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Tipsy: A Sobering Look at the Effects of Alcohol-Related Incidents in Immigration Removal Proceedings

Many respondents in removal proceedings submit applications for relief that reflect one or more alcohol-related offenses. Depending on the type of relief application at issue and the nature, frequency, and recency of the alcohol-related history, alcohol use can have a significant impact on whether or not a respondent is successful in receiving relief.¹ Making this determination involves an assessment of the circumstances surrounding the alcohol-related incidents—including whether or not they resulted in criminal convictions—and a determination of whether the incidents (1) result in immigration law inadmissibility,² (2) negate a finding of good moral character,³ (3) involve a criminal-related bar,⁴ or (4) implicate a discretionary denial.⁵



The presence of alcohol-related convictions and even alcohol-related incidents can, therefore, trigger any number of avenues of inquiry. As a matter of course, the presence of these alcohol-related incidents requires each of the parties to undertake specific analyses, which range from an examination of the legal and regulatory provisions, to relevant case law,⁶ and a consideration of related policy guidance provided by the executive branch.⁷ (These two issues are discussed in more detail below.) Moreover, given the complex interaction in the Immigration and Nationality Act (INA) between alcohol abuse as a mental health issue and a “habitual drunkard” designation as an issue involving moral character (as discussed below⁸) immigration law employs standards that have evolved dramatically over the past 60 years through changes in both the scientific understanding of the nature of alcohol use and abuse and variations over time and across communities about who is considered a habitual drunkard.⁹ As a result, the parties to a removal proceeding must navigate a wide array of documentary and testimonial evidence—including medical, psychiatric, academic, law enforcement, and conviction records—to determine the extent to which alcohol-related offenses and incidents have an impact on eligibility for relief from the multiple prongs of morality, health, criminality, and discretion, as discussed in more detail later in this article.¹⁰ This evidence can affect eligibility for even the most minimal form of relief, such as post-conclusion voluntary departure, which includes a statutory element requiring a showing of good moral character.¹¹ Ultimately, alcohol-related incidents

can derail almost any application on discretionary grounds.¹²

Because of the array of consequences that can be triggered by alcohol-related incidents, it is useful to be proactive in employing case management techniques that identify these potential issues. Early identification of these issues may successfully narrow contested matters through stipulations of fact and law agreed upon at scheduled status conferences.¹³ Failure to do so can result in ultimately, yet good faith, motions to continue for development of additional material evidence,¹⁴ which can cause procedural delays. Thus, because of the immigration court’s high volume dockets,¹⁵ the goals of judicial economy,¹⁶ and the complex nature of cases that implicate so many possible contested issues,¹⁷ all parties are best served by careful and timely attention to these matters.¹⁸

There is an additional obstacle in resolving these matters expeditiously. Case law that interprets the good moral character bar in the habitual drunkard context is limited.¹⁹ Similarly, even though the health-related grounds for inadmissibility are more clearly defined by statute and have been interpreted by the executive branch’s interagency memos,²⁰ there is little case law reviewing the statutory provision as it relates to alcohol abuse or dependency.²¹ Moreover, given that leaders in the medical field have characterized alcohol abuse as a mental health issue,²² there is lack of clarity about the overlap between alcohol abuse as an issue of good moral character and alcohol abuse as a medical issue. (Historical perspectives on this issue are discussed in more detail below.)

This article will review the statutory, regulatory, judicial, and policy underpinnings related to alcohol use and abuse as determined in the current analytical framework. First, the discussion will examine the legislative history behind the relevant statutory provisions and consider how the implementing regulations have transformed over the past six decades—considering these changes in historical context and as a reflection of the evolution in scientific and societal perceptions of alcoholism and morality. Second, the paper will examine the judicial application of the current statutory and regulatory framework and review how changes in executive branch policy have influenced enforcement of the relevant laws and regulations. Third, the article will identify the lines of inquiry that parties must resolve in the most common types of immigration cases. Finally, the article will consider

whether or not the current legal framework meets the intent of the legislation and will pose questions as to whether the current adjudicatory process is meeting its mandate effectively.

This article is intended to start the conversation on how to resolve these complex and interrelated issues. The discussion will neither resolve the more than 200-year-long interest in defining and redefining moral character in the immigration context nor prescribe how best to reconcile statutes governing immigration law that may or may not be in conflict, depending on one's understanding about the science of alcohol abuse and dependency. The topic is a sensitive one from a multitude of perspectives, because it requires reconciliation of morality, scientific, and discretionary decision-making. However, even if the current framework remains unchanged, this article proposes case management techniques that might bring about more consistent record development, clearer judicial analysis, and greater uniformity in outcome.

