the only nonimmigrant classifications to which the general visa exemption for Canadians does not apply. More specifically, the visa exemption for Canadians also does not apply to K fiancés, spouses, and children; S witnesses and informants; and V spouses and children of lawful permanent residents. *See* 8 CFR § 212.1(a)(1); 22 CFR § 41.2(a). However, this article focuses on E-1 treaty traders and E-2 treaty investors because these are the non-visa-exempt classifications for Canadians that are most commonly impacted by the rule of automatic revalidation and that have been at the center of key discussions between immigration attorneys and federal officials on the implications of the rule with respect to Canadians.

23. Letter of Efren Hernandez III, Director, Business and Trade Services, Immigration and Naturalization Service, U.S. Department of Justice, HQ 70/6.2.5 (Nov. 2, 2001) (responding to letter from Jimmy W. Go re: Reentry into the US with Expired E Visa dated Oct. 17, 2001).

24. *See id.*

25. *See* 22 CFR § 41.2(*l*) (stating that notwithstanding the general visa exemption for Canadians, "a visa is required of a Canadian national who is classified, or seeks classification, under INA § 101(a)(15)(E)").

26. Letter of Efren Hernandez III, *supra* note 23.

27. The worker in this hypothetical would be subjected to an E-2 visa process that is "highly involved," because when the beneficiary of a valid USCIS-approved petition granting them a change to, or an extension of stay in, E status subsequently applies for an E visa, the approved petition does not establish a presumption before a consular officer that the beneficiary meets the definition of a treaty trader or treaty investor. Unlike an H-1B or L-1 visa applicant, for example, whose classification as a specialty-occupation worker or as an intracompany transferee working in a managerial, executive, or specialized-knowledge capacity is established *prima facie* by a USCIS-approved petition on behalf of the applicant, an E visa applicant must affirmatively establish their eligibility for classification before a consular officer, even if they are the beneficiary of a recently approved petition showing that their eligibility was already established before USCIS not long ago. *Compare* 9 FAM 402.10-9(A)a. ("An approved petition is considered *prima facie* evidence that the requirements for visa classification, which are examined by a USCIS adjudicator during the petition process, have been met.") and 9 FAM 402.12-6(A)a. ("An approved individual petition is considered *prima facie* evidence the requirements for visa classification, which are examined by a USCIS adjudicator during the petition process, have been met.") *with* 9 FAM 402.9-2c. ("If the applicant's qualification for E-1 or E-2 classification is uncertain, you may request whatever documentation is needed to overcome that uncertainty."). For an overview of the sweeping evidence that must be submitted to establish eligibility for E classification, see USCIS Form I-129 Instructions (03/10/2021 ed.) at 22–23, www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf, and U.S. Embassy & Consulates of Canada, Treaty Trader and Investors, https://ca.usembassy.gov/visas/treaty-trader-and-investor-visas/.

28. 68 Fed. Reg. 5190 (Jan. 31, 2003).

29. The joint interim final rule made clear that the permanent residents of Canada and Bermuda impacted by the removal of the passport and visa exemptions may continue to be admitted without a visa separately under the VWP. *See id.* at 5190 ("Residents of Canada or Bermuda who are nationals of a Visa Waiver country … may continue to be admitted without a visa ….").

30. For a list of the Commonwealth countries, see *id.* at 5191.

31. *See* 68 Fed. Reg. 5190 (Jan. 31, 2003).

32. AILA, Canadian Permanent Residents Without Visas Cannot Use Automatic Revalidation (Oct. 29, 2003), AILA Doc. No. 03102944.

33. *Id.*

34. For a current list of VWP countries, see DHS, Visa Waiver Program Requirements (June 2, 2021), www.dhs.gov/visa-waiver-program-requirements.

35. *See* 8 CFR § 217.3(b).

36. *See id.*

37. *See* CBP's *Inspector's Field Manual* § 15.7(i)(1) ("Aliens admitted under the VWP may be readmitted to the U.S. after a departure to foreign contiguous territory or adjacent islands for the balance of their original admission period, provided they are otherwise admissible and meet all the conditions of the VWP, with the exception of arrival on a signatory carrier, in accordance with 8 CFR 217.3(b). The inspecting officers also have the discretion to grant the applicants entirely new periods of admission, providing they are arriving on signatory carriers."), § 15.7(i)(2) ("If the alien needs to stay in the U.S. for longer than the original period of admission, the officer can consider granting another 90-day period of admission, provided the alien meets the requisite criteria."). But note that the *Inspector's Field Manual* began to be phased out in 2013 and was ultimately replaced with the Officer's Reference Tool. *See* CBP Memorandum, *Use of the Inspector's Field Manual* (Apr. 4, 2013), AILA Doc. No. 19070933; AILA, Lawsuit Seeks Transparency in CBP Admission Procedures (Dec. 19, 2016), AILA Doc. No. 16121953.

38. 9 FAM 403.11-5(B)c.

39. Minutes from the AILA/CBP Office of Field Operations Meeting (Apr. 6, 2016), AILA Doc. No. 16052700.

40. *Id.*

41. *See, e.g.*, 81 Fed. Reg. 91648 (Mar. 27, 2013) ("The Form I-94 is used to document status in the United States, the authorized length of stay, and departure."); 8 CFR § 1.4 (defining "Form I-94").

42. *See* 81 Fed. Reg. 91648 (Mar. 27, 2013).

43. *See generally* USCIS Interoffice Memorandum, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009), AILA Doc. No. 09051468. *See also* 81 Fed. Reg. 91646, 91652 (Dec. 29. 2016) (laying out (1) commenters' concerns about how the automation of Form I-94 would affect automatic revalidation under 22 CFR § 41.112(d); (2) commenters' recommendations that in the training of CBP officers, emphasis be placed on the need to reactivate a previously closed Form I-94 records for automatic revalidation purposes; and (3) CBP's response that "CBP maintains the electronic Form I-94 record in CBP systems and will use the electronic format to revalidate a previous, unexpired admission or extension of stay if all other revalidation requirements are met").

44. 22 CFR § 41.112(d)(2)(i), (iv).

45. *See* Minutes from AILA CBP OFO Liaison Committee Meeting (Nov. 4, 2016), at 11, AILA Doc. No. 17010304 (noting that the conditions under 22 CFR § 41.112(d)(2) that a returning nonimmigrant have a previous Form I-94 showing an unexpired period of admission and that the nonimmigrant be seeking readmission within this period can be interpreted merely as conditions precedent to automatic revalidation that do not prevent a CBP officer from granting the nonimmigrant a new, full period of admission rather than only readmission for the balance of time left on the previous Form I-94; CBP rejected this interpretation, stating that automatic visa revalidation does not provide any grounds for extension of an I-94).

46. *Id.*

47. AILA Liaison/CBP Q&As (Mar. 14, 2007), AILA Doc. No. 07060775.

48. AILA-Chicago Chapter & CBP Field Office Liaison Meeting Questions (Oct. 12, 2012), AILA Doc. No. 13021301.

49. AILA, Frequently Asked Questions (FAQs) Regarding the June 22, 2020, Presidential Proclamation 10052 (updated Aug. 12, 2020), AILA Doc. No. 20072138.

50. *See* INA § 101(a)(13)(A) (defining "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer").

51. INA § 212(a)(7)(B)(i); 8 CFR § 212.1.

52. AILA/CBP Liaison Q&As (April 10, 2014), AILA Doc. No. 14051241. *See also* Minutes from CBP/AILA San Diego Liaison Committee Meeting (Oct. 24, 2012), AILA Doc. No. 12112142 (noting CBP's remarks that "[u]nfortunately, the automatic revalidation provision is one that has traditionally been commonly misunderstood and misinterpreted by CBP Officers at the ports of entry over the years, and it is an ongoing challenge for our ports of entry and our training department to ensure that this provision of law is fully understood and comprehended by all officers").

53. In detaching the rule of automatic revalidation from visas, and anchoring it instead solely to status, the proposed reformulation would involve vacating the current DOS regulation at 22 CFR § 41.112(d) and promulgating a new CBP rule under title 8 of the Code of Federal Regulations.

54. *See* AILA/CBP Liaison Q&As (Apr. 10, 2014), AILA Doc. No. 14051241.

55. *See, e.g.*, *id. See also* 81 Fed. Reg. 91646, 91652 (Dec. 29. 2016) (laying out commenters' concerns about the experiences of nonimmigrants who have returned to an American port of entry seeking readmission in reliance on the rule of automatic revalidation).

56. *See* CBP Carrier Liaison Program, Six-Month Club Update (Dec. 5, 2016), www.cbp.gov/sites/default/files/assets/documents/2017-Dec/Six-Month%20Club%20Update122017.pdf.

57. The reformulation of the rule of automatic revalidation proposed by this article does not purport to change the scope of CBP's discretionary authority. Under the proposed reformulation, therefore, it is possible that those who seek a new, lengthened period of admission because their prior admission period was "shorted" to the expiration date of their prior passport, for example, may be granted new admission rather than readmission, but only until the "shorted" expiration date of the prior period of admission based on CBP's exercise of discretion. Legal and policy proposals to curb or otherwise modify CBP's discretionary authority go beyond issues related to the rule of automatic revalidation and exceed the scope of this article. But by purging visas from the rule and emphasizing that it applies only if readmission is affirmatively sought,

the proposed reformulation may minimize, if not eliminate, conflation by CBP of its misapplications of the rule with exercises of its discretionary authority.

58. *See* AILA/CBP Liaison Q&As (Apr. 10, 2014), AILA Doc. No. 14051241.

59. *But see supra* note 21, discussing the CBP practice of readmitting visa-subject pleasure visitors who return with a preexisting valid B-1/B-2 visa after a trip to Canada or Mexico for a period of 30 days or less, despite the fact that the rule of automatic revalidation does not apply. *See also* Minutes from AILA National Liaison Meeting with CBP Office of Field Operations (Oct. 8, 2015), AILA Doc. 16031104, in which the situation of holders of preexisting valid E visas who return to the United States after a trip to Canada or Mexico for 30 days or less is discussed. AILA noted that despite the inapplicability of the rule of automatic revalidation at 22 CFR § 41.112(d), there were reported instances in which CBP was adapting the rule to this situation, with the agency attributing the practice to the discretion it has either to admit on the old I-94 based on brief travel to a contiguous territory or to grant a new period of admission. As discussed in note 57, *supra*, recommendations on modifying the scope of CBP's discretionary authority exceed the bounds of this article. With respect to CBP's discretionary authority, the article's proposed reformulation of the rule of automatic revalidation seeks merely to offer a way to more clearly delineate when the rule does and does not apply and to minimize the potential for reliance on such authority as a mere cover for what are actually misapplications of the rule.

60. To the extent that a nonimmigrant who has had their visa revoked presents a concern from a criminal, national-security, health, or related perspective, their ability to rely on the rule of automatic revalidation under the proposed reformulation should not heighten any such concern. This is because the reformulated version of the rule would still require satisfaction of the same conditions as those required by the current rule listed at 22 CFR § 41.112(d)(2). These conditions include those introduced in 2002 that are specific to national security, namely that the nonimmigrant not apply for a new visa while abroad and not be a national of a country designated as a state sponsor of terrorism. *See* 67 Fed. Reg. 10322 (Mar. 7, 2002). Under 22 CFR § 41.112(d)(2), the nonimmigrant must also not require a waiver under INA § 212(d)(3), which waives most grounds of inadmissibility related to criminality, national security, and health. It is not legally self-contradictory to require "admissibility" as a condition of readmission under automatic revalidation (which, as this article contends, is not an "admission"), because asking whether a person is admissible, i.e., *can be* admitted, does not necessarily mean that the person is seeking an actual *admission* under INA § 101(a)(13). *See, e.g.*, *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999) (finding that adjustment of status, which requires that the applicant establish admissibility, is not an "admission" under INA § 101(a)(13)).

61. *See supra* note 15.

The Plight of International Adoptees

Exclusion in Law Causes Thousands of International Adoptees to Face Deportation[1]

Mara Weisman*

Abstract: Due to an exclusion in current immigration law, between 18,000 to 49,000 legally, internationally adopted individuals face potential deportation. This article addresses a brief history of international adoption, an analysis of the Child Citizenship Act of 2000, identification of deportable offenses for noncitizens, case studies of affected individuals, a history of legal attempts to amend the law, and, finally, a proposed bill that seeks to resolve this injustice.

U.S. nationality bestows on an individual access to an array of fundamental rights: the right to remain in the United States, the right not to be detained as an alien, the right to travel under the protection of the United States, the right to vote, the right to fully participate in the social programs of the United States such as Social Security, and the right to obtain various licenses and permission to work in the United States. The sudden loss of U.S. nationality can leave a person vulnerable to removal, entails the loss of valuable economic rights, and potentially leaves the individual stateless. As harsh as such a consequence would be for a person who immigrated to the United States as an adult, it would be far harsher for an individual adopted as a child. A child born overseas and adopted by U.S. parents most likely has no family in their birth country, would likely not know the language or culture, and would likely not have any means of support there. Yet because of technical failures in securing the adopted child's citizenship and an exclusion in current immigration law, this is the unfortunate reality for thousands of individuals legally adopted from overseas. A number of these individuals have been removed from the United States, accused of violating their immigration status.

The hardship is compounded by the injustice of the result. When infants and young children were adopted, they had no hand either in choosing to come to the United States or in failing to perfect their papers. Often many children do not learn of their lack of citizenship until years later when applying for employment, a passport, or Social Security retirement benefits. Others do not become aware until they are convicted of a crime. Upon completing their sentences, these individuals are immediately placed in removal proceedings and then sent back to their countries of origin. Having left their birth countries as infants or young children, these individuals are suddenly thrown into a foreign world where they do not speak the language or possess any contacts who

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could offer guidance. "Deportation is like the death sentence to them," said Hellen Ko, a chief counselor at the government-run Korea Adoption Services.

There have been efforts to correct this. Congress passed the Child Citizenship Act of 2000 (CCA), granting automatic citizenship to most children adopted internationally by U.S. citizens.[2] However, the CCA, which amended the Immigration Nationality Act (INA),[3] excluded adopted individuals who were 18 years old or older as of February 27, 2001, the time the law went into effect.[4] It is estimated that between 18,000 and 49,000 individuals currently fall into this category.[5] Subsequent legislation has been proposed, but no amendment or additional bill has been passed to remedy this exclusion.[6]

This paper contains an analysis of the CCA, an identification of deportable offenses for noncitizens, several case studies of affected individuals, and a history of legal attempts to amend the law. Finally, the paper introduces a proposed amendment to the current law to correct the exclusion resulting from the CCA and offer a viable solution for international adoptees, along with some additional nonlegislative recommendations.

Prior Law and Its Consequences

Prior to 2000, INA § 320 stated:

> (a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such alien parent is naturalized, become a citizen of the United States, when (1) such naturalization takes place while such child is unmarried and under the age of eighteen years; and (2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of eighteen years.
>
> (b) Subsection (a) of this section shall apply to an adopted child only if the child is residing in the United States at the time of naturalization of such adoptive parent, in the custody of his adoptive parents, pursuant to a lawful admission for permanent residence.

Specifically, the statute required the non-U.S. citizen parent of the internationally adopted child to complete a naturalization process after the child arrived in the United States in order for the child to automatically attain citizenship.[7] However, not all such adoptive parents were able to complete their naturalization process, and consequently, many adopted children were unaware that they were not U.S. citizens.[8] According to Bert Ballard, an adoption studies scholar at Pepperdine University, "Hundreds of thousands

of children have been adopted to the United States, and if even 1% of those [non U.S.-citizen parent] naturalizations never happened under pre-[CCA] guidelines, then that oversight affects literally thousands of American families."[9]

This predicament directly conflicts with the United States' obligations under international law. The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption "established a legal framework for the arrangement and formalization of intercountry adoptions for ratifying states."[10] Specifically, the Convention states, "In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognised [sic], rights equivalent to those resulting from adoptions having this effect in each such State."[11] Further, the Convention states, "The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State."[12] As a signatory to the Convention, which the United States ratified in 2008, the United States is obligated to fulfil the Convention's provisions.[13] In 2000, the United States passed the Intercountry Adoption Act of 2000 to recognize and implement the Hague Convention.[14] A purpose of the Act is "to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests."[15] In spite of the provisions of the Convention and the Intercountry Adoption Act, the CCA was passed with an exclusion of thousands of adopted individuals from the rights of U.S. citizenship.[16]

The Child Citizenship Act of 2000

The CCA amended the INA, attempting to provide a retroactive and proactive solution for internationally adopted children whose U.S. citizen parent had not completed the naturalization process in order for the child to gain citizenship.[17] After the CCA was adopted, most internationally adopted children would receive automatic citizenship upon the completion of their adoption.[18] INA § 320 now states:

> (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled: (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization. (2) The child is under the age of eighteen years. (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

> (b) Subsection (a) [above] shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under [INA § 101(b)(1)].

According to the law, if a child's adoption by a U.S. citizen is completed abroad, either from a Hague Convention country or a non-Hague Convention country, the child automatically becomes a citizen upon entering the United States as long as they are under 18 years old and live in the United States with their adopted parent(s).[19] Children who enter the United States with the intention of adoption automatically become permanent residents and attain citizenship after their adoption is finalized, as long as they are under 18 years old and live in the United States with their adopted parent(s).[20] The CCA also covers adopted children who were under 18 years old on February 27, 2001.[21] Overall, the CCA resulted in 75,000 adopted children becoming citizens as soon as the law went into effect.[22] However, the CCA intentionally excludes adopted individuals who were 18 years and older on February 27, 2001, and whose parent(s) had not completed their naturalization.[23]

This omission resulted from a political compromise to appease conservative lawmakers who did not want to extend citizenship to adults who had previously committed crimes.[24] Consequently, the tens of thousands of individuals affected by this exclusion, who had been removed from their origin countries at a young age and raised in the United States, were classified as noncitizen aliens[25] and could be subject to deportation for minor, nonviolent crimes. "Generally speaking, it ensured that adult adoptees were treated no differently than illegal aliens and terrorists."[26]

Consequences of the Current Law

According to the INA, noncitizen aliens are deportable for several classes of criminal offenses, including crimes of "moral turpitude," aggravated felonies, crimes involving controlled substances, certain firearm offenses, crimes of domestic violence and child abuse, and human trafficking.[27] Defined vaguely, "moral turpitude" is commonly known to include "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man," and may include murder, voluntary manslaughter, kidnapping, robbery, and aggravated assault.[28] Aggravated felonies include, but are not limited to, child pornography, disclosure of classified government information, drug trafficking, human trafficking, kidnapping, lewd acts with a minor child, owning or running a house of prostitution, rape, and treason.[29] In addition, crimes with sentences of one year or longer also fall into this category and include bribery, burglary, counterfeiting, crimes of violence, forgery, obstruction of justice, perjury, racketeering, receipt of

stolen property, and theft.[30] Finally, crimes involving more than $10,000 also constitute aggravated felonies and include fraud, money laundering, and tax evasion.[31] Some internationally adopted individuals may face deportation for committing even minor, nonviolent crimes.

Prior to 1990, judges possessed the discretion to "minimize the risk of unjust deportation" when a noncitizen committed a crime deemed as deportable.[32] The Immigration Act of 1917 included the procedure known as "Judicial Recommendation Against Deportation" (JRAD), where the sentencing judge in both state and federal prosecutions had the power to make a recommendation that a noncitizen not be deported.[33] This recommendation was binding on the attorney general because the sentencing judge had been given "conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation."[34] When judges exercised their discretion, the individual would still be required to serve his or her criminal sentence, but would not be in danger of deportation.[35] However, in 1990, Congress rescinded JRAD regarding all deportable offenses and even retracted the attorney general's authority to prevent deportation.[36] Currently, if a noncitizen commits an aggravated felony, even if it is considered a minor act and has been committed years prior, removal is nearly an automatic result.[37]

Case Studies

The following case studies offer a glimpse into the consequences of current immigration law and the exclusionary aspect of the CCA.

Monte Haines

Monte Haines arrived in the United States at eight years old from South Korea on an IR-4 visa, which is used when a child's adoption will be finalized after entering the United States.[38] Sadly, Haines' adopted father physically abused and severely neglected him.[39] Eventually, a teacher intervened and called Child Protective Services, who removed Haines from his home and placed him in foster care.[40] After living in several different foster homes, Haines was finally adopted by a new family at 11 years old.[41]

Years later, Haines decided to enlist in the U.S. Army, where he served for three years.[42] Later, Haines was arrested for transporting drugs and served a three-year prison sentence.[43] Immediately after completing his sentence, he was detained for two years and then deported to South Korea, where he did not speak the language or understand the culture.[44] "All I had was twenty dollars on me; I didn't know where I was," he said after landing at the airport.[45] "There was nobody there to talk to."[46] Haines has suffered immeasurable harm in South Korea, where he lived for a time on the streets and, as of 2017, could

only find work as a bartender.[47] Haines explained that he and his adoptive parents had always believed he had received citizenship after the completion of his adoption.[48]

Adam Crapser

Adam Crapser was born in South Korea and adopted at three years old with his biological sister.[49] After Crapser endured physical abuse and cruelty for six years, Crapser's adoptive parents gave the children up to foster care and the siblings were separated.[50] Finally, after living in several different foster homes, Crapser was adopted by new parents. However, these parents also physically abused Crapser and the other adoptive and foster children living there.

When Crapser was 16, his mother kicked him out of the house, and he stayed in a homeless shelter and then on various friends' couches.[51] One day, he decided to break into his old house to retrieve some personal items such as his Korean Bible. Police arrested Crapser, convicted him of burglary, and sentenced him to 25 months in prison. This incident initiated a difficult trajectory for Crapser, who was then convicted of several misdemeanors and assault.[52] However, he committed himself to learning from his mistakes and eventually married, became a full-time father, and opened a barbershop.[53] Crapser attempted to secure a long-term job, but neither set of his adoptive parents nor his adoption agency had ever filed his paperwork for citizenship,[54] and he was too old to be protected by the CCA. Eventually, Crapser applied for a green card to attempt to move forward, but, after the government performed a background check and discovered his criminal record, the government began Crapser's deportation proceedings.[55]

Crapser was separated from his wife and children and deported to South Korea, where he experienced severe anxiety and depression while adjusting to life in a country he had left when he was three years old.[56] While in South Korea, Crapser filed a lawsuit against the South Korean government and Holt Children's Services for gross negligence in his and other children's adoption processes, but the lawsuit has dragged on for years.[57] Even if Crapser ultimately wins his case, he would not be granted U.S. citizenship or guaranteed an immediate ticket back to the United States.[58] In the meantime, Crapser explains of his suffering in South Korea: "It's a daily struggle to survive and to continue to want to push forward and want some justice and want some accountability and want some answers .... It's heartbreaking. A lot of the depression that I deal with, a lot of the hopelessness that I feel at times is attributed to the separation from my family that I created and not being able to be actually involved in their life every day like I was."[59]

Constitutional Challenges

Adoptees have challenged the constitutionality of their deportations. For example, in *Hughes v. Ashcroft*,[60] the petitioner was born in Poland in 1956 and adopted by U.S. citizens at four years old.[61] Although the petitioner's adoption was finalized, his parents never completed the paperwork for his naturalization.[62] At 28 years old, the petitioner was convicted of felonies related to sexual abuse he experienced as a child.[63] He was sentenced to 24 years of prison, though he was paroled after serving 12 years.[64] Immediately afterward, he was placed in removal proceedings.[65]

The petitioner argued that he fulfilled all three conditions listed in the CCA and thus should have been granted automatic citizenship. He was adopted by U.S. citizens, entered the United States as a lawful permanent resident as a child under 18 years old, and was in the legal and physical custody of his parents then as well as for a period of time afterward.[66] However, the court held that the text of the statute states that a person must have been under the age of 18 at the time the law was enacted, February 27, 2001, and citizenship granted through the Act was therefore inapplicable to the petitioner.[67]

The CCA was created to resolve an unjust problem for international adoptees such as Hughes. However, the text of the statute intentionally excludes people such as Hughes merely because of an individual's age, not at the time of adoption but at the effective date of the law.

The *Hughes* court acknowledged that under Title II of the CCA, "Protections for Certain Aliens Voting Based on Reasonable Belief in Citizenship," certain foreign nationals who either voted illegally or made false claims about citizenship are protected from deportation.[68] Under this provision, a foreign national who permanently lived in the United States before 16 years old, whose parents were U.S. citizens, and who reasonably believed themself to be a U.S. citizen would not be considered deportable for unintentionally misrepresenting themself as such.[69] Although the court included Title II to contrast the language of "child" used in Title I of the CCA (which grants automatic citizenship), the inclusion of Title II sheds light on a potential area of incongruity.[70] The law allows an exception for deportability for individuals who were not aware they lacked citizenship when they voted.[71] However, the law does not allow a similar exception for deportability for individuals who were not aware they lacked citizenship when they committed crimes.

In the *Hughes* case, the petitioner was not arguing that he should not have been penalized for his crimes; he was simply arguing that he should not be deported in addition to fulfilling his criminal sentence. Although he was not arguing unawareness, his case still highlights a potential unfairness in the law. If individuals are exempted from deportability because of voter fraud based on their mental state (believing they were citizens), an argument can be made that individuals should also be exempted from deportability due to a criminal

conviction based on their mental state (believing they were citizens at the time of the crime and thus misunderstanding the consequences).

Additional Hardships

The threat of deportation is not the only difficulty that adoptees who are excluded from the CCA endure. It is extremely difficult to function in the United States without the benefits and security of citizenship or other type of legal status.[72] For example, Kairi Shepherd was born in India and adopted in 1982.[73] Sadly, her adoptive mother died when she only eight years old, leaving her with guardians.[74] Ms. Shepherd (Kairi's mother) passed away before she was able to complete her daughter's naturalization application.[75] In 2004, Shepherd was convicted of forgery and served a criminal sentence.[76] Immediately afterward, the government began removal proceedings.[77] Ultimately, Secretary Hillary Clinton became involved in Shepherd's case and was able to prevent her deportation.[78] However, life without citizenship or legal status means that Shepherd, who has multiple sclerosis, "does not have access to government medical assistance to subsidize her medical expenses and cannot travel by plane, train or bus within the United States because she lacks legal identification."[79]

This reality affects many adoptees who are excluded from the CCA.[80] For them, life without U.S. citizenship may prevent them from securing jobs, obtaining student loans, and managing many aspects of daily life that are routine for citizens.[81]

Legal Attempts at Solving the Problem

There has been a series of legal attempts at solving the problem created by the CCA's exclusion.[82] First, in 2013, the Senate approved the Citizenship for Lawful Adoptees Amendment.[83] The bill attempted to fix the loophole and grant citizenship to those who were excluded from the CCA.[84] Its sponsor, Senator Mary L. Landrieu (D-La.), posited that "[s]ome adopted children, through no fault of their own, endure a precarious legal status, which can result in the horror of being deported to a country they don't remember at all, where they don't have any ties or even speak the language."[85] Unfortunately, the bill stalled in the House of Representatives and was never passed.[86]

In 2015, Senator Amy Klobuchar, co-chair of the Congressional Coalition on Adoption, sponsored the Adoptee Citizenship Act of 2015.[87] The bill sought to "amend the Immigration and Nationality Act to grant automatic citizenship to all qualifying children adopted by a United States citizen parent, regardless of the date on which the adoption was finalized."[88] The bill also proposed to create a pathway back to the United States for adoptees

who had been deported and had already served their criminal sentences.[89] In 2016, the House of Representatives introduced a companion bill.[90] Representative Trent Franks stated, "Adopted individuals should not be treated as second class citizens just because they happened to be the wrong age when the Child Citizenship Act of 2000 was passed."[91] However, the bill did not pass. Some adoptee rights advocates believed that after the terrorist attacks on September 11, 2001, legislators were hesitant to pass any bills that would grant citizenship to noncitizens who possessed criminal convictions.[92]

In 2018, another attempt was made.[93] Senator Roy Blunt, along with Senators Amy Klobuchar, Mazie Hirono, and Susan Collins, sponsored the Adoptee Citizenship Act of 2018.[94] An identical bill was introduced in the House of Representatives.[95] However, the language of the bills differed from previous bills and included more limitations.[96] Ultimately, they did not proceed out of committee and were not passed.[97]

Persistently, Senators Roy Blunt, Mazie K. Hirono, Susan Collins, and Amy Klobuchar sponsored the Adoptee Citizenship Act of 2019.[98] Blunt commented, "This bipartisan bill will fix current law to ensure these individuals have the stability and opportunity they should have had when their families welcomed them into the U.S."[99] Further, Senator Klobuchar stated, "These adoptees grew up in American families. They went to American schools. They lead American lives. This bill would ensure that international adoptees are recognized as the Americans that they truly are and right this wrong."[100] The 2019 bill stated:

> Section 320(b) of the Immigration and Nationality Act (8 USC 1431(b)) is amended to read as follows: (b) Adopted Children Of Citizen Parent. (1) IN GENERAL. Subsection (a) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under subparagraph (E), (F), or (G) of section 101(b)(1), regardless of the date on which the adoption was finalized." (2) The requirements for adoptees include: (A) The individual was adopted by a United States citizen before the individual reached 18 years of age. (B) The individual was physically present in the United States in the legal custody of the citizen parent pursuant to a lawful admission before the individual reached 18 years of age. (C) The individual never acquired United States citizenship before the date of the enactment of the Adoptee Citizenship Act of 2019. (D) The individual was residing in the United States on the date of the enactment of the Adoptee Citizenship Act of 2019 pursuant to a lawful admission." (3) "(A) IN GENERAL.—An individual who meets all of the criteria described in paragraph (2) except for subparagraph (D) shall automatically become a citizen of the United States on the date on which the individual is physically present in the United States pursuant to a lawful admission.[101]

The bill also stated that if a background check revealed that "the individual has committed a crime that was not properly resolved, the Secretary of Homeland Security and the Secretary of State [will] coordinate with relevant law enforcement agencies to ensure that appropriate action is taken to resolve such criminal activity."[102]

Although the bill was ambitious toward correcting the exclusion of the CCA, many activists felt that it did not extend far enough, leaving some adoptees still excluded from citizenship.[103] Adoptees brought to the United States as young children on visitor visas and whose parents never followed the proper procedures to obtain a green card for their child are crucially excluded.[104] These individuals are considered "visa overstays" and live without legal status in the United States.[105]

For example, one adoptee was adopted from Iran and entered the United States on a six-month tourist visa.[106] Her adopted parents finalized her adoption shortly after she entered the United States, and she grew up without any knowledge that she was not a U.S. citizen.[107] Only when she applied for a passport did she find that her parents had never filed for her green card. She attempted to file for citizenship in 2008 but was ultimately denied.[108] Initially hopeful about the bill, she was devastated to learn that it would not apply to her. "This bill was my last shred of hope .... I no longer have hope. I am stateless."[109] The bill expired on December 10, 2020,[110] but was reintroduced in substantially the same form in 2021 as the Adoptee Citizenship Act of 2021.[111]

Proposed Bill: The Justice for Adoptees Act of 2021

The following is the author's proposal toward a new bill entitled "The Justice for Adoptees Act of 2021." It would amend INA § 320(b) to read as follows:

> (b) Adopted Children of Citizen Parent.
>
> (1) IN GENERAL. Subsection (a) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under subparagraph (E), (F), or (G) of section 101(b)(1), regardless of the date on which the adoption was finalized.
>
> (2) LIMITED APPLICATION TO CERTAIN ADOPTED INDIVIDUALS RESIDING IN THE UNITED STATES.—Notwithstanding section 318, an individual born outside of the United States who was adopted by a United States citizen parent shall automatically become a citizen of the United States when all of the following conditions have been fulfilled:
>
> (A) The individual was adopted by a United States citizen before the individual reached 18 years of age.

(B) The individual was physically present in the United States in the legal custody of the citizen parent pursuant to a lawful admission before the individual reached 18 years of age.

(C) The individual never acquired United States citizenship before the date of the enactment of the Justice for Adoptees Act of 2021.

(D) The individual was residing in the United States on the date of the enactment of the Justice for Adoptees Act of 2021.

(3) LIMITED APPLICATION TO CERTAIN ADOPTED INDIVIDUALS RESIDING OUTSIDE OF THE UNITED STATES.—

(A) IN GENERAL.—An individual who meets all of the criteria described in paragraph (2) except for subparagraph (D) shall automatically become a citizen of the United States on the date on which the individual is physically present in the United States pursuant to a lawful admission.

(B) INAPPLICABILITY OF GROUNDS OF INADMISSIBILITY.—The grounds of inadmissibility set forth in section 212(a) shall not apply to an individual described in subparagraph (A) who is seeking admission to the United States.

(C) CRIMINAL BACKGROUND CHECK.—Notwithstanding subparagraphs (A) and (B), an individual described in subparagraph (A) may not be issued a visa unless—

(i) the individual was subjected to a criminal background check; and

(ii) if the background check conducted pursuant to clause (i) reveals that the individual has committed a crime that was not properly resolved, the Secretary of Homeland Security and the Secretary of State will coordinate with relevant law enforcement agencies to ensure that legal proceedings result and any ensuing criminal sentences are fulfilled by the individual prior to receiving citizenship. Upon completion of the criminal sentence, the individual will be granted citizenship.

The language in this proposal is taken from the Adoptee Citizenship Act of 2021, with several important adjustments. First, the term "pursuant to a lawful admission" is intentionally removed from subparagraph (2)(D). The removal of this key phrase addresses one of the major limitations of the 2021

bill, which excludes citizenship for adoptees whose visas have already expired and are living without current legal status.

Second, subparagraph (3)(C)(ii) is amended to include stricter language for those who have committed unresolved crimes to appease lawmakers who have rejected previous bills for their perceived leniency on criminals. The amended portion is italicized: "If the background check conducted pursuant to clause (i) reveals that the individual has committed a crime that was not properly resolved, the Secretary of Homeland Security and the Secretary of State will coordinate with relevant law enforcement agencies to *ensure that legal proceedings result and any ensuing criminal sentences are fulfilled by the individual prior to receiving citizenship. Upon completion of the criminal sentence, the individual will be granted citizenship*." While the new language mandates adequate sentencing for adoptees who engaged in unresolved crimes, it does not exclude these individuals from being eligible for citizenship. Protection from deportation, even when a crime has been committed, is a fundamental right that citizens of the United States enjoy. That same measure should be afforded to both biological and adopted children of United States citizens.

Why are these changes necessary? First, it is critical to correct the currently introduced bill to remove a significant subgroup of adoptees from being excluded from citizenship. Second, it is equally necessary to present a bill that is likely to pass. Previous versions of the Adoptee Citizenship Act have failed since 2015. This new proposal must address the criticism of prior bills, which is why there is updated language related to unresolved crimes. In other respects, however, the proposed bill is similar to current congressional bills and retains the protections provided by them.

The proposed bill is critical, especially given the current immigration practices in the United States. Although the Biden administration is attempting to improve the immigration climate, adoptees who were excluded from the CCA are still vulnerable to deportation.

The Path Forward

To begin with, judicial discretion concerning deportable offenses should be reinstated. If judges in criminal cases are permitted, as they were prior to 1990, to issue a judicial recommendation against deportation, they could take adopted individuals' circumstances into account and recommend against deportation while still requiring them to serve criminal sentences for their crimes.