Relevant Statutory Provisions, Brief Legislative History, and Evolution of Alcoholism as a Disease

The Immigration and Nationality Act regulates alcohol-related conduct in immigration law by prescribing it in the following four contexts:

- as indication of a lack of morality,
- as a mental health issue,
- as one of many factors that a judge can consider in exercising discretionary authority, and
- as a criminal issue.

As a practical matter, the criminal ground is fairly well defined, because the Board of Immigration Appeals (BIA) has concluded that a conviction for a charge of aggravated driving under the influence (DUI) with two or more prior DUI convictions is not a crime involving moral turpitude.²³ In addition, the U.S. Supreme Court has held that a DUI conviction is not an aggravated felony when there is no mens rea articulated in the statute.²⁴ The remaining three grounds will be covered in depth below.

Historical Perspectives on Moral Character and Alcohol Abuse Policies

The U.S. immigration policy's periods of great expansion and those of waning support have reflected the values, morals, and mores of the constituents that the legislation has served. Today, the alcohol-related bars are a clear reflection of legislative concerns about preserving health and safety as well as shaping the type of character deemed moral for admissibility, but, in the early years of this nation, the focus on morality was much more single-minded. Dating back to legislation passed by the First Congress in 1790, the first naturalization statute contained a prominent morality requirement and limited the benefit to per-

sons who could establish that they possessed "good character."²⁵ In practice, however, the application of these early immigration policies was relatively liberal and, by the end of the 1800s, immigration to the United States had burgeoned and the country was experiencing pronounced social tensions that called into question whether the then current law was successfully excluding those who did not possess good moral character.²⁶ This populist unrest resulted in the enactment of restrictionist immigration laws that prohibited the admission of "undesirable" immigrants.²⁷ In the years after World War I, an ever-tightening admission standard, coinciding with the rise of the temperance movement in the United States,²⁸ led to the enactment of legislation that set forth a jumble of excludable persons. It is in this list of excludable persons that we first see a reference to the undesirability of those deemed to suffer from "chronic alcoholism" at the same time that those deemed mentally defective are identified as undesirable.²⁹ At this point in the country's history of legislation related to immigration, one should note that alcoholism is neither defined as a mental defect nor is it clearly identified as a moral impairment.

In the 1930s and 1940s, however, the focus of the debate shifted to defining alcoholism as a matter of addiction and disease. The use of alcohol was becoming socially acceptable and the ill effects of "addiction" were confined to only some individuals who, for reasons unknown, developed an unhealthy relationship with the substance.³⁰ This shift in perception was propagated by some of the early leaders of Alcoholics Anonymous and gained more momentum among the mainstream with the 1960 publication of *The Disease Concept of Alcoholism* by Elvin Jellinek, a scientist at the Yale Center of Alcohol Studies.³¹

As the scientific community continued the debate on the origins and parameters of alcohol abuse and dependence, Congress took up comprehensive immigration reform and enacted the framework that is in place today and guides decision-making on all these issues. The INA frames alcohol use as a moral character issue and as a separate health issue. Under the INA, from a moral character standpoint, habitual drunkenness prevents an applicant from establishing good moral character. Similarly, from a health standpoint, alcohol abuse and dependence can result in health-related inadmissibility.

However, in the more than 60 years since the the INA was enacted, there has been considerable development in the general understanding of habitual drunkenness and alcohol abuse and dependence. First, the scientific community's views about the neuroscience of alcoholism have evolved considerably. Under current mainstream medical thought, alcoholism is considered a mental disease and can be diagnosed using criteria set forth in the Diagnostic

and *Statistical Manual of Mental Disorders IV* (DSM-IV) for diagnosing alcohol dependence and abuse. A DSM-IV diagnosis of alcohol dependence requires a “maladaptive pattern of alcohol use, leading to clinically significant impairment or distress” with three or more of the following symptoms occurring within the same 12-month period:

1. tolerance, as defined by either of the following:
 - a need for markedly increased amounts of the substance to achieve intoxication or desired effect, or
 - markedly diminished effect with continued use of the same amount of substance;
2. withdrawal, as manifested by either of the following:
 - the characteristic withdrawal syndrome for the substance, or
 - the use of alcohol to relieve or avoid withdrawal symptoms;
3. consumption of alcohol in larger amounts or over a longer period than was intended;
4. a persistent desire or unsuccessful efforts to cut down or control alcohol use;
5. a great deal of time spent in activities to obtain alcohol, use the alcohol, or recover from its effects;
6. rejection of or reduction in important social, occupational, or recreational activities because of alcohol use; and
7. continued use of alcohol despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance (for example, continued drinking despite recognition that an ulcer was made worse by alcohol consumption).³²

While mainstream scientific studies reflect that alcohol dependence is a disorder of the brain, some critics reject this theory.³³ Critics argue that the onset of alcoholism necessarily includes a volitional element, not simply genetic or environmental factors, because alcoholics can only develop the disease through the active use of alcohol. This type of skepticism was a crucial factor in a 1988 U.S. Supreme Court decision that upheld a regulation permitting the Veterans’ Administration to avoid paying educational benefits on the basis that alcoholism always includes an element of willful misconduct and therefore was not a “handicap” as defined by the Rehabilitation Act of 1973.³⁴ This confluence between voluntary and involuntary factors and the notion that alcohol use and abuse reflect a lack of inner discipline confounds scientists, judges, and lawmakers and leads some to contend that alcoholism is a moral disorder rather than a disease.³⁵

Similarly, there has been marked development of

the common understanding of habitual drunkenness. In his article, “The Discovery of Addiction: Changing Conceptions of Habitual Drunkenness in America,” published in 1978 in the *Journal of Studies on Alcohol*, Dr. Harry G. Levine, a sociologist who studies the history of addiction, explains that he uses the term habitual drunkard as an equivalent to the following description:

Drunkard, ... intemperate, inebriate, and alcoholic, to describe people who regularly or periodically got drunk. All those terms have been commonly used in America. Drunkard and habitual drunkard were common in the 17th, 18th and 19th century, and habitual drunkard is still sometimes used today. Inebriate appears to have come into usage in the early 19th century. Alcoholic was coined in the mid-19th century but did not come into regular usage until the 20th century.³⁶

It is under this backdrop that parties must apply the term “habitual drunkard” in the context of moral character and reconcile how it relates to or can be distinguished from the modern definition of alcoholism.

Bars to Findings of Good Moral Character

The INA defines good moral character in § 101(f) of the act. The statute does not define morality positively but instead defines it in the negative, delineating attributes that render an individual to fall outside the definition.³⁷ At the top of the list is the term “habitual drunkard”;³⁸ a person who is or has been a habitual drunkard is unable to establish character that is “good” or “moral.” Even though most of the applications for relief in removal proceedings require that the applicant have good moral character, there is limited immigration case law defining habitual drunkard as a bar to a finding of good moral character. The only published BIA decision on this issue, *Matter of H-*,³⁹ was decided soon after the INA was enacted. In that case, a hospital psychiatrist treating a committed respondent testified that, based on his personal knowledge and review of hospital records, the respondent had been a chronic alcoholic as of a date certain. The hospital records revealed that the respondent had managed to leave the hospital surreptitiously on several occasions and “immediately began drinking heavily, necessitating his immediate and forcible return to the hospital.” Ultimately, the BIA determined that the respondent clearly fell under the good moral character bar of § 101(a)(f)(1) of the INA and barred relief.⁴⁰ The BIA has not taken up the issue in a precedent decision since it made that determination.

Thus, as a starting point, one could look to the *Black's Law Dictionary*, which defines "habitual drunkenness" as activity in which "[o]ne who frequently and repeatedly becomes intoxicated by excessive indulgence in intoxicating liquor so as to acquire a fixed habit and an involuntary tendency to become intoxicated as often as the temptation is presented, even though he remains sober for days or even weeks at a time."⁴¹

"Habit" is further clarified as "not the ordinary use, but the habitual use; ... the habit should be actual and confirmed, but need not be continuous, or even of daily occurrence."⁴² The DSM-IV's alcoholism definition does not refer to habitual drunkenness, *per se*.⁴³ However, parties trying to either apply the standard or understand how it differs from alcoholism would be hard-pressed to conclude that habitual drunkenness does not correlate in some respects with the definition of alcohol dependence found in the DSM-IV.

Under the current framework, even if an alcohol-related incident does not trigger a ground for removal or a statutory bar to relief, most of the common forms of relief in immigration court contain a general catchall discretionary component, which is discussed below, as well as a separate discretionary component related to good moral character itself. As a practical matter, a search for any precedent or nonprecedent authority on the issue of discretionary good moral character denials yields no results.