Additionally, nonprofit organizations should educate criminal defense attorneys concerning the nuances of immigration law, specifically regarding noncitizens' susceptibility to deportation. For example, in the case of *Padilla v. Kentucky*, a noncitizen's counsel failed to explain to the individual beforehand that a guilty plea would result in automatic deportation.[112] Thus, "the

importance of accurate legal advice for non-citizens accused of crimes has never been more important."[113] If outside consultants could take the initiative to educate attorneys, certain deportations may be prevented.

A legislative solution is still required. Lobbyists should petition Congress to pass legislation such as the proposed Justice for Adoptees Act of 2021. A revision of the law is necessary to correct a problem that has had devastating effects on many international adoptees over the past decades. Legislators would do well to remember the Biblical command, "The alien who resides with you shall be to you as the citizen among you; you shall love the alien as yourself, for you were aliens in the land of Egypt."[114]

Notes

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1. The term "deportation" is intentionally used in this article rather than "removal." While "deportation proceedings" has been replaced with the term "removal proceedings" in current law, *see* Calcano-Martinez v. I.N.S., 533 U.S. 348, 350 n.1 (2001), the INA refers to grounds of deportation for those admitted to the United States who are to be removed. *See* INA § 237. Most international adoptees will have been admitted.

2. 8 USC § 1431 (2000).

3. *Id.*

4. DeLeith Duke Gossett, *"[Take From Us Our] Wretched Refuse": The Deportation of America's Adoptees*, 85 U. of Cincinnati L. Rev. 33, 65 (Aug. 2018); *see* 12 *USCIS Policy Manual*, pt. H, ch. 4.D.

5. Gossett, *supra* note 4, at 35; National Alliance for Adoptee Equality, Adoptee Citizenship Act, https://sites.google.com/kagc.us/adoptee-equality/bill-summary?authuser=0; Choe Sang-Hun, *Deportation a "Death Sentence" to Adoptees After a Lifetime in the U.S.*, The New York Times, July 2, 2017, www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html.

6. Holland L. Hauenstein, *Unwitting and Unwelcome in Their Own Homes: Remedying the Coverage Gap in the Child Citizenship Act of 2000*, 104 Iowa L. Rev. 2123, 2125 (May 2019).

7. *See also* 12 *USCIS Policy Manual*, pt. H, ch. 4.D.

8. Jennifer K. Dobbs et al., *Deporting Adult Adoptees*, Foreign Policy in Focus (July 4, 2012), https://fpif.org/deporting_adult_adoptees/.

9. *Id.*

10. Kathleen Ja Sook Bergquist, *Right to Define Family: Equality Under Immigration Law for U.S. Inter-Country Adoptees*, 22 Geo. Immigr. L.J. 1, 10 (2007).

11. Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 26, May 29, 1993, www.hcch.net/en/instruments/conventions/full-text/?cid=69.

12. *Id.* art. 18.

13. Hauenstein, *supra* note 6, at 2130; Frederic L. Kirgis, *International Agreements and U.S. Law*, Insights (May 27, 1997), www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law.

14. 42 USC § 14901(a).

15. 42 USC § 14901(b)(2).

16. INA § 320.

17. Gossett, *supra* note 4, at 63.

18. *Id.*

19. *See also* USCIS, Before Your Child Immigrates to the United States, www.uscis.gov/adoption/bringing-your-internationally-adopted-child-to-the-united-states/before-your-child-immigrates-to-the-united-states.

20. *Id.*

21. Gossett, *supra* note 4, at 65.

22. *Id.*

23. *Id.*

24. *Id.*; Daniel A. Medina, *Some Adoptees are Undocumented Because Their Parents Forgot to Fill Out a Form. Now Congress Is Taking Action*, The Intercept (May 14, 2019), https://theintercept.com/2019/05/14/adoption-citizenship-bill/.

25. Gossett, *supra* note 4, at 65; *see* INA § 101(a)(3).

26. Gossett, *supra* note 4, at 65–66.

27. INA § 237(a)(2)(A)–(F).

28. Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* § 6:2 (2021 ed.).

29. INA § 101(a)(43).

30. *Id.*

31. *Id.*

32. *Padilla v. Kentucky*, 559 U.S. 356, 361 (2010).

33. *Id.*

34. *Janvier v. U.S.*, 793 F.2d 449, 452 (2d Cir. 1986).

35. Immigrant Legal Resource Center et al., *Restore a Fair Day in Court*, www.ilrc.org/sites/default/files/resources/ijn-judicial-discretion-factsheet.pdf; Gossett, *supra* note 5, at 52.

36. *Padilla*, 559 U.S. 356 at 363.

37. *Id.* at 366.

38. Keep Us Home, Monte Haines (Apr. 29, 2015), www.keepushome.org/montes-story/; USCIS, Your New Child's Immigrant Visa, www.uscis.gov/adoption/bringing-your-internationally-adopted-child-to-the-united-states/your-new-childs-immigrant-visa/your-new-childs-immigrant-visa.

39. Global Adoption News, Monte Haines Deportation Story (Feb. 6, 2017), https://adoptionland.org/6515/montehaines-deportation-story/.

40. *Id.*

41. Keep Us Home, *supra* note 38.

42. *Id.*

43. *Id.*

44. *Id.*
45. Choe Sang-Hun, *supra* note 5.
46. *Id.*
47. *Id.*; Keep Us Home, *supra* note 38; Hauenstein, *supra* note 6, at 2136.
48. Keep Us Home, *supra* note 39.
49. Maggie Jones, *Adam Crapser's Bizarre Deportation Odyssey*, The New York Times, Apr. 1, 2015, www.nytimes.com/2015/04/01/magazine/adam-crapsers-bizarre-deportation-odyssey.html.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. NBC News, *Adoptee Deported by U.S. to Sue South Korea, Adoption Agency* (Jan. 23, 2019), www.nbcnews.com/news/asian-america/adoptee-deported-u-s-sue-south-korea-adoption-agency-n961776.
57. *Id.*
58. *Id.*
59. *Id.*
60. 255 F.3d 752 (9th Cir. 2001).
61. *Id.* at 755.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 759.
67. *Id.*
68. *Id.*
69. INA § 237(a)(3)(D)(ii).
70. *Hughes*, 255 F.3d at 759.
71. *See* INA § 237(a)(3)(D)(ii).
72. Hauenstein, *supra* note 6, at 2137.
73. *Shepherd v. Holder*, 678 F.3d 1171, 1175 (10th Cir. 2012).
74. *Id.*
75. Hauenstein, *supra* note 6, at 2137.
76. *Shepherd* at 1175.
77. *Id.*
78. Hauenstein, *supra* note 6, at 2138.
79. *Id.*
80. Gossett, *supra* note 4, at 69.
81. *Id.* at 69.
82. Hauenstein, *supra* note 6, at 2139.
83. *Id.* at 2139.
84. Gossett, *supra* note 4, at 66.
85. *Id.*
86. *Id.* at 67.
87. *Id.* at 70.

88. Adoptee Citizenship Act of 2015, S.2275, 114th Cong. (2015).
89. Gossett, *supra* note 4, at 71.
90. Adoptee Citizenship Act of 2016, H.R. 5454, 114th Cong. (2016).
91. Gossett, *supra* note 4, at 72.
92. Hauenstein, *supra* note 6, at 2139.
93. *Id.* at 2140.
94. *Id.*
95. *Id.*
96. Adoptees for Justice, *The Adoptee Citizenship Act: Current Status*, https://adopteesforjustice.org/adopteecitizenship/.
97. *Id.*
98. U.S. Senator Roy Blunt Press Release, *Blunt, Hirono, Collins, Klobuchar Introduce Adoptee Citizenship Act of 2019* (May 22, 2019), www.blunt.senate.gov/news/press-releases/blunt-hirono-collins-klobuchar-introduce-adoptee-citizenship-act-of-2019.
99. *Id.*
100. *Id.*
101. Adoptee Citizenship Act of 2019, S.1554, 116th Cong. (2019).
102. *Id.*
103. Daniel A. Medina, *supra* note 24.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. Adoptees for Justice, *supra* note 96.
111. Adoptee Citizenship Act of 2021, H.R.1593, S.967, 117th Cong. (2021).
112. *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010).
113. *Id.* at 364.
114. *Leviticus* 19:34 (New International Version 1973).

"Deferring the Dream"

An Analysis of DACA-Related Litigation and Legislation

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Abstract: This paper discusses the present state of DACA-related litigation and legislation. Specifically, after a brief history of the DACA program, it discusses the holding and prospective effects of *DHS v. Regents*, the Supreme Court's decision on the rescission of the DACA program as it relates to the issue of reliance in the third section. Then the paper briefly discusses the two most significant cases post-*Regents* cases involving DACA and relevant considerations for the ongoing *Texas II* case. Lastly, this paper discusses the U.S. Citizenship Act of 2021 and the American Dream and Promise Act of 2021 and their proposed solutions to the Dreamers' dilemma.

Introduction

No matter what side of the political aisle one stands on, the last couple of years have made evident how much immigration law and policy can impact and affect the lives of many people. The effects of policies such the separation of families, the "remain in Mexico" program, and the pandemic-related restrictions on international travel have been frequent in news cycles and have caught the attention of many Americans. However, there is one particular group of immigrants who has long pleaded for the attention of the president, Congress, and the federal courts to little avail: the *Dreamers*.

This term has been used for the last two decades to describe those individuals who were brought to this country as underage children, many of whom have attended school, graduated from universities, made valuable contributions to the United States, and only know this country as their home. Some of these individuals have also taken advantage of the Deferred Action for Childhood Arrivals (DACA) program to obtain, among other benefits, a temporary permission to remain in the United States and to chase the American dream of providing a better life for themselves and their families. However, because of the way they were brought into the country and the looming end of this program, they live in a state of precariousness as to their futures in the United States.

This paper discusses the present state of DACA-related litigation and legislation. Specifically, after a brief history of the DACA program, it discusses the holding and prospective effects of the Supreme Court's decision

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on the rescission of the DACA program as it relates to the issue of reliance in the third section. Then it briefly discusses the two most significant post-*Regents* cases involving DACA and relevant considerations from the *Texas II* case. Lastly, this paper discusses the U.S. Citizenship Act of 2021 and the American Dream and Promise Act of 2021 and their proposed solutions to the Dreamers' dilemma.

Background of the DACA Program

The Obama administration announced the implementation of the DACA program on June 15, 2012, through then-Secretary of the Department of Homeland Security Janet Napolitano.[1] As an exercise of DHS's prosecutorial discretion, this program was intended to provide a humanitarian solution for "Dreamers," that is, "certain young people who were brought to this country as children and know only this country as home."[2] The memorandum recognized that "[a]s a general matter, these individuals lacked the intent to violate the law" and, therefore, proposed the program as a way to focus the department's enforcement efforts on higher-priority cases.[3]

The DACA program allows these individuals, who are otherwise removable under Immigration and Nationality Act (INA) § 237, to apply for deferral of deportation and work permits, for renewable two-year terms if they meet the following criteria:

- They came to the United States before their 16th birthday;
- They were present and continuously resided in the United States since June 15, 2007;
- They had no lawful status on June 15, 2012;
- They are currently in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States;
- They have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and
- They were under 31 years of age as of June 15, 2012.[4]

This program has had wide-ranging positive effects and has enabled "almost 800,000 eligible young adults to work lawfully, attend school, and plan their lives without the constant threat of deportation—usually to an unfamiliar country."[5] U.S. Citizenship and Immigration Services (USCIS) reports that as of the end of 2020 there were approximately 636,390 active DACA recipients.[6] However, the program has also drawn extensive criticism and has been enmeshed in litigation since its onset.[7]

The Effects of *Department of Homeland Security v. Regents of the University of California* on the Future of the DACA Program

The DACA program was last before the Supreme Court during its 2019 term in *DHS v. Regents of Univ. of Cal.*[8] That case involved a suit following the recission of the DACA program under the Trump administration.

In short, then-Attorney General Jefferson B. Sessions sent a letter to Acting Secretary of Homeland Security Elaine C. Duke, advising that DHS "should rescind" the DACA program on September 4, 2017.[9] In that letter, the attorney general cited to a Fifth Circuit opinion (and the Supreme Court's affirmance thereof)[10] in concluding that DACA shared the "same legal . . . defects that the courts recognized as to DAPA" (the Deferred Action for Parents of Americans program)[11] and was "likely" to meet a similar fate.[12] The attorney general also urged DHS to "consider an orderly and efficient wind-down process" for the program.[13] The next day, Secretary Duke acted on the attorney general's advice and terminated DACA.[14]

Duke then detailed how the program would be wound down: No new applications would be accepted, but DHS would entertain applications for two-year renewals from DACA recipients whose benefits were set to expire within six months.[15] For other DACA recipients who had previously issued grants of deferred action and work authorization, their benefits "would not be revoked but would expire on their own terms, with no prospect for renewal."[16]

As the Chief Justice points out, the issue in that case was "not whether DHS may rescind DACA," as "[a]ll parties agree[d] that it may."[17] Notably, the decision did not touch on the constitutionality of the DACA program nor its recission but instead focused on the question of "whether the agency complied with the procedural requirement that it provide a reasoned explanation for [the DACA recission]."[18] Specifically, the issues before the court were: (1) whether the claims were reviewable under the Administrative Procedure Act (APA); (2) if so, whether the rescission was arbitrary and capricious in violation of the APA; and (3) whether the plaintiffs stated an equal protection claim.[19]

As to the issue of reviewability, DHS argued that because DACA constituted a "general non-enforcement policy," the decision to rescind it belonged to a limited category of unreviewable actions that are committed to agency discretion.[20] This category, DHS asserted, includes "an agency's decision not to institute enforcement proceedings[.]"[21] The majority of the Court, however, rejected this argument by correctly noting that the DACA memorandum did not create a mere nonenforcement policy, but proceedings for the adjudication of affirmative immigration benefits.[22] Namely, these benefits include deferred deportation, nonaccrual of unlawful presence, the issuance of work permits, and eligibility for Social Security and Medicare.[23] The majority held that "access to these types of benefits is an interest courts often are called upon to protect," thus making the decision reviewable.[24]

Turning to the merits of the case, the Court explained that it must look only toward the explanation provided by the agency at the time of the rescission.[25] That explanation was found in Acting Secretary Duke's memorandum. The Court observed:

> "Taking into consideration" the Fifth Circuit's conclusion that DAPA was unlawful because it conferred benefits in violation of the INA, and the Attorney General's conclusion that DACA was unlawful for the same reason, [Duke] concluded—without elaboration—that the "DACA program should be terminated."[26]

The Court held that this explanation was insufficient for a total recission of the DACA program. In doing so, it focused its attention on only one of respondents' arguments, namely, whether Acting Secretary Duke failed to consider important aspects of the problem before her.[27] The Court explained that DACA stands on two pillars: forbearance from removal and the granting of eligibility for other benefits (work permit, Social Security, Medicare, etc.). The decision to rescind DACA was found to be arbitrary and capricious because it did not consider the possibility of letting the forbearance of removal benefit stand, while rescinding the other associated benefits.[28] Moreover, the Fifth Circuit decision to terminate DAPA did nothing to require "the Secretary to remove any alien or to alter the Secretary's class-based enforcement priorities. In other words, the Secretary's forbearance authority was unimpaired."[29]

Importantly, the Court did not stop there. It held that Duke "failed to address whether there was 'legitimate reliance' on the DACA Memorandum."[30] DHS (and the Thomas dissent) argued that it was not required to consider the reliance of DACA recipients because they allegedly have no "legally cognizable reliance interests" in the continuance of the program, since the DACA memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments.[31] However, the Court notes that DHS failed to support its proposition that reliance is automatically precluded by such features.[32] On the other hand, the respondents and their *amici* brought forth many relevant considerations in their briefing, such as the fact that many DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program.[33] Moreover, the exclusion of DACA recipients from the U.S. labor force may have potentially drastic effects for the U.S. and local economies.[34] The Court noted that these concerns are "noteworthy" but "not dispositive."[35] DHS could have weighed these and other reliance interests and concluded they are outweighed by other policy concerns.[36] However, because DHS was not "writing on a blank slate," "it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[37] Such considerations were completely lacking in the rescission.

Therefore, the Court held that it was arbitrary and capricious on that separate ground.

Thus, the majority ultimately struck down the recission in what some viewed as a "major rebuke" of the Trump administration's actions.[38] The Court's treatment of the reliance interests of DACA recipients is important for the future of DACA because it holds that the program cannot simply be rescinded without giving due weight to the effects it would have.

When addressing the reliance interests that Acting Secretary Duke should have considered, Chief Justice Roberts seemed to draft a "road map" for the future of the DACA program:[39]

> Had Duke considered reliance interests, she might, for example, have considered a *broader renewal period* based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more *accommodating termination dates for recipients caught in the middle of a time-bounded commitment*, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have *instructed immigration officials to give salient weight to any reliance interests engendered by DACA* when exercising individualized enforcement discretion.[40]

The Court *did not* hold that DHS *is obligated* to follow these very considerations to the letter. However, they are given as examples of the types of considerations that would be needed to rescind the benefits granted by DACA under the APA. It seems that deferred action under DACA could not be lawfully rescinded, "at least without a case-by-case analysis and consideration of [the] individual circumstances and reliance interests in each particular case."[41]

Furthermore, many of the reliance interests mentioned (and arguably alluded to) by the Court are related to DACA recipients' interest in property.[42] Although not specifically mentioned by the Court,[43] these property interests are relevant to a future rescission analysis because they implicate due process concerns. Namely, the Supreme Court has held in *Goldberg v. Kelley* that the modern concept of due process property interests covers "entitlements" such as government benefits that one has a legitimate expectation to receive.[44] These "entitlements" are treated as "property" under the Due Process Clause and can take the form of food stamps, welfare, and other benefits available to those who take part in statutory benefit programs.[45] "[A]ccordingly, the procedures that are employed in determining whether an individual may continue to participate in [a] statutory program *must comply with the commands of the Constitution*."[46] In a similar way, DACA recipients have a strong argument that the aforementioned benefits cannot be rescinded without due process. But what procedures does due process require in the recission of DACA? Consideration thereof "must begin with a determination of the precise nature

of the government function involved *as well as of the private interest that has been affected by governmental action*."[47] In *Goldberg*, the court held that a welfare recipient is entitled to a hearing before an impartial officer before their welfare benefits are terminated.[48] Further research is required to determine the specifics of the due process requirements involved in the rescission of programs such as DACA.[49] However, because the private interests involved in each case could vary substantially, the aforementioned case-by-case analysis is likely required. This analysis should weigh the reliance and property interests involved to determine when and how deferred action under DACA should be terminated for each applicant.

Thus, the Court's holding[50] in *DHS v. Regents of Univ. of Cal.* has the effect of limiting DHS's power to rescind DACA. DHS is still within its power to rescind DACA, but it may not do so without giving due weight to the relevant interests involved. Furthermore, even if the DACA program is terminated, the Supreme Court's decision in *DHS v. Regents of Univ. of Cal.* implicates that DHS will likely need to conduct a case-by-case analysis of the timing of each recission and its effects on the lives and livelihoods of DACA recipients.

DACA-Related Litigation Post-*Regents*

In the aftermath of *DHS v. Regents*, USCIS[51] issued the following statement severely criticizing the decision: "Today's court opinion has no basis in law and merely delays the President's lawful ability to end the illegal Deferred Action for Childhood Arrivals amnesty program."[52] The full statement implied an unwillingness to fully adhere to the Supreme Court's decision.[53] Holding fast to that opinion, USCIS did not, under the direction of Acting Secretary of Homeland Security Chad Wolf, fully reinstate DACA but instead chose to limit the program to only allow renewals to recipients who had already been conferred deferred action under DACA. By way of memorandum, Wolf directed USCIS to reject all initial DACA requests.[54]

This action sparked the litigation in *Vidal v. Wolf*. There, Judge Garaufis vacated the Wolf memorandum because he found that Mr. Wolf was not lawfully serving as acting secretary of homeland security under the Homeland Security Act at the time of its issuance.[55] Judge Garaufis did not stop at a vacatur. In a separate order, he noted that while district courts should not lightly order injunctions in administrative law cases, judicial review of agency action allows the court to "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."[56] In that case, the court also enjoined DHS to "post a public notice, within 3 calendar days of this Order … that it is accepting first-time requests for consideration of deferred action under DACA, renewal requests, and advance parole requests" in accordance with the court's prior order.[57] After this decision

came out, USCIS began accepting new applications for DACA and has since continued to do so.[58]

Importantly, neither the district court nor the Fifth Circuit's opinion in separate DAPA litigation ever held that DACA 2012 was unconstitutional, nor unlawful under the APA.[59] These issues were, until recently, pending before Judge Hanen in *Texas v. United States (Texas II)*.[60] There, the plaintiffs,[61] led by the State of Texas, attacked the legality of the DACA program itself. The plaintiffs pled the court for a declaratory judgment that DACA is in violation of the Take Care[62] Clause of the Constitution, the APA, and to enjoin DHS "from issuing or renewing any DACA permits in the future."[63] In a recent decision, Judge Hanen granted summary judgement for the plaintiffs and held that DACA memorandum and the program were unlawful.[64]

Notably, in the months before that order, many people were already of the opinion that Judge Hanen appeared to side with the plaintiffs.[65]

In fact, Judge Hanen had already "sided" with the defendants on the merits of the case. Back in 2018, the plaintiffs moved the court for a preliminary injunction[66] that would enjoin DHS from continuing the DACA program (i.e., issuing and renewing DACA grants) while the case was pending.[67] In their motion, the plaintiffs argued (in relevant part) that an injunction was merited under *Winter v. NRDC*[68] because (1) the plaintiffs were likely to succeed on the merits in proving that DACA was unlawful,[69] (2) the plaintiff states would "suffer irreparable injuries" if an injunction was not granted,[70] and (3) the "balance of equities" and the public interest weighed in favor of the plaintiff states.[71] Regarding the "irreparable injuries," the plaintiff states claimed that they would suffer:

> ongoing harms such as (a) the healthcare, law enforcement, and education costs imposed by aliens who would not remain in the country but for renewal of their unlawful lawful-presence status and work authorization; and (b) injury to citizens of the States in attempting to secure employment.[72]

Importantly, the plaintiffs also claimed that the equities weighed in their favor, not only because of their injury, but because there would be (allegedly) "no irreparable injury" to the defendants, as DACA has "all along [been characterized] as being temporary and revocable at any time in the Executive's sole discretion."[73]

Ruling on the motion, Judge Hanen held that the plaintiff states were likely to succeed on the merits.[74] In sum, the court held that the states' substantive APA claim was likely to be successful.

> The DACA program contradicts statutory law and violates the APA because the INA directly addresses the issues of lawful presence and work authorization for aliens in this country but *does not* include

> those designated by DACA. Furthermore, the award of lawful presence and an entire array of federal, state, and local rights and benefits to aliens Congress has deemed inadmissible flies in the face of the INA's goals of deciding who comes to and stays in the United States, who works in the United States, and who qualifies for government-funded benefits.[75]

Moreover, the court explained that DACA "allots lawful presence and its corresponding benefits to more than a million [undocumented individuals]."[76] The granting of these benefits constitutes the bestowal of "rights and obligations" that are characteristic of substantive rules under the APA.[77] Thus, in the court's opinion, DACA constitutes a substantive rule[78] that cannot be promulgated without notice and comment rulemaking procedures.[79] Since these procedures were not followed, the states were found likely to win on the procedural APA issue as well. Therefore, the plaintiffs met the first *Winter* factor.

Furthermore, the court held that states provided evidence "sufficient to support a finding" that the aforementioned burden on the states is "irreparable, as there is no source of recompense" for these monetary costs.[80] However, the court held that the states could not prevail on this issue because of the unreasonable delay in seeking the injunction.[81] It explained that Texas and other federal courts have long recognized that "[a] delay in seeking an injunction has been viewed as a concession or an indication that the alleged harm does not rise to a level that merits an injunction[.]"[82] Here, Texas and the other plaintiff states "could have brought a lawsuit against the entire [DACA] program in 2012" when it began, "or anytime thereafter," but failed to do so until 2018.[83] Thus, this failure was fatal to their efforts to prove "irreparable harm" sufficient to warrant a preliminary injunction.

Furthermore, the court rejected the notion that the defendant-intervenors could not prove an irreparable injury. At the time of the order, DACA had been in effect for six years and was the "status quo."[84] Importantly, Judge Hanen took into account the significant reliance interests[85] of DACA recipients:

> The proposed injunction could cause the DACA recipients to *lose their ability to travel within the United States* and *many other benefits* that flow from lawful presence. For many, this could, in theory, *make them susceptible to immigration proceedings* and eventual *removal* where applicable. . . . [T]he reality of the situation is that it conferred lawful presence and numerous other benefits, and many DACA recipients and others nationwide have *relied* upon it for the last six years.[86]

On the other hand, even if the states' injury was lessened by the injunction and the subsequent departure of some DACA recipients,[87] they would still be forced to incur the costs of those who remain and other persons who

are unlawfully present in their vicinities.[88] Thus, this *Winter* factor weighed in favor of maintaining the status quo. In Judge Hanen's words, "the egg has been scrambled. To try to put it back in the shell with only a preliminary injunction record, and perhaps at a great risk to many, does not make sense nor serve the best interests of this country."[89] Thus, the court ultimately denied their motion for preliminary injunction.[90]

However, on July 16, 2021, Judge Hanen ultimately decided to "vacate" the DACA program in his first post-*Regents* order on the merits of the case.[91] His reasoning in that order followed the broad strokes of the denial of the preliminary injunction: namely, Judge Hanen agreed with the plaintiffs that DACA was unlawful from its onset and that it violated the APA procedurally and substantially.[92]

Judge Hanen explained that the promulgation of DACA violated the APA procedurally by failing to go through notice-and-comment rulemaking before implementing a program with "fixed criteria" and that affects the "rights and obligations" of the concerned parties.[93]

Furthermore, Judge Hanen decided that the program also substantially violates the APA for two major reasons under the *Chevron* analysis.[94] First, Hanen argues that Congress has already "spoken on the issue" by not explicitly grant DHS the power to promulgate the program[95] and by enacting the INA and related statutes, which provide a comprehensive statutory scheme for removal and the allocation of lawful presence[96] and work authorization.[97] Second, Hanen argues that DHS's interpretation is not reasonable for similar reasons, that is, because it "usurps the power of Congress to dictate a national scheme of immigration laws" by granting lawful presence and work authorization "to over a million people for whom Congress has made no provision and has consistently refused to make such a provision."[98]

Lastly, Judge Hanen concludes his legal analysis by arguing that the DACA program was arbitrary and capricious.[99] That is, he argues that DHS failed to consider many factors before promulgating the program, including two factors that were referenced in *Regents*: (1) the failure to consider the granting of forbearance of removal without the added benefits, and (2) the failure to consider reliance interests.[100] However, he focuses on the reliance interests of the plaintiff states in protecting their workforce, not those of the DACA recipients.[101]

Nonetheless, it may come at a surprise that this decision is of limited value. Despite its holding that DACA is unlawful, there are three important takeaways from this decision. First, Judge Hanen once again considers the reliance and property interests of DACA recipients that will be affected, as discussed in *Regents* and in his denial of the preliminary injunction in 2018.[102] Even he notes that his decision does nothing to "resolve the issue of the hundreds of thousands of DACA recipients and others who have relied upon this program for almost a decade."[103] This reliance grows by the day. Second, the program itself is still alive for those who have already been granted DACA;

USCIS is merely enjoined from *approving* new applications, not from *accepting* them.[104] Lastly, no matter what Judge Hanen (or the 5th Circuit) decides on appeal, their decisions are bound by and cannot contradict Justice Robert's holding in *Regents*. Even if DACA is declared unlawful and further vacated, it cannot be completely rescinded without taking into account the reliance and property interests of the thousands of Dreamers who have already been granted DACA. As Judge Garaufis did in *Vidal*, it may be necessary for the court in *Texas II* to use its equitable powers to impose specific guidelines on DHS in order to make sure that the rights of these individuals are adequately considered and protected.

Recent Legislative Proposals Could Mean a Permanent Solution for Dreamers

One thing is clear: action by Congress on the matter would bring this seemingly endless litigation to an end. Many believe that the aforementioned *Texas II* case will finally be the impetus Congress needs to pass legislation protecting Dreamers.[105] Over the course of the past 20 years, there have been many proposals of a "DREAM Act" that would provide a pathway to legal permanent residency and citizenship to Dreamers.[106] In this section, I address key points of the American Dream and Promise Act of 2021,[107] which passed the House of Representatives on March 18, 2021, and the related proposal by President Biden, the U.S. Citizenship Act of 2021, which has yet to pass either chamber.[108] Although the text of the bills are currently available, we do not know what their final versions will be. Nor is it certain that either of these will be the version of the DREAM Act that will finally be signed into law. It is also important to note that these proposals are not legislative versions of the 2012 DACA memo. They are alternative solutions that address the same underlying problems that the DACA program sought to address, namely, the stake of noncitizens who are now undocumented and were brought into this country as children.

The 353-page U.S. Citizenship Act is President Biden's first attempt at comprehensive immigration reform.[109] For one, the Act would amend the INA to create a new type of lawful status, that of a "lawful prospective immigrant" or LPI.[110] Noncitizens who obtain this status would be considered (1) lawfully present, (2) eligible to work in the United States, and (3) be allowed to travel outside and reenter the United States unless otherwise inadmissible.[111] Eligible applicants would receive an initial term of LPI status for six years, which could be renewed for additional six-year terms, as long as they remain eligible under the new INA § 245(G)(b). Those requirements include having been continuously physically present since January 1, 2021, being physically present in the United States at the time of filing, paying a fee prescribed by DHS, passing background checks, and not being inadmissible on certain criminal and other

grounds (with some exceptions).[112] However, LPIs would not be eligible for certain tax and Affordable Care Act benefits.[113] After five years in LPI status, these individuals would be eligible for full-fledged permanent residency if they continue to meet LPI requirements, such as passing background checks, submitting applications under special procedures, and not having been absent for more than 180 days (with certain exceptions).[114] This new LPI status is relevant because it basically grants an amnesty for noncitizens who have been unlawfully present in the United States and meet the other requirements. It could also protect noncitizens who, for example, did not qualify for DACA for failure to meet the educational or age requirements.

Furthermore, the Act also specifically addresses Dreamers in its section 1103, titled "The Dream Act." That section would specifically grant a path to legal permanent resident (LPR) status to those who (1) first entered into this country when they were 18 years old or younger; (2) have obtained a high school diploma, a GED, or other specific commensurate award; (3) have obtained a college degree or other educational alternatives;[115] and (4) have registered for Selective Service (if required).[116] These requirements can also be waived "if the noncitizen demonstrates compelling circumstances for the noncitizen's inability to satisfy such requirement."[117] Spouses and children of individuals eligible under this section may also adjust status.[118]

The bill that has already passed the House, namely, the Dream and Promise Act (DPA), contains a similar provision. The DPA would direct the secretary of homeland security to grant noncitizens who are inadmissible or deportable from the United States conditional permanent residency[119] (as opposed to the new LPI status) status for 10 years, and cancel removal proceedings if they:[120] (1) have continuous physical presence in the United States since January 1, 2021, (2) have met similar education requirements similar to those in the U.S. Citizenship Act,[121] (3) were 18 years old or younger on the date of their initial entry into the United States, (4) are not inadmissible on certain criminal and security grounds, and (5) pass security and law enforcement background checks.[122]

However, for these individuals to have their conditions removed and gain full lawful permanent resident status under the DPA, they would have to[123] (1) not have abandoned their residence in the United States during the period of conditional residence, (2) meet similar higher education requirements to those of the U.S. Citizenship Act (or their alternatives under that Act), and (3) not be otherwise inadmissible.[124] The bill also contains a hardship exception for these requirements.[125] The bill instructs the secretary to create a streamlined procedure for those individuals who have already been granted DACA.[126] However, the specifics of that "streamlined procedure" are not elaborated.

As previously mentioned, these proposals are not exactly legislative versions of the original 2012 DACA memo. They go further than the DACA memo in two major ways. For one, DACA eligibility was cut off for individuals who either entered the United States after their sixteenth birthday (as opposed to

being 18 years old or younger at the time of entry), entered after June 15, 2007, or were 31 years old or over as of June 15, 2012.[127] Dreamers who fall into these categories but still meet the new requirements would be eligible for adjustment of status under the new bills. Second, and more importantly, these bills offer a *permanent* solution for Dreamers. LPR status (even if at first conditional) would allow Dreamers what they have longed for: a pathway to citizenship, greater protection from deportation, and the ability to travel abroad without the risk of being excluded from the United States—their home—forever. The bills are, however, similar to the original DACA program in that they seek to protect those who were brought as children and that they recognize the value that Dreamers who are educated, have military service, and are law-abiding citizens bring to the table.

The longer wait time for naturalization and the conditional nature of the initial statuses in the bills were most likely crafted to appease critics who view such an act as overbroad exercise of amnesty for "violators" of immigration law. However, the appealing characteristic of such legislation has always been that these individuals were brought into the United States by their parents and failed to comply with the law through no fault of their own. In many cases, these individuals only know this country as home. Additionally, the bills are retrospective in determining their eligibility requirements. Only those individuals who were present in the United States since January 1, 2021, would be eligible for the relief mentioned above, so long as they meet the bills' other requirements. As such, both bills have a strong defense against the claim that they will invite increased illegal immigration to this country.

In any case, these bills constitute a solution that will render Dreamers free from the whims of political agendas and the uncertainty of litigation. In the coming months, we should keep a close eye on their progress. Hopefully, one of the two will become the true "DREAM Act," the one to finally make it through Congress and into law.

Conclusion

What does all this teach us? First, *DHS v. Regents* was a victory for judicial review against the arbitrariness of agency action. Second, the APA can and should be utilized as a powerful tool to protect the interests of immigrants, whether by way of arbitrary-and-capricious review or an attack on the procedural validity of governmental appointments. The DACA cases also teach us that a court (or presidential administration) that wishes to rescind or declare DACA unlawful should be cognizant of the reliance and property interests of Dreamers and should tread carefully to make sure that those interests are protected.

Lastly, the *Texas II* litigation makes it clear that now more than ever it is time for Congress to Act. The protection of Dreamers cannot be left to

the whims of changing administrations or the uncertainty of litigation. It is not certain how *Texas II* will be decided on appeal at the Fifth Circuit and Supreme Court levels. Hopefully, the looming outcome of that litigation will ensure that the Dream Act will finally be passed and that this group of nearly 800,000 young people, all of whom contribute to the United States, will finally be allowed to pursue legal status in the country they call home. The dream should no longer be deferred. The time for action has come.

Notes

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1. DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), AILA Doc. No. 12061544.

2. *Id.* at 1.

3. *Id.*

4. *Id.* at 1–2.

5. American Immigration Council, *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers* (Aug. 2020), www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf.

6. USCIS, *Count of Active DACA Recipients by Month of Current DACA Expiration, as of Dec. 31, 2020*, www.uscis.gov/sites/default/files/document/data/Active_DACA_Recipients%E2%80%93December31%2C2020.pdf.

7. Geoffrey A. Hoffman, *Legal Consequences of DACA Rescission*, Houston J. of Int'l Law-Sidebar 102–03 (Oct. 23, 2017).

8. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020).

9. Letter from Jefferson B. Sessions III, Att'y General, Office of Att'y General to Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. (Sept. 4, 2017), accessible at www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.