Health-Related Bars to Admissibility

An alien is inadmissible on health-related grounds related to certain physical or mental disorders when such disorders are associated with behavior that may pose, or has posed, a threat to the property, safety or welfare of the alien or others.⁴⁴ When the alien has a history of such a disorder, he or she is inadmissible if such behavior is likely to recur or lead to other harmful behavior.⁴⁵

Applicable Health and Human Services Regulations and Medical Examination Procedures

The law that the civil surgeons apply to make determinations of health admissibility is governed by the U.S. Department of Health and Human Services (DHHS). At a basic level, DHHS regulations identify communicable diseases that have significance for public health and set forth compliance measures and vaccinations that focus primarily on physical disorders.⁴⁶ However, DHHS regulations also identify some mental disorders as problematic, including alcohol abuse and dependence disorder.⁴⁷ During medical examinations for certain immigration relief applications, civil surgeons are required to ask questions about an applicant's prior or current use of alcohol.⁴⁸ The results of the medical examination are provided on a Form I-693, Report of Medical Examination and

Vaccination Record. Notably, the civil surgeon must diagnose alcohol abuse or alcohol dependence and include "any diagnoses of substance abuse/addiction based on DSM[IV] criteria ... with current associated harmful behavior or history of associated harmful behavior judged likely to recur."⁴⁹

Once an alien has reported this information, the civil surgeon applies specific criteria outlined in the DSM-IV in a multistep process to assess the following: (1) whether the alcohol use equates to a mental disorder; (2) if so, whether it is or has been used with associated harmful behavior; and (3) if it has been used with associated harmful behavior, whether the harmful behavior is likely to recur.

The DSM-IV criteria for diagnosing an alcohol-related mental disorder is defined under the entry "Alcohol Abuse and Alcohol Dependence."⁵⁰ For a civil surgeon to diagnose an "alcohol abuse" mental disorder, one or more of the following criteria must be present for over a year:

- role impairment, including failed work or home obligations;
- hazardous use, including driving while intoxicated;
- legal problems relating to alcohol; or
- social problems attributable to use of alcohol.⁵¹

On the other hand, for a civil surgeon to diagnose an "alcohol dependence" mental disorder, the DSM-IV requires the presence of three or more of the following criteria for more than one year:

- increased tolerance to alcohol;
- signs or symptoms of withdrawal from alcohol;
- consumption of more alcohol or more frequent use than intended;
- unsuccessful attempts to cut back on alcohol consumption;
- excessive time spent in relation to alcohol, such as time spent obtaining alcohol or suffering from a hangover;
- impaired social or work activities attributable to use of alcohol; or
- use of alcohol despite physical or psychological consequences.⁵²

If either of the two mental diagnoses is present, the civil surgeon must proceed to the second step in the process and determine whether the alcohol has been used with associated harmful behavior. Specifically, the civil surgeon must ask general questions during the medical exam to determine whether there are or have been incidents that are related to the alcohol-related mental disorder and whether these incidents have been associated with harmful behavior. Harmful behavior has been found to include operating a motor

vehicle under the influence of alcohol or engaging in violence that arises as a result of alcohol abuse.⁵³ The civil surgeon can order multiple medical appointments and make referrals for further evaluation.⁵⁴

Recently, the Centers for Disease Control (CDC) issued technical instructions, which have the force and effect of regulations.⁵⁵ These instructions advise civil surgeons in immigration-related examination to review all of the applicant's available records, including medical, psychiatric, police, and school reports.⁵⁶ If, after reviewing all the relevant information, the civil surgeon determines that there is a mental disorder with associated harmful behavior, he or she must make a finding of a "Class A" condition. This finding reflects that the respondent's alcohol-related behavior has posed a threat to the property, safety, or welfare of the alien or others and that such behavior is likely to recur or lead to other harmful behavior.⁵⁷ A "Class A" finding renders the respondent inadmissible under INA § 212(a)(1)(A)(iii). Conversely, if the civil surgeon determines that the respondent has a history of a mental disorder but there is no associated harmful behavior or there is associated harmful behavior but that it is deemed unlikely to recur, then a "Class B" finding is made and the respondent is not rendered inadmissible on that ground.⁵⁸