10. *See Texas v. U.S.*, 86 F. Supp. 3d 591, 669–70 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, 171–86 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016) (hereinafter *Texas I*).

11. This program, which never went into effect, would have made approximately 4.3 million parents of U.S. citizens and lawful permanent residents eligible for the same forbearance from removal, work eligibility, and other benefits as the DACA recipients. *See DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1902 (2020).

12. Letter from Jefferson B. Sessions.
13. *Id.*
14. Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. to James W. McCament, Acting Dir., USCIS, et al., *Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children"* (Sept. 5, 2017), www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.
15. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020).
16. *Id.* (internal references omitted).
17. *Id.* at 1905.
18. *Id.* at 1916.
19. *Id.*
20. *Id.* at 1905–06.
21. *Id.* (citing *Heckler v. Chaney*, 470 U. S. 821, 831–32 (1985)).
22. *Id.* at 1906.
23. *Id.*
24. The majority also rejected DHS's argument that 8 USC § 1252(b)(9) and (g) bar review of the rescission as inapplicable to this case. *See DHS v. Regents*, 140 S. Ct. at 1907.
25. *Id.* at 1908–10. The majority rejected the reasons Secretary Nielsen gave for rescinding DACA approximately nine months after the rescission and after litigation had commenced as an impermissible "post hoc rationalization" for the action. *Id.* at 1908–09 (citing *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 539, (1981) and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971)). In doing so, the majority cited to precedent favoring requiring a new decision before considering new reasons for a prior agency action, because it promotes "agency accountability . . . by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority." *Id.* at 1909 (internal citations omitted).
26. *Id.* at 1910.
27. *Id.*; *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem[.]").
28. "But *State Farm* teaches that when an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (citing *State Farm*, 463 U.S. at 51) (internal quotations omitted).
29. *Regents*, 140 S. Ct. at 1911 (citing *Texas I*, 809 F.3d at 166, 169) (internal quotations omitted).
30. *Id.* at 1913 (internal citations omitted).
31. *Id.* at 1913–14.
32. *Id.*
33. *Id.*
34. *Id.* (summary of possible negative effects).
35. *Id.*
36. *Id.*
37. *Id.*

38. Totenberg, Nina, *Supreme Court Rules For DREAMers, Against Trump*, NPR (June 8, 2020), www.npr.org/2020/06/18/829858289/supreme-court-upholds-daca-in-blow-to-trump-administration.

39. *See* Geoffrey A. Hoffman, *Chief Justice Roberts Gave Us a Roadmap for a Way Forward on DACA*, Yale J. on Reg. (July 7, 2020), www.yalejreg.com/nc/chief-justice-roberts-gave-us-a-roadmap-for-a-way-forward-on-daca-by-geoffrey-a-hoffman.

40. *Regents*, 140 S. Ct. at 1914 (2020) (emphasis added).

41. Geoffrey Hoffman, *Chief Justice Roberts Gave Us a Roadmap for a Way Forward on DACA*.

42. *Regents*, 140 S. Ct. at 1914 (noting that DACA recipients have "enrolled in degree programs, embarked on careers, started businesses, purchased homes," etc.).

43. These due process property interests were likely not mentioned by the court because they were not at issue before it. *Regents*, 140 S. Ct. at 1903 n.1 ("Plaintiffs also raised … assorted due process challenges, some of which survived motions to dismiss. Those claims are not before us.").

44. *Goldberg v. Kelley*, 397 U.S. 254, 262 n.8 (1970) (superseded by statute on other grounds).

45. *See also Atkins v. Parker*, 472 U.S. 115, 128–29 (1985) (citations omitted) (quoting *Goldberg*, 397 U.S. at 262–63).

46. *Hudson v. Bowling*, 232 W. Va. 282, 290 (2013) (citing *Goldberg*, 397 U.S. at 262–63) (emphasis added).

47. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (emphasis added).

48. *Goldberg*, 397 U.S. at 266–67.

49. For the relevant factors for determining "the specific dictates of due process," *see, e.g., Matthews v. Eldridge*, 424 U.S. 319, 334–35 (1976),

50. The court also held that the plaintiffs failed to show a plausible inference that the rescission was influenced by discriminatory bias. See Regents, 140 S. Ct. at 1915–16. For more information about the impact of the court's decision on the equal protection issue, *see Department of Homeland Security v. Regents of the University of California*, 134 Harv. L. Rev. 510 (Nov. 2, 2020).

51. USCIS is the agency of the Department of Homeland Security that is tasked with administering the U.S. naturalization and immigration system.

52. USCIS, USCIS Statement on Supreme Court's DACA Decision (June 19, 2020), www.uscis.gov/news/news-releases/uscis-statement-on-supreme-courts-daca-decision.

53. "Ultimately, DACA is not a long-term solution for anyone, and if Congress wants to provide a permanent solution for these illegal aliens it needs to step in to reform our immigration laws and prove that the cornerstone of our democracy is that presidents cannot legislate with a 'pen and a phone.'" *Id.*; *see also* Chandler R. Finley, *USCIS Statement on Supreme Court DACA Decision*, National Law Review, Vol. X, No. 178, www.natlawreview.com/article/uscis-statement-supreme-court-daca-decision.

54. DHS Memorandum, *Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"* (July 28, 2020), www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf.

55. *Vidal v. Wolf*, No. 16-CV-4756 (NGG) (VMS) (E.D.N.Y. Dec. 4, 2020), available at www.dhs.gov/sites/default/files/publications/21_0115_354-order-vacating-wolf-further-relief_1.pdf.

56. *Id.*, slip op. at 3, citing *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939), and *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 672–73 (S.D.N.Y. 2019)).

57. *Id.* The court's prior order in the case is dated Nov. 14, 2020, and can be found at www.dhs.gov/sites/default/files/publications/20_1114_ogc_batalla-vidal-partial-msj-class-cert-order_508.pdf.

58. *See* www.uscis.gov/i-821d (USCIS page for I-821D, Consideration of Deferred Action for Childhood Arrivals).

59. Geoffrey A. Hoffman, *Chief Justice Roberts Gave Us a Roadmap for a Way Forward on DACA*, Yale J. on Reg. (July 7, 2020), www.yalejreg.com/nc/chief-justice-roberts-gave-us-a-roadmap-for-a-way-forward-on-daca-by-geoffrey-a-hoffman.

60. *Texas v. U.S.*, No. 1:18-cv-00068 (S.D. Tex.) (*Texas II*).

61. The original plaintiffs are the states of Texas, Alabama, Arkansas, Louisiana, Nebraska, South Carolina, and West Virginia. Complaint at 6, *Texas v. U.S.*, No. 1:18-cv-00068 (S.D. Tex. May 1, 2018), ECF No. 1. Kansas and Mississippi have since joined the suit as plaintiffs.

62. The president has the constitutional duty to "take Care that the Laws [of the United States] be faithfully executed." U.S. Const. art. II, § 3.

63. Complaint at 73, *Texas v. U.S.*, No. 1:18-cv-00068 (S.D. Tex. May 1, 2018), ECF No. 1.

64. *See* Memorandum and Order, *Texas v. U.S.*, No. 1:18-cv-00068 (S.D. Tex. May 1, 2018), ECF No. 575.

65. *See* Michelle Casady, *Texas Judge Wonders if Congress Will Moot DACA Challenge*, Law360 (Mar. 30, 2021); *see also* Juan Lozano, *No Immediate Ruling After Hearing on Fate of DACA Program*, AP (Dec. 22, 2020), https://apnews.com/article/donald-trump-houston-deferred-action-for-childhood-arrivals-program-immigration-us-supreme-court-bc19608c6aa54623902c44ded180d005.

66. Judge Hanen is the also same judge who issued the injunction against the implementation of the DAPA program and an expansion of DACA in 2015. *See Texas v. U.S.*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

67. *See generally* Pl.'s Mot. for Prelim. Inj., *Texas v. U.S.*, No. 1:18-cv-00068 (S.D. Tex. May 1, 2018), ECF No. 5.

68. The standard for granting injunctions goes as follows: "A plaintiff seeking a preliminary injunction must establish [I] that he is likely to succeed on the merits, [II] that he is likely to suffer irreparable harm in the absence of preliminary relief, [III] that the balance of equities tips in his favor, and [IV] that an injunction is in the public interest." *Id.* at 7 (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)).

69. *Id.* at 21–27.

70. *Id.* at 40–42.

71. *Id.* at 42–47.

72. *Id.* at 41.

73. *Id.* at 9, 42.

74. *See generally* Memorandum Opinion and Order at 63–104, *Texas v. U.S.*, No. 1:18-cv-00068 (S.D. Tex. Aug. 31, 2018), ECF No. 319. The court's comprehensive memorandum and order covers approximately 117 pages and various points that are too lengthy for the purposes of this paper. This paper concentrates itself only on a handful of subjects in the order that are relevant to this discussion.

75. *Id.* at 103–04 (emphasis added).

76. *Id.*

77. *Id.* at 96.

78. In deciding whether an action is a "substantive rule," courts look at "whether the rule (1) impose[s] any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion." *Id.* (citing *Texas I*, 809 F.3d at 171 (internal quotations omitted)).

79. *Id.* at 94.

80. *Id.* at 107.

81. *Id.* at 109–12.

82. *Id.* at 109 (internal references omitted).

83. *Id.* at 111 (noting that an injunction of the entire program was not requested in *Texas I* in 2014 nor anytime thereafter).

84. *Id.* at 113.

85. The court addressed only the interests of the plaintiff states and defendant DACA recipients but did mention that the federal defendants "could also be damaged by the injunction." *See id.* at 112 n.110.

86. *Id.* at 113–15. (emphasis added).

87. "According to the evidence, the number of illegal aliens would decrease due to the approximately twenty percent of DACA recipients who said they would leave the country[.]" *Id.* at 114.

88. *Id.*

89. *Id.* at 115.

90. *Id.* at 117.

91. *See* Memorandum and Order, *Texas v. U.S.*, No. 1:18-cv-00068 (S.D. Tex. May 1, 2018), ECF No. 575, 576–77.

92. *Id.*

93. *Id.* at 34, 42 ("A program of such magnitude, even if some discretion exists somewhere in the process, cannot fall within [the] 'narrow' exception to the APA's notice and comment requirements.") (internal citations omitted).

94. *Id.* at 45 (citing *Chevron, USA., Inc. v. Nat. Res. Def Council, Inc.*, 467 U.S. 837, 843 (1984)).

95. *Id.* at 45–51.

96. *Id.* at 51–54.

97. *Id.* at 54–57.

98. *Id.* at 62.

99. *Id.* at 74–76.

100. *Id.*

101. *Id.*

102. *See id.* at 76–77.

103. *Id.*

104. *Id.* at 77.

105. Sabrina Rodriguez, *"They need to move quickly": A Texas DACA Case Could Force Congress to Move on Immigration*, Politico, (Feb. 10, 2021), https://www.politico.com/news/2021/02/10/texas-daca-congress-biden-immigration-468199.

106. *See, e.g.*, S. 1545, 108th Cong. (2003); S. 2075, 109th Cong. (2005); S. 2205, 110th Cong. (2007); S. 729, 111th Cong. (2009); H.R. 1751, 111th Cong. (2009); S. 952, 112th Cong. (2011); S. 744, 113th Cong. (2013); S. 3542, 114th Cong. (2016); H.R. 496, 115th Cong. (2017); S. 1615, 115th Cong. (2018); S. 874, 116th Cong. (2019); *see also* Congressional Research Service Report, Andorra Bruno, *Unauthorized*

Childhood Arrivals, DACA, and Related Legislation (Nov. 6, 2019), https://fas.org/sgp/crs/homesec/R45995.pdf.

107. H.R. 6, 117th Cong. (2021).

108. H.R. 1177, 117th Cong. (2021); S. 348, 117th Cong. (2021).

109. *See* Nicole Narea, *The New Biden-Backed Immigration Bill, Explained*, Vox (Feb. 18, 2021), www.vox.com/policy-and-politics/22289746/biden-immigration-reform-bill-congress.

110. *See generally* the U.S. Citizenship Act, S. 348, § 1101 (2021).

111. *See id.* at § 1101.245B(e)(1), (3)–(4).

112. *Id.* at § 1101.245B(e)(1).

113. *See id.*

114. *Id.* at § 1102(a).

115. The college degree requirement can be fulfilled by obtaining an associate's degree or being enrolled in a program leading to a bachelors or higher or a recognized postsecondary credential from an area career and technical education school. *See id.* at § 1103.245D(a)(5)(A). If applicants have not obtained a degree, they can also meet this requirement if they have served in the Armed Services for at least two years or, if discharged, were honorably discharged. *Id.* at § 1103.245D(a)(5)(B). Alternatively, they would be required to prove that they have earned income for at least three years working at least three-fourths of the time they have had valid work authorization. *Id.* at § 1103.245D(a)(5)(C). Individuals enrolled in an aforementioned higher education program would get that time credited towards the three-year requirement. *Id.*

116. *Id.* at § 1103.245D(a).

117. *Id.* at § 1103.245D(b).

118. *Id.* at § 1103.245D(c).

119. A "conditional permanent resident" is a noncitizen granted the status of a legal permanent resident who must subsequently petition to have their "conditions" removed upon the completion of the statutory period and demonstrate that they have met the specific statutory requirements. *See, e.g.*, INA § 216. This is different from the LPI status in the U.S. Citizenship Act in that conditional permanent resident status is the same status as currently existing LPR status, other than the "conditions" imposed on it.

120. American Dream and Promise Act, H.R. 6, 117th Cong. § 102(b) (2021); *see also* Congresswomen Lucille Roybal-Allard, et al., *H.R. 6, the Dream and Promise Act of 2021*, AILA Doc. No. 21030440.

121. Compare the U.S. Citizenship Act, S. 348, § 1103.245D(a)(5)(A), (B) with the American Dream and Promise Act, H.R. 6, 117th Cong. § 102(b)(1)(D) (2021).

122. *See* the American Dream and Promise Act, H.R. 6, 117th Cong. § 104 (2021).

123. *See id.*

124. Compare the U.S. Citizenship Act § 1103.245D(a)(5)(A), (B) with the American Dream and Promise Act § 104.

125. The American Dream and Promise Act § 104(a)(2).

126. *Id.* § 102(3)(b)(3).

127. *See* DHS Memorandum, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), AILA Doc. No. 12061544.

The Civil Penalty of Deportation

Angela Landa*

Abstract: The penalty of deportation should be removed as a collateral punishment attached to criminal convictions and returned to its sole use as a civil penalty. This argument will be supported by demonstrating the intertwining of the civil and criminal systems of law occurring in modern cases that are built on the ideas and purposes set forth in foundational cases that designated the penalty of deportation as civil. The intent is to display the happenstance blurred line between the two bodies of law and their connection to deportation and then to present the harms that derive from this unofficial fusing.

> If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.[1]

Introduction

Over the past two decades, immigration reform has been a topic at the forefront of many presidential debates, legislation proposals, and everyday political discussions. The United States spends billions on immigration enforcement every year with a priority focused on national safety and threat avoidance. The penalty of deportation, often imposed as the result of criminal activity, is nonetheless labelled as a civil penalty. This paper argues that the penalty of deportation for a criminal offense should be imposed only after the foreign national is given the same procedural rights as a defendant in a criminal proceeding. This argument will be supported by demonstrating the intertwining of the civil and criminal systems of law occurring in modern cases, which are at odds with the ideas and purposes set forth in

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foundational cases that designated the penalty of deportation as civil. The administrative flaws resulting from this modern-day misapplication of law and lack of procedural safeguards for those in removal proceedings will then be addressed. The intent is to display the blurred line between the two bodies of law in the deportation context and then to present the harms that derive from their unofficial fusing.

The first section lays out the foundation and subsequent development of immigration proceedings and the penalty of deportation, beginning with a synopsis of immigration as a civil matter generally. The remainder of the section focuses specifically on deportation by discussing the differences and similarities between criminal punishments and civil immigration penalties, and the case precedents that established deportation as a civil penalty.[2] Two cases in particular demonstrate the failure to apply constitutional procedural safeguards when approaching the penalty of deportation for criminal conduct. The second section discusses administrative issues that have resulted as modern laws have moved further from the intended purposes of deportation. This section then addresses the effect of the "criminalization" on the identity of ethnic Americans. The last section states clearly and succinctly the recommended solution that would begin to mend today's broken and unjust immigration system.

Foundations of Deportation as a Civil Penalty

The development of immigration law in the United States was an unorganized process prompted by a need to establish a legal framework to regulate the admission and exclusion of foreign persons into the country. This section begins with a brief explanation of how immigration law fell into the civil proceedings category. One of the possible consequences of an immigration violation is deportation, and the Supreme Court cemented deportation as a civil penalty in 1893.[3] It is difficult to understand the implications of this designation without knowing the difference between civil penalties and criminal punishments, so this section defines these terms and their differences. The late nineteenth-century cases *Fong Yue Ting* and *Wong Wing*, which set the foundation for this distinction, will be analyzed. Next, *Padilla v. Kentucky* will be discussed to show the Supreme Court's continued inability to divorce civil penalties from criminal punishment. This part concludes with a discussion of the *Galvan v. Press* and *INS v. Lopez-Mendoza* cases, which although not foundational in the designation of deportation as a civil penalty, illustrate the current framework of protections that are inaccessible to noncitizens placed in removal proceedings arising out of criminal convictions. These two cases are exemplary for their lack of procedural safeguards in removal hearings, which make up only a portion of the current framework of protections that are inaccessible to noncitizens placed in removal proceedings arising out of criminal convictions.

Question of Legal Authority

In 1889, the Supreme Court was tasked with an issue that initially placed immigration matters in the realm of civil law. Before the court was the question whether Congressional legislation excluding noncitizens from admission was subservient to a contradictory international treaty.[4] In short, the Court held that Congressional legislation took precedence. Immigration matters were decided to be a federal issue and Congress was responsible for matters "regulat[ing] commerce with foreign nations . . . ." Accordingly, this sovereign power within the Constitution was found to supersede treaties with other nations.[5] This decision was said to be in the best interest of the state, so that it could protect its citizens regardless of treaties with other countries.[6]

The designation of congressional authority over immigration law, although seemingly insignificant, would set a precedent for future issues with regard to immigration. Legislation would be deferred to Congress and would not be subject to the "constitutional limitations applicable to congressional acts generally . . . ."[7] The Court's 1889 decision not only excluded immigration law from being considered a criminal matter, but would eventually place immigration law within its own specific category of civil law.

Distinguishing Criminal Punishment and Civil Penalty

To explain the difference between a criminal punishment and a civil penalty there must first be an explanation in the difference between criminal law and civil law. *Black's Law Dictionary* gives a succinct definition. Criminal law is "[t]he body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders."[8] Civil law is "[t]he law of civil or private rights, as opposed to criminal law or administrative law."[9]

Criminal law and civil law are separate bodies of law. There are different safeguards given to those charged, different rules the court must abide by, and different types of penalties that may be imposed. Criminal cases are initiated by the government prosecutors on behalf of the state or public against an individual for violating codified laws, whereas civil law governs all other matters and is usually brought between people or institutions.[10] Occasionally, there are criminal law violations that constitute grounds for a completely separate complaint or charge under civil law that can be brought by another party, including the government.

Black's Law Dictionary gives a further explanation of the two bodies of law by stating that a differentiation can be made by looking at the purpose behind the legal action. Is the action brought to redress or give restitution to wrongs committed, or is it to give a punitive sentence in order to deter future offenses and give retribution? The former describes civil law, and the latter, criminal law.

The confusion surrounding immigration law and its placement somewhere in between civil and criminal law comes because although deportation is a civil penalty (as will be discussed in the next section), there are crimes that can be committed that will render a noncitizen deportable.[11]

Immigration law is codified in the Immigration and Nationality Act (INA), which can be found in the U.S. Code under Title 8. There are several sections worth noting for purposes of deportation and its relationship with civil and criminal laws. First, the law governing "Deportable Aliens" is found in the INA § 237 and divide the classes of deportable persons into several sections, including, among others, (1) "Inadmissible at time of entry or of adjustment of status or violates status"[12] and (2) "Criminal Offenses."[13] Under criminal offenses there are several subsections, but one of utmost importance and impact for deportation purposes is the section "Aggravated felonies,"[14] which are defined within the INA (§ 101(a)(43)) and cover over 30 types of offenses, some of which are as minor as a failure to appear in court or theft and if noncitizens are convicted it will render their legal status to be deportable.[15] The section covering "Inadmissible Aliens" also includes "Criminal and related grounds."[16] Additionally, the INA punishes unlawful entry with fines and/or imprisonment (which are criminal in nature),[17] while also punishing entry into the United States through places other than ports of entry with fines that are civil in nature.[18] The intermingling of penalties and punishments that come as a result of criminal behavior is an ever-present theme in immigration law, but as will be discussed later in this paper, the penalty of deportation is severe and is often imposed on noncitizens because of criminal violations rather than civil offenses.

Foundation of Deportation as a Civil Penalty: *Fong Yue Ting* and *Wong Wing*

The Supreme Court's 1893 decision in *Fong Yue Ting* enforced the notion that the Constitution, and therefore Congress, had the power to create laws that "expel aliens of a particular class, or to permit them to remain."[19] The case concerned several Chinese laborers that had failed to obtain certificates that were required as part of the 1892 Geary Act. The certificates required a credible, white, resident witness to, in essence, vouch for the laborers as residents of the United States. There was an issue raised regarding equal protection under this law, but the Supreme Court recognized Congress's plenary powers and sentenced the laborers to be deported for their failure to obtain and show legitimate certificates of their residence in the United States.[20]

This decision was detrimental to noncitizens, especially Chinese laborers who were unable to attain citizenship at that point in time, seeking to remain in the United States. It also diminished the judiciary recourse afforded to noncitizens that had been ordered to be deported. The Court held when an

officer finds someone in violation of the law he "may arrest him, not with a view to imprisonment or punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge, for the purpose of a judicial hearing and determination" of the facts to decide the question of whether he will be able to remain in the country or be deported.[21] However, the Court found the characteristics of the hearing, such as a claim be stated against the foreign national, parties being present at the proceedings, and there being a judge, to be all that were necessary for a civil case. Additionally, the Court held, no formal complaint or pleading was required, and the statute allowed the judge to have authority over the proceedings for the deportees.[22]

Several years following *Fong Yue Ting* the Court heard *Wong Wing*, which was concerned with the consequences of the Chinese Exclusion Act. Under the Chinese Exclusion Act, Chinese persons convicted of unlawful entry or presence in the United States were not only ordered to be removed but were administratively sentenced to provide hard labor. Wong Wing was found to be unlawfully in the country and sentenced to 60 days of hard labor prior to deportation.[23] When the Supreme Court reviewed the case, they held the imposition of imprisonment and hard labor by executive branch officials was a violations of the Fifth Amendment right to indictment of a grand jury for crimes, and Sixth Amendment right to a jury trial for the crimes alleged.[24] Although siding with the Chinese noncitizens that brought the case in ruling that hard labor and punitive imprisonment were definitively punishments that required due process of law under the Constitution in order to impose, the Supreme Court ultimately distinguished the deportation itself, reinforcing deportation as a civil penalty.

Enmeshed Criminal Convictions and Deportation

The case of *Padilla v. Kentucky* is the quintessential example of immigration consequences flowing automatically from criminal law. It portrays the extent to which criminal convictions determine the outcome of deportation proceedings. The Court's opinion gives background as to the development of immigration law throughout the years, which is critical for understanding the changes in the law that have stripped noncitizens of avenues to continue to reside in the United States after conviction of a now-broad group of crimes.

The Immigration Act of 1917 made certain criminal acts committed in the United States deportable offenses.[25] The Act was aimed at noncitizens who were authorized to be in the United States but were not yet classified as citizens or could not yet qualify for citizenship. Part of the 1917 Act allowed for judicial recommendations against deportation (JRAD) as part of the sentencing process for noncitizens charged with certain crimes, even though the penalty of deportation is a civil matter. JRADs were done away with when the 1990 INA amendments were passed. This eliminated case-by-case recommendations

against deportation, diminishing the ability of noncitizens to remain in the country.[26] The Court stated that these changes to the immigration system "dramatically raised the stakes of a noncitizen's criminal conviction."[27] Then, in emphasizing the effect of these changes, the Court stated that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm . . . deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[28]

Padilla was decided with this background of immigration reformation in place. Mr. Padilla was a long-time resident of the United States who had been charged with a drug trafficking offense. His attorney presented him with a plea deal, and when asked about immigration consequences, assured Padilla he "did not have to worry about immigration status since he had been in the country so long."[29] Relying on his attorney's advice, Padilla took the plea deal for the drug charge and was subsequently ordered to be removed from the country. The case came forward on an ineffective assistance to counsel claim that the Court held was cognizable. More importantly for this paper, the Court expressly delineated the relationship between criminal law and deportation. The Court stated:

> We have long recognized that deportation is a particularly severe "penalty," but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.[30]

The result of this case is a requirement for counsel of noncitizens facing criminal charges to advise their clients about not only adverse immigration consequences that they could be subject to by pleading guilty, but to also inform their client of the consequence of deportation when it is "truly clear."[31]

Procedural Protections Not Afforded in Deportation Proceedings

There are many different cases that have affected the rights of noncitizens in deportation proceedings, but this paper takes as examples *Galvan v. Press*[32] and *INS v. Lopez-Mendoza*,[33] which cover *ex post facto* law and exclusionary rule applicability, respectively. The results in these two cases appear rather harsh

and cruel, but the rights at issue are not more instrumental or important than other criminal procedure rights not given to noncitizens, such as *Miranda* warnings, the Eighth Amendment right to bail, and inadmissibility of involuntary confessions.[34] Each of these rights for noncitizens were at issue because of the labelling of deportation as a civil penalty and the intricacies of immigration consequences entangled in both civil and criminal law. Although these rights are found to be fundamental and necessary in order to have due process in criminal proceedings, the Supreme Court and Congress have not found these rights to be necessary and therefore restricted access to them for noncitizens in deportation proceedings, even if they stem from criminal convictions.

In 1925 the Court defined constitutionally prohibited *ex post facto* laws as criminal statutes punishing prior acts as crimes that *when committed* were innocent acts.[35] Additionally, *ex post facto* law restrictions prevent criminal punishments from being heightened after the fact. These prohibitions protect a person from being defenseless against laws that punish acts that were not deemed to be criminal at the time they were committed. The Court further elaborated that the prohibition is based on the notion that if laws punish innocent acts as criminal retroactively, it would alter the "criminal quality" of the act to ultimately disadvantage the accused.[36]

In *Galvan v. Press*, the applicability of this prohibition was at issue for a Mexican noncitizen when he was ordered to be deported because he violated the Internal Security Act of 1950.[37] Galvan had been interrogated twice in 1948 and said he had joined the Communist Party. He was a member from 1944 to 1946. Unfortunately for Galvan, the 1950 Act would require the deportation of any noncitizen who had become a member of the Communist Party either when they entered the United States or any time after their entrance.[38] Among the topics of deliberation were the plenary powers of Congress in dictating deportation laws and whether the plenary powers in matters of immigration were of a greater priority than the Due Process Clause's application to a "person." In support of due process, the Court stated that "the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *Ex Post Facto* Clause, even though applicable only to punitive legislation, should be applied to deportation."[39] However, the Court ultimately ruled that it could only judicially review the law in conjunction with the power that was allotted Congress in the Constitution, therefore requiring the enforcement of the legislation. It was "the unbroken rule of this Court" that the *Ex Post Facto* Clause "has no application to deportation."[40]

The Fourth Amendment to the Constitution grants the right of security against unreasonable searches and seizures. To support this right, the Supreme Court created the exclusionary rule as a protection of these rights and as a deterrent to unlawful law enforcement behaviors. The exclusionary rule is a remedy of the Court that excludes from the courtroom evidence that is the result of an illegal search or seizure. To decide whether the evidence will be suppressed the Court, using the "*Janis* test," weighs the likelihood that exclusion

would deter unlawful behavior by law enforcement against the societal costs of excluding the evidence.[41] The applicability of this constitutional safeguard for noncitizens in removal proceedings became an issue for the court to decide in *INS v. Lopez-Mendoza*, when two noncitizens had admitted their unlawful presence in the country after they had been unlawfully arrested.[42]

Deciding the *Lopez-Mendoza* case compelled the Court to reconcile the consequence of deportation, in a "purely civil action" for unlawful entry, when it has also been made a crime to enter or remain in this country unlawfully.[43] The Court recognized that deportation proceedings are purposefully streamlined and made simple by determining a single issue: the eligibility of the noncitizen to remain in the country.[44] In defending the deportation process, the former Immigration and Naturalization Service (INS) argued that there were over a million deportable citizens apprehended every year, and the investigatory burden of these officers was great, so much so that they could not be expected to "compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest."[45] Because of the vast numbers of noncitizens apprehended, if the exclusionary rule were to be used to suppress evidence, then the hearings would have likely required considerably more effort from the INS. The Court looked to the *Janis* test, which too was born out of a civil proceeding, and found that the "civil deportation proceeding is a civil complement to a possible criminal prosecution," and that only a small percentage of undocumented noncitizens arrested were tried for criminal prosecutions, instead being put in civil deportation proceedings.[46] As for societal costs of allowing the exclusionary rule to apply in deportation proceedings, the Court found it would counteract the very purpose of the criminal court, because it would have to exclude evidence from an unlawful search or seizure while allowing and excusing an ongoing violation of immigration laws. The Court found that setting an undocumented noncitizen free was a cost that outweighed the benefit of deterring Fourth Amendment violations.[47]

Consequences of Intertwining the Criminal and Civil in Deportation Proceedings

The term "crimmigration," although recently coined, has long been applicable because of the underlying criminal law issues that appear repeatedly within the practice of immigration law. To address the consequences of the clash resulting from the intersection of the two bodies of law, this section is divided into the discussion of two separate obstacles. This section first addresses two issues related to the administration of deportation that have come about as a result of present-day laws made on the foundations Supreme Court decisions that defined and carried out deportation with a different purpose and definition than exists today. These two administrative issues are the dissociation between the initial intent of deportation when designated to be a civil penalty and the

evolution to its current purposes, and the adverse effect on citizens from the "criminalization" of noncitizens who have the same racial makeup or ethnic background. The second section advocates for application of legal safeguards when noncitizens are placed or may be placed in deportation proceedings as a result of alleged criminal activity.

Administrative Issues

From the immigration cases of the 1890s discussed prior, the Supreme Court made a point to differentiate the penalty of deportation from punishment and instead frame it as a part of the process to return undocumented noncitizens to their native countries. About 130 years ago, the purpose of deportation was solely to remove an undocumented noncitizen who had not complied with admission procedures. This was simply done "without any punishment being imposed or contemplated . . . under the laws of the country out of which he is sent."[48] However, the present-day deportation policy has evolved into a "crime control strategy," which is evident by the inclusion of an increasing number of criminal grounds that result in the deportation of noncitizens who are lawfully residing in the United States, most notably the "aggravated felony" grounds.[49]

Congress created the label of aggravated felony in 1988. It was initially reserved for the crimes of "murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices."[50] In the years of immigration reform and legislation since then, Congress has allowed the term to envelope over 30 different types of offenses, various of them potentially misdemeanors, such as theft or filing a false tax return. This expansion of criminal charges, in addition to the other legislative changes in immigration policy mentioned as a precursor to *Padilla v. Kentucky*, would hurt the ability of many noncitizens to remain in the country. These expansions in consequences of criminal activity and restrictions of available avenues to get a deportation order overturned are concerning, given that deportation in the United States is grounded in a decision from the 1890s that labelled it a civil penalty and separated it from the safeguards and procedures criminal proceedings, and even from the courts of law in which criminal liability is adjudicated.

Daniel Kanstroom explains the magnitude of foundational decisions, such as *Fong Yue Ting*, by which the Supreme Court "sets in motion a chain of events that can result in a rather drastic curtailment of . . . rights somewhere else."[51] When discussing administrative issues that arise from the civil penalty of deportation, the lack of efficiency of governmental agencies is not a regular topic. Rather, a gross "over efficiency" in deportations is noted, which brings into question the justice and due process that is afforded noncitizens in deportation proceedings. There is an alarming increase of "long-term permanent residents, who may have lived in the United States since early

childhood, [deported] for increasingly minor post-entry criminal conduct."[52] In sum, the current purpose behind the administrative process of deportation has strayed from the intent that was foundational to the Supreme Court when they made their initial decision to classify deportation as a civil penalty, because this decision left noncitizens effectively impotent against modern-day immigration repercussions for many criminal convictions. These noncitizens are being removed from the country for twentieth-century criminal laws built on nineteenth-century notions of immigration penalties.

The other pressing administrative issue that has resulted from the increased criminal law influence on immigration law is the "criminalization" of citizens of certain racial or ethnic makeups because of the immigration rhetoric surrounding undocumented noncitizens. Legislation must be neutral and unbiased as to race, but there have been agreements between criminal law enforcement and immigration enforcement agencies to carry out immigration laws, leading to a rise of racial profiling and suspected criminality of racial and ethnic minorities. Additionally, the "criminalization" of nonwhite citizens has been increasingly experienced in conjunction with the steady expansion of immigration and crime laws. This concern was recognized as a pervasive problem in *Lopez-Mendoza*, when the respondent insisted that denying the exclusionary rule in deportations would mean that Hispanic Americans must endure their ethnicity being stigmatized as criminal and their nationality questioned when detained as the result of an unlawful search or seizure. The Court recognized this concern as legitimate and important but did not extend the exclusionary rule to cover noncitizens for deportation purposes. The Court said that application of the exclusionary rule in deportations must *significantly* add to the Fourth Amendment rights of nonwhite Americans to justify this expansion of coverage, and the Court found it did not.[53]

The *Lopez-Mendoza* decision was made in 1984. Since then, the enforcement of local, state, and immigration law has only continued to converge. One situation that exemplifies the consequences of the *Lopez-Mendoza* decision happened in 1997 with "Operation Restoration." Operation Restoration generated extreme racial profiling when local law enforcement and border patrol agents went to Chandler, Arizona and would stop "anyone they suspected of being 'illegal' to prove their citizenship."[54] The actions of the enforcement officers were clearly an expedition to detain noncitizens using techniques like racial profiling and stereotyping of any Hispanic-looking person. These individuals would then be questioned and asked for identification to prove the legality of their presence in the United States. At the time *Lopez-Mendoza* was decided, the Supreme Court did not have this incident to consider, but if the Supreme Court were to take into account "Operation Restoration" and programs such as 287(g)[55] and Secure Communities,[56] which would expand the scope of responsibilities local and state law enforcement had within immigration enforcement, it is questionable if the Court would still agree that the exclusionary rule does not significantly add to the protections of citizens, particularly nonwhite Americans.

Referring to political and government officials justifying the increase in oppression of the Latino community, Yolanda Vázquez writes that they "have been allowed to create, pass, and enforce laws that would be given greater scrutiny if allegations of protection and security to our country and its citizens were not used."[57] This paper not only echoes the sentiment expressed by Vázquez, but additionally credits the Supreme Court with nonchalantly expanding oppressive legislation using the same justifications.

These administrative issues are consequences that were unforeseen when the foundational cases of immigration law were decided. The evolution of the law of deportation has resulted in an immigration system that is now unidentifiable and far removed from what was initially intended.