Review of a Civil Surgeon's Finding

If either the Department of Homeland Security (DHS) or the alien are unsatisfied with the civil surgeon's determination made during the medical examination, either party may request re-examination.⁵⁹ In such a case, the director of the CDC must convene a board of medical officers to review all records submitted by the alien or any witnesses and consider statements from the examining physician.⁶⁰ The board of medical examiners can order subsequent physical or psychiatric examinations, including compliance with a prescribed rehabilitation program.⁶¹ At the conclusion of their review, the board must issue a report, which is considered final, unless the director of the CDC agrees to a further review.⁶²

Medical Examinations in Practice

The regulations set forth that medical examinations by a civil surgeon are required in connection with certain applications for relief, such as adjustment of status.⁶³ However, in cases other than adjustment of status relief applications, nothing prevents a respondent from obtaining an immigration-related health examination by a civil surgeon to aid a decision-maker in determining admissibility on health-related grounds under the REAL ID Act.⁶⁴ The evidence could take the form of a civil surgeon's report or any other type of medical, psychiatric, police, or school report.

DHS Policy Guidance

From the standpoint of executive branch policy, according to a DHS memorandum published in

January 2004, the department has strict guidance about when it should argue that alcohol-related arrests or convictions could or should be considered prima facie evidence of a health-related inadmissibility.⁶⁵ The memorandum declares that, when there is a "significant criminal record of alcohol-related driving incidents," the DHS should require medical re-examinations.⁶⁶

This memorandum defines a "significant criminal record" as including the following:

- one or multiple arrests or convictions for an alcohol-related driving offense while driving on a suspended license that was the result of prior alcohol-related driving incidents;
- one or multiple arrests or convictions for an alcohol-related driving offense that resulted in personal injury or death;
- one or multiple felony convictions for an alcohol-related driving offense or where a sentence of incarceration was imposed;
- two or more arrests or convictions for alcohol-related driving offenses within the past two years; or
- three or more arrests or convictions for an alcohol-related driving offense when one of the arrests or convictions occurred in the past two years.⁶⁷

Notably, this list is not exclusive; the memorandum goes on to include other potential evidence of mental disorders with associated harmful behavior, including alcohol-related domestic violence offenses.⁶⁸

In addition, the Department of State (DOS) has issued guidance with respect to processing visa applications for applicants who have alcohol-related driving arrests or convictions.⁶⁹ That guidance states that "consular officers must refer applicants to panel physicians (civil surgeon counterparts outside of the United States) [if] (a) an applicant has a single drunk driving arrest or conviction within the last three calendar years or two or more drunk driving arrests; or (b) [drunk driving] convictions in any time period."⁷⁰ By comparison with the Yates Memo, the DOS employs a stricter interpretation of when aliens could be rendered inadmissible under § 212(a)(2) of the act for posing a threat to themselves or others.

Waivers under the Immigration and Nationality Act

When a "Class A" condition is found, aliens applying for an adjustment of status may pursue a waiver of the § 212(a)(1)(A)(iii) ground of inadmissibility under § 212(g)(3) of the INA. By filing an I-601 waiver, the attorney general can waive the ground of inadmissibility following consultation with the secretary of the DHHS.⁷¹ Waiver applications are evaluated according to the following criteria:

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- the applicant's mental disorder and type of behavior associated with it;
- the applicant's current condition;
- the prognosis, based on a reasonable degree of medical certainty, that harmful behavior is not likely to recur; and
- the recommendation concerning treatment and how it will reduce the likelihood that the mental disorder will result in future harmful behavior.⁷²

Suggested treatments in waiver requests often include enrollment in an alcohol rehabilitation program and/or follow-up care by a doctor who specializes in handling addiction-related mental health issues.

General Discretionary Determinations

How many alcohol-related driving offenses would it take for an otherwise eligible respondent to be denied relief as a matter of discretion? The answer to that question is not clear.⁷³ In the context of discretionary applications for relief, in *Matter of Marin*, the Board of Immigration Appeals held that the immigration judge "must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of ... relief appears in the best interest of this country."⁷⁴ It therefore follows that frequency and recency of alcohol-related offenses could be detrimental to a respondent's request for relief. Even though rehabilitation is not an absolute prerequisite for relief,⁷⁵ a respondent's efforts to rehabilitate himself or herself is often a factor in an immigration judge's discretionary determination.⁷⁶

Of course, there is no firm rule as to how decision-makers should consider alcohol-related offenses in the context of adjudicating discretionary relief requests. However, in the absence of clear precedent authority on discretionary determinations, the Board of Immigration Appeals advises reviewing unpublished cases for guidance in making these determinations.