Lack of Due Process

As was discussed previously, there are several safeguards afforded to persons who are standing trial for criminal charges that are not afforded to persons in deportation hearings resulting from criminal convictions. In *Wong Wing*, the Supreme Court differentiated punishment from civil penalty as being much harsher and necessitating access to due process for criminal defense. Although calling deportation "less severe" than criminal punishment is highly contested, the Supreme Court made this decision to clarify the guaranteed rights afforded to people that are being punished in order to achieve due process.[58]

The Supreme Court's steadfast adherence to maintaining justice and due process for criminal punishment appears to be at odds with the automatic consequence of deportation attached to the growing list of aggravated felonies for legally residing noncitizens in the United States. At the time that *Fong Yue Ting* and *Wong Wing* were decided, the United States did not even have an avenue for Chinese immigrants to attain citizenship. It was not until 1965 that any semblance of current citizenship acquisition laws was created, and since then Congress reformed the immigration laws to add provisions making specific crimes deportable offenses for those on their pathway to citizenship. All this to say, when the foundations for immigration and deportation were created, they could not have foreseen laws that would be built on the foundations of their decisions and construed to withhold protections from people being penalized (by deportation) for crimes committed.

Chris Westfall, discussing the impact of the civil penalty designation made in *Fong Yue Ting*, explains the procedures used for immigration, which are severely limited compared to criminal proceedings. The removal proceeding for noncitizens is brief and limited as to what evidence may be presented, the type of trial that is set, the right to an appeal of the decision, and the right to counsel that is afforded. "The procedures by which we currently remove lawful permanent residents are civil and do not resemble the robust protections that many would expect. Unlike criminal proceedings, immigration law is not administered by Article III courts, does not occur in front of a jury, and does

not carry the right to counsel."[59] The absence of the right to counsel in deportation proceedings as it exacerbates the failure to provide adequate safeguards as an unintended consequence is shown in *Padilla*. Because of the civil nature of deportation and immigration law, the criminal attorney had no knowledge and gave his client wrong advice regarding the future of his immigration status. Constitutionally, noncitizens must have counsel, but only in criminal cases. As was mentioned previously, there are over 30 different types of offenses that qualify as aggravated felonies, and if a noncitizen is convicted or pleads guilty to one of these crimes then they are automatically deportable. The advice that Padilla's attorney had given him, which he followed, made him deportable. The Court held that this representation was deficient in defending Padilla, and overall raised the standards for criminal attorneys in advising their clients of immigration consequences. However, deportation, initially designated as a civil penalty, was never intended to be used as a collateral (or possibly even direct) punishment for criminal convictions. The morphed interpretation of the civil penalty of deportation has brought about this issue, and many others, that should have never arisen, because criminal convictions should never have entered the civil world of deportation without the protections guaranteed for criminal proceedings.

When the Constitution was written, the *Ex Post Facto* Clause was so central to justice and equality that it the Framers wrote the protection into Article 1 of the Constitution. "One of the most fundamental tenets of the criminal justice system is that individuals cannot be prosecuted for engaging in conduct that was not against the law at the time it took place."[60] As seen in *Galvan*, the consequences of *ex post facto* laws not applying in immigration can be devastating. It is even more shocking because today there are noncitizens who were convicted of crimes before 1996 and who had served their punishment but remain deportable because after their conviction the conviction became an aggravated felony.

There must be uniformity in consequences and application of laws. If constitutional questions are decided in a criminal context, then whatever protections are afforded ought to extend to all proceedings initiated as a result of crime. The current deportation process is too intertwined in criminal law for noncitizens to go without the safeguards found to be necessary for citizens. The safeguards that are constitutionally given to citizens in criminal proceedings must extend to deportation proceedings to achieve the ideals of due process and justice.

Restoring Civil Immigration

To begin to mend the state of the current immigration system, the purposes behind the initial designation of immigration as a civil penalty must be restored. Immigration law is increasingly complex, and the intertwining

and inclusion of criminal law requiring penalties of deportation without concomitant safeguards is wholly unjust and an abuse of the due process and principles of justice this country was built on. Julie Stumpf asks, "What shape would a properly constituted immigration sanctions scheme take? The answer depends, to a large extent, on the overarching goals of immigration law and the purpose of immigration sanctions."[61] If the country would like to punish those that are committing crimes, then there are criminal laws to instruct that punishment that provide safeguards to ensure a just and fair trial that will protect the defendant from being disadvantaged. Including those crimes as a basis for deportation is an avenue that has been taken and may be continued, but without the safeguards put in place to ensure fundamental and necessary rights are protected in immigration court, then the goal achieved in Stumpf's question is an immigration scheme that is merciless, unfair, and completely biased.

Conclusion

Deportation is a very complex topic, and it is currently holding space somewhere between immigration law and criminal law. Serious problems have arisen because of the intertwining of the two disciplines, as outlined in this paper. For all the reasons stated above, the safeguards provided to citizens in criminal proceedings should be extended to noncitizens facing deportation for criminal offenses.

Notes

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2. *Wong Wing v. United States*, 168 U.S. 228 (1896).
3. *Fong*, 149 U.S. at 698.
4. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
5. U.S. Const. art. 1, § 9, cl. 9.; *See also Chae Chan Ping*, 130 U.S. at 606; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 856 (1987).
6. *Chae Chan Ping*, 130 U.S. at 609.
7. Louis Henkin, *supra* note 5, at 858. *See also* Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. Legis. & Pub. Pol'y 343 (2001); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255.

8. *Criminal Law*, Black's Law Dictionary (11th ed. 2019).
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10. American Bar Association, *How Courts Work* (Sept. 9, 2019), www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases/.
11. American Immigration Council, *Two Systems of Justice* (Mar. 2013), www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf.
12. INA § 237(a)(1).
13. INA § 237(a)(2).
14. INA § 237(a)(2)(A)(iii).
15. INA § 237(a)(2).
16. INA § 212(a)(2).
17. INA § 275(a).
18. INA § 275(b).
19. *Fong Yue Ting*, 149 U.S. 698, 714 (1893).
20. *Id.* at 698, 727.
21. *Id.* at 728.
22. *Id.* at 729.
23. *Wong Wing v. United States*, 163 U.S. at 230,231 (1896).
24. *Id.* at 234.
25. *Padilla v. Kentucky*, 559 U.S. 356, 362 (2010).
26. *Id.* at 362, 363.
27. *Id.* at 364.
28. *Id.*
29. *Id.* at 359.
30. *Id.* at 365, 366.
31. *Id.* at 369.
32. 347 U.S. 522 (1954).
33. 468 U.S. 1032 (1984).
34. *See id.* at 1039; *See also* Deborah Anker et al., *Panel I: Fairness in Immigration Proceedings*, 16 N.Y.U. Rev. L. & Soc. Change 21 (1987).
35. *Beazell v. Ohio*, 269 U.S. 167 (1925).
36. *Id.* at 170; *See also* Victor C. Romero, *supra* note 7, at 360.
37. *Galvan v. Press*, 347 U.S. 522, 523 (1954).
38. *Id.* at 526.
39. *Id.* at 531.
40. *Id.*
41. *United States v. Janis*, 428 U.S. 433, 454 (1976).
42. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984).
43. *Id.* at 1038; Elizabeth L. Young, *Converging Systems: How Changes in Fact and Law Require a Reassessment of Suppression in Immigration Proceedings*, 17 U. Pa. J. Const. L. 1395 (2015).
44. *Lopez-Mendoza*, 468 U.S. at 1039; *See also* Patricia J. Schofield, *Evidence in Deportation Proceedings*, 63 Tex. L. Rev. 1537 (1984).
45. *Lopez-Mendoza*, 468 U.S. at 1050.
46. *Id.* at 1042, 1043.
47. *Id.* at 1047.
48. *Fong Yue Ting*, 149 U.S. 698, 709 (1893).

49. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1889, 1923 (2000).

50. American Immigration Council, Aggravated Felonies: An Overview (Mar. 2021), www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf.

51. Daniel Kanstroom, *supra* note 49, at 1920.

52. *Id.* at 1893.

53. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1045 (1984).

54. Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 How. L.J. 639, 654 (2011).

55. *See* American Immigration Council, Fact Sheet, *The 287(g) Program: An Overview* (July 8, 2021), www.americanimmigrationcouncil.org/research/287g-program-immigration.

56. *See* ICE, Secure Communities (archived content), www.ice.gov/secure-communities.

57. Yolanda Vázquez, *supra* note 54, at 644.

58. *Wong Wing v. United States*, 168 U.S. 228, 238 (1896).

59. Chris Westfall, *A World Without Fong Yue Ting: Envisioning an Alternative Reality if the Dissenters Prevailed*, 33 Geo. Immigr. L.J. 399, 401 (2019); *See also* Carla L. Reyes, *Access to Counsel in Removal Proceedings: A Case Study for Exploring the Legal and Societal Imperative to Expand the Civil Right to Counsel*, 17 UDC-DCSL L. Rev. 131, 137 (2014).

60. American Immigration Council, *Two Systems of Justice*, *supra* note 11.

61. Julie Stumpf, *Fitting Punishment*, 66 Wash. & Lee. L. Rev. 1683, 1728 (2009).

Motion for Subsequent Custody Redetermination Hearing

What to Know About Asking an Immigration Judge for Bond Again

Matthew Boles*

Abstract: In the case where an immigration judge either denied bond or granted a bond the respondent cannot afford, he may be able to file a motion for a subsequent custody redetermination hearing, but the procedure and standard are different. This article provides an overview of requesting a subsequent custody redetermination hearing. It describes the process for requesting an initial custody redetermination hearing and for a subsequent custody redetermination hearing. The article then addresses the legal standard and examines several unpublished decisions and recent arguments. Next, the article provides tips when preparing a motion for a subsequent custody redetermination hearing. Finally, the article has a brief description about alternatives to detention (ATD).

Introduction

One of the most common questions a client will ask is whether they can be released from Department of Homeland Security (DHS) custody on a bond or by any other means. Although immigration detention is civil,[1] detention centers and their practices in at least some facilities resemble criminal incarceration, with prison uniforms, strip searches, and shackles.[2] Aside from the obvious benefit of freedom, being nondetained has several other advantages while removal proceedings are pending. While two-thirds of respondents who are not detained are represented in immigration court, that number for detained respondents is only 14 percent.[3] Nondetained respondents are more likely to gather proof and supporting documents and have a better chance of pursuing relief, and the respondent's family does not have the same strains.[4] Whether a respondent can be released, and how, depends on several factors.

In some instances, a respondent may be released on a bond, either on an Immigration and Customs Enforcement (ICE) bond or one from an Immigration Judge (IJ). When requesting a custody redetermination hearing, provide proof to show the court has jurisdiction and that the client is not a danger to the community and is not a flight risk. Assuming a client is not subject to mandatory detention[5] and is not otherwise ineligible for bond, an IJ may initially deny or set a bond the client cannot afford. An appeal can take several

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months, and the client's removal proceedings continue to proceed uninterrupted while they are detained.

Process for Custody Redetermination Hearings

Although the focus of this article is subsequent custody redetermination hearings, an overview of the process for requesting an initial hearing for custody redetermination from an IJ provides context. The IJ's initial decision matters because it affects the subsequent custody redetermination hearing analysis.[6]

DHS makes an initial custody determination and fills out the Form I-286. DHS may continue to detain the respondent or offer release, such as on an "ICE bond."[7] Knowing what DHS determined is important for three reasons. First, DHS must make a determination before an immigration court has jurisdiction to issue a bond.[8] Second, if the respondent is offered an ICE bond, an obligor can simply pay the bond. Third, if there is an ICE bond but the respondent has a custody redetermination hearing, the IJ can either revoke or increase the bond amount, in addition to keeping it the same or lowering it. An attorney can request a custody redetermination hearing orally, in writing, or at the discretion of the IJ, by telephone.[9] IJs cannot redetermine the custody status *sua sponte*.[10] Additionally, the bond hearing is "separate and apart" from removal proceedings.[11] The IJ can hold a bond hearing at any time once DHS makes its determination and before there is an administratively final decision.[12]

Unlike in the criminal context, there is no right to a bond in the immigration context.[13] Generally, the respondent has the burden of proving the court has jurisdiction, that they are not a danger to the community or threat to national security, and that they are not a flight risk.[14] At the conclusion of the hearing, the IJ makes a determination.[15] While the IJ can reserve judgment, in practice most IJs render decisions orally.[16] If the motion is withdrawn or no action was taken, the material-change-in-circumstances standard does not apply to the next custody redetermination hearing.[17] Either side has 30 days to appeal. In the 2018 fiscal year, 48 percent of respondents who had bond hearings were granted bond.[18] For those who are either granted a bond they cannot afford or are denied a bond, one option is to file a motion for a subsequent custody redetermination hearing.

Subsequent Custody Redetermination Hearings

A respondent[19] may be able to request a subsequent custody redetermination hearing if they are still in DHS custody and do not have an administratively final order of removal.[20] The IJ still has jurisdiction for bond, even if there is a pending appeal of a removal order.[21] According to an amicus brief filed by former IJs, "reconsideration requests [about bonds] rarely result in a reversal of

the IJ's decision."[22] Nonetheless, if facts do change, it is a mechanism to request an additional custody redetermination hearing. A respondent can file a subsequent motion for custody redetermination even while appealing the first bond decision.[23] In this scenario, if the IJ subsequently grants a bond, the appeal with the Board of Immigration Appeals (BIA) for the first bond denial is rendered moot.[24] Filing a motion for a subsequent custody redetermination hearing does not toll the appeal time.[25]

There are important differences between requesting an initial custody redetermination hearing and a subsequent custody redetermination hearing. First, unlike the first custody redetermination hearing, a motion for a subsequent custody redetermination hearing must be made in writing.[26] Additionally, the motion "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination."[27] The respondent has the right to one bond hearing,[28] so an IJ may determine there is no material change in circumstances without having a hearing. When preparing the motion, the rules set forth in the *Immigration Court Practice Manual* applicable to submitting the first motion for custody redetermination hearing apply, such as writing the full name and alien registration number of the respondent on the cover page and the location of the detention facility where the client is detained.[29]

Differences between initial custody redetermination motion and motion for subsequent custody redetermination hearing	
Initial custody redetermination request	**Subsequent custody redetermination request**
Can be made orally, in writing, or at the discretion of the IJ, by phone	Must be made in writing
Can be made once DHS makes its custody determination. Do not have to wait for the Notice to Appear to be issued.	Made after an IJ has made a decision regarding bond but before case is administratively final; can also file motion for custody redetermination with pending appeal to BIA for merits case and/or initial custody redetermination
Standard: danger to community and flight risk	Standard: alien's circumstances have materially changed since the previous request
Similarities between initial custody redetermination motion and motion for subsequent custody redetermination hearing	
IJs do not have authority to order the hearing *sua sponte*	
File motion with immigration court that has administrative control	
Immigration court has jurisdiction until there is a final administrative order	
Must comply with requirements in the *Immigration Court Practice Manual*	
Once the IJ renders a decision, either side can reserve or waive the right to appeal	

Material Change in Circumstances Standard

What exactly constitutes a material change in circumstances to warrant a subsequent custody redetermination hearing? Surely not every change is material, so how have the BIA and IJs analyzed this standard?

In a case involving denaturalization, the Supreme Court held that a change in fact is "material" if it would either have a natural tendency to influence or is predictably capable of affecting the decision that was decided.[30] The BIA precedent chart does not list any published decisions related to this standard for custody redetermination hearings.[31] There are unpublished BIA decisions, which are not precedential,[32] that are helpful in determining whether a change is material. The material change standard is, in part, designed to eliminate from the docket cases involving issues without significant differences from those decided in a previous hearing. In response to a notice-and-comment period about requiring the motion for a subsequent custody redetermination hearing to be in writing, commenters stated this could limit the number of custody redetermination hearings someone may have. The response was twofold: (1) the rule does not limit the number of custody redetermination hearings a respondent can have, and (2) "[r]equiring the respondent to set forth a showing of material change in circumstances before appearing before the Immigration Judge will permit meritorious cases to be heard more quickly, and will discourage frivolous requests for multiple bond hearings."[33] This concern seems relevant, as there is a backlog of more than one million pending immigration cases.

A review of some cases in which the BIA found a material change in circumstances is beneficial. In one case, the dismissal of a pending criminal charge and the reinstatement of a respondent's grant of Deferred Action for Childhood Arrivals constituted a material change in circumstances, so the BIA remanded the case to the IJ to set a reasonable bond.[34] In another case, the BIA held that an IJ granting cancellation of removal for certain non-lawful permanent residents (42B) constituted a material change in circumstances, even though the IJ's initial denial was due to danger to the community.[35] The BIA upheld an IJ's finding of a material change in circumstances and a $8,500 bond when pending charges were dismissed after the evidence was suppressed in a criminal case.[36] In another case, the BIA held that the respondent's wife filing a family petition so that he would be eligible for adjustment of status was a material change in circumstances and granted a $10,000 bond.[37] The BIA disagreed with the IJ and found material change in circumstances when the United States Citizenship and Immigration Services (USCIS) approved an employment authorization document based on a pending adjustment of status application in a different case and granted a $12,500 bond.[38] Also, the BIA upheld an IJ's determination that a different respondent in virtually in the same circumstances as a respondent receiving a bond without appeal from DHS constituted a material change in circumstances.[39] Finally, the BIA upheld

a decision finding a material change in circumstances when the respondent attended classes for rehabilitation after a DUI, stated that he would abstain from drinking and driving in the future, and his wife stated that she would drive him.[40]

There are also several unpublished BIA decisions about what *does not* constitute a material change in circumstances. The BIA held that a stay from the Ninth Circuit and filing a U visa application was not a material change in circumstances when the IJ previously determined the respondent was a danger to the community and a flight risk.[41] In that case, the BIA noted that the U visa application did not have the Supplement B (I-918B).[42] This is particularly important, as a signed 918-B is required for USCIS to grant a U visa, as it shows that a qualifying crime occurred and that the person has been, is currently, or will likely be helpful in the investigation or prosecution of the case. The BIA also has held that proof that a respondent has a brother and other family in the United States was not a material change in circumstances for flight risk, considering that the respondent previously testified to the contrary.[43] Additionally, a change in sponsor so that the respondent would reside with his fiancé was not a material change in circumstances.[44]

What about decisions from IJs? Although not BIA decisions, reviewing some IJ decisions is instructive. An IJ found there was a material change in circumstances when a domestic violence charge was dismissed.[45] In another case, an IJ found an approved family petition from a U.S. citizen wife was a material change in circumstances.[46] In a third case, an IJ found a material change in circumstances when the respondent, an asylum seeker, was diagnosed with posttraumatic stress disorder, filed an asylum application, and had some additional documents to corroborate his case, and his wife in a different detention center had received a bond since the initial hearing.[47] But filing an asylum application and a mental health report not from a psychiatrist or psychologist has been deemed on at least one occasion as not being a material change in circumstances.[48]

Looking at these unpublished decisions from the BIA and decisions from IJs, some general rules emerge in cases involving both danger to the community and flight risk. I start with changes that impact the analysis with respect to danger to the community. I start with danger to the community for two reasons. First, an IJ "should only set a bond if he first determines that the alien does not present a danger to the community."[49] Second, there are no statutory guidelines to assist IJs on what factors are relevant when making a determination about danger.[50] Some of the factors in *Matter of Guerra* are related to whether a respondent is a danger to the community.[51] The purpose of denying bond if the respondent is deemed a danger to the community is twofold: (1) to ensure the appearance at future hearings, and (2) to prevent further criminal activity.[52] The first reason is essentially a flight risk element. If the IJ initially decided the respondent was a danger to the community, proof to the contrary is essential. Objective grounds to demonstrate lack of danger

since the previous custody redetermination hearing should suffice. This includes dismissal of charges that were pending at the time of the previous custody redetermination hearing.[53] Further, an IJ granting 42B cancellation of removal after a respondent establishes, among other requirements, that he is a person of good moral character and should be granted the form of relief as a matter of discretion, is a material change with respect to danger to the community.[54]

I next turn to flight risk. Once determining a respondent is not a danger to community, an IJ will determine whether the respondent is "likely to abscond, or [is] otherwise a poor bail risk" and has broad discretion when deciding factors to be considered.[55] The IJ will generally look at "bond equities" correlated with appearing at court hearings if not detained.[56] An IJ can place more weight on some factors, as long as the decision to do so is reasonable.[57] Obtaining the necessary proof that a respondent is not a flight risk while he is detained can be challenging.[58] Generally, minor changes in circumstances, including whom the respondent would live with or submitting a defective application, would not be considered a material change.[59] However, USCIS approving of an application or a respondent now being eligible for a form of relief is generally a material change.[60]

The material change in circumstances language is used in other aspects of immigration law. Examples include a material change in some nonimmigrant employment that would necessitate a new petition,[61] material changes occurring after the approval of an EB-5 immigrant visa petition leading to revocation,[62] and for asylum seekers, an exception to the one-year filing requirement if there are "changed circumstances which materially affect the applicant's eligibility for asylum."[63]

The material change in circumstances language for subsequent custody redetermination hearings requires an attorney or pro se respondent to show a difference to warrant an additional hearing with respect to custody. But not all differences are material. When preparing a motion for a subsequent custody redetermination hearing, focus on changes outside of the removal proceedings, such as any pending criminal charge(s), potential eligibility for a visa and filing with USCIS, or medical issues.

Two Trends in Arguing Material Change in Circumstances: COVID-19 and Financial Ability to Pay

Attorneys have advocated a material change in circumstances because of two particular circumstances: COVID-19[64] and the respondent's inability to pay a bond. For both circumstances, organizations have created template bond motions and advisories to assist attorneys.

Attorneys have argued that the dangerousness of COVID-19, particularly in a carceral setting, is a material change that necessitates release from custody in the form of either lowering the bond or granting a bond in the first place.[65]

Attorneys' fears about COVID-19 spreading in ICE facilities is well founded: as of August 6, 2021, 23,205 people in ICE custody contracted COVID-19, and immigrants in ICE custody have passed away after contracting the virus.[66] To assist attorneys and pro se respondents, at least one organization created pro se motions for custody redetermination based on a material change in circumstances for respondents detained during the COVID-19 pandemic.[67] A different organization created a practice advisory in March of 2020 that included a template motion for a subsequent custody redetermination hearing based on the pandemic.[68] A letter signed by several law professors of immigration law clinics to the chief immigration judge states that COVID-19 constitutes a material change in circumstances.[69] The issue of whether COVID-19 was a material change in circumstances was discussed on an AILA listserv, including DHS's opposition.[70] Attorneys have made similar arguments in the criminal context: the American Bar Association has a template for an "Emergency Motion for Pretrial Release Due to Public Health and Safety Threat Posed by COVID-19 Pandemic" and advocated that courts should consider the "stark change in circumstances."[71] An Administration of Justice Bulletin suggests criminal defense attorneys argue that COVID-19 is a "material bearing" in arguing for reduced bond.[72] The National Association for Criminal Defense Attorneys lists on its website bond motions based on COVID-19.[73]

In 2017, the Ninth Circuit issued a decision requiring both ICE and IJs to consider the respondent's ability to pay and whether a respondent could be released with nonmonetary conditions.[74] The American Civil Liberties Union (ACLU) created a practice advisory and included a pro se sample motion for a subsequent custody redetermination hearing for respondents who had a bond hearing before, arguing the material change is the new court decision when an IJ previously did not have to consider the ability to pay.[75] At least one nonprofit legal service provider in Colorado filed a motion for subsequent custody redetermination, citing this lawsuit as one of the arguments after their client previously received a $7,000 bond.[76] If a respondent's ability to pay changes after an IJ initially considers this in the initial bond hearing, it may be worth filing a motion for subsequent bond redetermination hearing.

Tips for Preparing for a Subsequent Motion for Custody Redetermination

When attorneys consider whether to file a motion for a subsequent custody redetermination hearing, it is important, as in any case, to be fully prepared and understand the procedural history. Custody redetermination hearings do not have to be recorded. Reviewing filings, both from the respondent and from DHS, is critical in determining next steps.

First, prepare for the initial custody redetermination hearing and understand whether to withdraw the motion or ask for no action. The material

change in circumstances standard is a high standard, and there may not be any changes after the first (and possibly only) custody redetermination hearing. If the IJ in the hearing asks for additional proof, an attorney can move to withdraw the bond motion or ask the IJ to take no action. If this occurs, the IJ does not make a decision in the hearing, and an attorney can file a motion later without having to show a material change in circumstances. Explain to the client ahead of time that asking for no action may be better than the IJ making a decision in some circumstances, especially if one can acquire additional proof to address the IJ's concerns.

Second, analyze and understand the IJ's initial decision, because whether a change is material from the IJ's perspective could largely depend on the prior decision. If, for example, the IJ denied bond or set a high bond due to danger to the community, additional proof that the respondent is not a flight risk is irrelevant. Conversely, if there was a finding the respondent is not a danger to the community, further proof that they are not a danger to the community will not affect the IJ's decision. Focus on the IJ's decision in the original hearing to determine what change would be material and what proof will be required. If the hearing was recorded, it could be useful to request the digital audio recording.

Third, the motion for a subsequent custody redetermination hearing should list all of the change(s) in circumstances since the previous hearing and argue why the changes are material. Include the supporting documents to prove the change(s). Create a record to be ready to appeal if the IJ determines there is no material change in circumstances. In numerous unpublished cases, the BIA has disagreed with an IJ and found a material change in circumstances.

Finally, do not focus exclusively on filing a motion for a subsequent custody redetermination hearing. There may be no changes after the initial hearing. If the IJ either denied bond or set a high bond amount, consider other options. A bond appeal with the BIA can take several months, and success is far from guaranteed. If an IJ grants a form of relief, then filing a motion for a subsequent custody redetermination hearing may be worthwhile. The BIA has determined that a grant of 42B cancellation of removal is a material change in circumstances. According to 2012 ICE Enforcement and Removal Operations field guidance, ICE should release a respondent who was granted asylum, withholding of removal, or protection under the Convention Against Torture, absent a finding that they are a danger to the community.[77] In that circumstance, an attorney can advocate for release without requiring a bond.

Alternatives to Detention

Another possibility for clients is to be released under ATD. ICE created ATD in 2004 under the Intensive Supervision Appearance Program (ISAP) I contract.[78] As of May of 2021, more than 96,000 people were enrolled in the

ISAP III, with more than 31,000 wearing an ankle monitor.[79] As President Biden's proposed budget calls for up to 140,000 participants despite criticism of the program,[80] a general understanding of the program is helpful.

Various statutes govern ICE's ability to detain immigrants. In the overwhelming majority of cases, ICE has the discretion and power to release a detainee.[81] Yet, at least while President Trump was in office, most detainees were detained without a bond.[82] ICE may enroll an immigrant who is released from custody into the ATD program, which allows monitoring and supervising.[83] The current ATD program is ISAP III.[84] Unlike ISAP I and II, ISAP III is available across the country with more than 100 locations, and the ATD program has different levels of supervision that can vary by case, such as GPS monitoring (ankle monitor), in-person visits, telephonic meetings, unscheduled home visits, and SmartLINK.[85] People in ISAP III are "supervised largely" by BI, Incorporated.[86] BI Inc., a wholly owned subsidiary of The Geo Group, Inc., has earned more than half a billion dollars as a result of its contracts with ICE for the program.[87] BI, Inc. lists its ISAP services on its website.[88] Some organizations and individuals are critical of ICE's ISAP III program, including electronic monitoring, and suggest other ATDs.[89] In a policy brief from March of 2021, AILA wrote about some of the burdens of ISAP: "In practice, ISAP imposes significant burdens upon noncitizens through its use of 24-hour electronic surveillance mechanisms like ankle monitors and phone tracking. Ankle monitors present physical and mental health concerns and result in criminal stigmatization for those required to wear them."[90] In 2016, Stanford Law School's Immigrants' Rights Clinic created a guide for people in the ISAP program who had immigration court in San Francisco, explaining how to request to have the ankle monitor removed.[91] After a certain period of time, the ankle monitor could be removed, and the number of visits or calls could decrease.[92]

In a 2019 *USA Today* article, a participant in the ISAP program said, "They treat you like you are an object" as she described how someone would call her one Tuesday a month, but they would not tell her which Tuesday it would be.[93] The year before, a father who came with his daughter, age eight, described wearing an ankle monitor as "humiliating."[94] As the number of people in an ATD program may increase to around 140,000 people, immigration attorneys and advocates can prepare by interacting with ICE to advocate that respondents be released without being placed into ISAP, or if they are, to have as few restrictions as possible.

Conclusion

ICE's daily average population of detainees in FY 2020 was 33,724.[95] For the thousands of respondents who are detained, filing a motion for custody redetermination once DHS makes its determination is of upmost importance.

If the IJ either grants a high bond a client cannot afford or denies bond, filing a motion for a subsequent custody redetermination hearing based on a material change in circumstances is another opportunity to advocate for a client's release.

The BIA has not defined a material change in circumstances with respect to bonds in a published decision. IJs and the BIA have analyzed whether there has been a material change in circumstances in several cases, with respect to danger to the community, flight risk, and new eligibility for or granting of relief from removal. The BIA has issued several unpublished decisions, which are precedential but are not binding on IJs. This article reviewed the process for initial and subsequent custody redetermination hearings, reviewed several BIA and IJ decisions, and provided tips for preparing for a motion for subsequent custody redetermination hearing. With this information, an attorney is better prepared to analyze and successfully persuade an IJ that there has been a material change in circumstances and grant or lower a bond.

Notes

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2. *See* Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. Civil Rights and Econ. Dev. 533, 536 (2014); *See also Jennings v. Rodriguez*, 138 S. Ct. 830, 865 (2018) (Breyer, J., dissenting) ("And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical.").
3. Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court* (American Immigration Council 2016), www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.
4. Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 Univ. of Chicago L. Rev. 137, 142–43 (2013).
5. *See* INA § 236(c). A respondent can challenge whether they are subject to mandatory detention. *See* Matter of Joseph, 22 I&N Dec. 660 (BIA 1999). To read more about ICE's authority for detention, see Danielle Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145, 158 (2020).
6. This article does not address whether a respondent is eligible for a bond from an IJ and assumes they are statutorily eligible.
7. "ICE bonds" refers to bonds issued by ICE, as opposed to by an IJ. *See* Matthew Boles, *What You Need to Know About ICE Bonds*, AILA Doc. No. 19040433.
8. 8 CFR § 1236.1(d).
9. 8 CFR § 1003.19(b).
10. *Matter of P–C–M–*, 20 I&N Dec. 432, 434 (BIA 1991).

11. 8 CFR § 1003.19(d); *Matter of R–S–H–*, 23 I&N Dec. 629, 630 n.7 (BIA 2003).

12. *Matter of Valles*, 21 I&N Dec. 769, 772 (BIA 1997).

13. *Matter of D–J–*, 23 I&N Dec. 572, 575 (A.G. 2003).

14. *See Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).

15. 8 CFR § 1003.19(f).

16. Immigrant Legal Resource Center, *Representing Clients in Bond Hearings: An Introductory Guide* (2017), www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf.

17. *Matter of A–M–O–*, AXXX XXX 479 (BIA Feb. 23, 2018).

18. TRAC Immigration, *Importance of Nationality in Immigration Court Bond Decisions* (Feb. 12, 2019), https://trac.syr.edu/immigration/reports/545/#:~:text=Nationally%2C%20currently%20less%20than%20half,two%20months%20of%20FY%202019.

19. The Catholic Legal Immigration Network (CLINIC) has samples of some documents related to a subsequent motion for custody redetermination based on material change in circumstances, such as (1) Sample Motion for Bond Redetermination Based on Changed Circumstances, (2) Sample Renewed Motion for a Bond Redetermination Hearing, (3) Sample DHS Opposition to Renewed Bond Redetermination Request, (4) Sample Immigration Judge Order Denying Bond for Successive Bond Redetermination. CLINIC, *Practitioners' Guide to Obtaining Release From Immigrant Detention* (last updated May 24, 2018), https://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention.

20. *Matter of Uluocha*, 20 I&N Dec. 133, 134 (BIA 1989).

21. *Matter of Valles*, 21 I&N Dec. 769, 771 (BIA 1997).

22. Brief of Former United States Immigration Judges and Members of the Board of Immigration Appeals as *Amici Curiae* in Support of Respondents, at 13, *Pham v. Guzman Chavez*, No. 19-1987 (U.S. 2021).

23. *Id.*

24. *Id.*

25. Hon. Dorothy Harbeck, *A New Calculus for the Measure of Mercy: Does the New Jersey Bail Reform Affect the Immigration Court Bond Hearings?*, 44 Rutgers L. Record, 106, 116 (2016–2017).

26. 8 CFR § 1003.19(e).

27. *Id.*; *see also Matter of Chew*, 18 I&N Dec. 262, n.2 (BIA 1982). Under 8 CFR § 1003.19(e), only respondents, and not DHS, can seek a redetermination based on a material change in circumstances. *See E–D–L–T–*, AXXX XXX 573 (BIA Nov. 28, 2018).

28. Denise L. Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom From Pretrial Immigration Detention*, 92 Ind. L. J. 157, 170 (2016).

29. EOIR, *Immigration Court Practice Manual* 9.3(c)(1).

30. *Kungys v. United States*, 485 U.S. 759, 770–72 (1988); *see also The Law Dictionary*, What Is Material Fact?, https://thelawdictionary.org/material-fact/ ("Crucial to the interpretation of a phenomenon or a subject matter, or to the determination of an issue at hand[,] this is a specific type of confirmed or validated event, item of information, or state of affairs.").

31. *See* DOJ, EOIR, BIA Precedent Chart, D–I, Detention and Bond, www.justice.gov/eoir/bia-precedent-chart-d-i.

32. Unpublished BIA decisions are not binding. *See Matter of Echeverria*, 25 I&N Dec. 512, 519 (BIA 2011).

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34. *Matter of V–B–C–*, AXXX XXX 289 (BIA Sept. 10, 2018).
35. *Matter of I–R–*, AXXX XXX 145 (BIA Nov. 5, 2018).
36. *Matter of G–G–P–*, AXXX XXX 416 (BIA Jan. 4, 2021).
37. *Matter of O–D–*, AXXX XXX 373 (BIA Oct. 22, 2018).
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39. *Matter of Wajid Ali Siddiqi*, A095 473 104 (BIA Apr. 26, 2011).
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41. *Matter of Padilla Sarmiento*, 2010 WL 3536690 (BIA 2010).
42. *Id.*
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46. Order from IJ, Stewart Immigration Court, Aug. 30, 2018 (copy on file with author).
47. Order from IJ, Stewart Immigration Court, Dec. 10, 2019 (copy on file with author).
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49. *Matter of Urena*, 25 I&N Dec. 140, 141 (BIA 2009).
50. Emily Ryo, *Predicting Danger in Immigration Courts*, 44 Law and Social Inquiry, 227, 230 (2019).
51. 24 I&N Dec. 37, 40-41 (BIA 2006).
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53. *See, e.g.*, *Matter of V–B–C–*, AXXX XXX 289; *Matter of G–G–P–*, AXXX XXX 416; Order form IJ, Krome Service Processing Center, Dec. 23, 2019, *supra* note 45.
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60. *See, e.g.*, *Matter of A–S–S–*, AXXX XXX 339; Order from IJ, Stewart Immigration Court, Aug. 30, 2018, *supra* note 46.
61. 8 CFR § 214.2(h)(2)(i)(E); *see also Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 546 (AAO 2015).
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