A review of relevant unpublished cases reveals that, in a 2008 unpublished decision, the BIA overturned an immigration judge's decision to grant relief as a matter of discretion.⁷⁷ The respondent had 22 criminal convictions, the majority of which were related to driving.⁷⁸ Seven of the offenses were related to alcohol, and the BIA pointed out that, even though the respondent had been sober for two years, because he had relapsed at the time of the hearing, he had continued to abuse alcohol.⁷⁹ As such, the BIA disagreed with the immigration judge that the respondent warranted relief as a matter of discretion.⁸⁰ Despite these findings, the BIA did not make a finding that the respondent was a habitual drunkard in its decision.⁸¹

In another unpublished decision, the BIA held that an immigration judge did not abuse discretion in granting voluntary departure when the respondent had four assault convictions, a conviction for resisting arrest, and "numerous arrests from 1995 to 2002," which were the result of his alcohol use.⁸² Once again, the BIA did not make a finding that the respondent was a habitual drunkard.

Conversely, in a 2009 unpublished decision, the BIA upheld an immigration judge's decision denying voluntary departure as a matter of discretion because of two DUIs and "insufficient equities."⁸³ One could argue that the respondents' equities in the aforementioned cases were comparable, but the immigration judges and the BIA came to differing conclusions on whether discretionary relief was warranted. In some of these decisions, alcohol played a significant role in the discretionary decision-making, but at no point was the habitual drunkard bar addressed. Indeed, a cursory search of published and unpublished BIA decisions results in no cases in which the habitual drunkard bar was addressed. In the absence of clear precedential authority, it would not be surprising to find a difference in opinion among immigration relief application decision-makers on the gravity of a DUI or other alcohol-related offenses and whether these offenses create a threat to the public welfare such that relief should be denied as a matter of discretion.

The only other case addressing the habitual drunkard bar occurred in an unpublished district court case involving the denial of a naturalization application, in which inconsistent testimony and documentary evidence was presented. The respondent in that case was deemed not to be a habitual drunkard, even though he had two DUI convictions. Nevertheless the court found the existence of the convictions were viewed as

negative factors that [led] to an examination of the circumstances ... [where] the blood alcohol contents shown by the two test results—.16 and .186—cast great doubt on the testimonial credibility of plaintiff's proverbial "two beers or so." Moreover, other doubts were created by the plaintiff's testimony, e.g., as to his drinking alcohol on just one occasion per month, which coincidentally resulted in the two drunk driving convictions—as well as his inability to account in either instance for why he was being stopped and arrested. Such lack of testimonial candor, although not necessarily "false testimony," is not consistent with "good moral character."⁸⁴

Case Management Techniques

Immigration courts and parties managing dockets that are often heavy can make significant gains in judicial economy through early issue detection.⁸⁵

Identifying alcohol-related issues at a master calendar hearing can afford enhanced supervision of the evidence-gathering process,⁸⁶ support meeting due process requirements,⁸⁷ and improve the ability to achieve timely case completion such that a respondent will be better aware of his burden of proving eligibility for the relief requested.⁸⁸ What follows is one set of case management systems and techniques that can be employed to assist parties in meeting their responsibilities efficiently and effectively in cases involving significant alcohol-related incidents.

Master Calendar Hearings

Because master calendar hearings are a useful vehicle for spotting relevant issues,⁸⁹ parties can do the following:

- They can identify the nature and type of criminal history at the time the application is filed with the court.⁹⁰
- When a respondent reveals multiple DUIs or alcohol-related incidents, a criminal history chart and case disposition(s) can be filed by a date certain, for example, at least six months prior to the merits hearing.⁹¹
- The parties can agree to an evidence submission schedule that includes a time line of alcohol-related activity being filed by a date certain—for example, at least six months prior to the merits hearing.⁹²
- The DHS can agree to state a written position by a date certain—for example, 30 days from receipt of the criminal history chart and alcohol-related activity time line—as to whether it will be asserting a health-related inadmissibility bar, under the 2004 Yates Memo guidance.⁹²
- The parties can agree to motion the court for a pre-hearing status conference several months in advance of the merits hearing to assist in narrowing the issues.⁹³

Pre-Hearing Status Conferences

During the months between the master calendar and the individual merits hearing, the immigration judge may hold status conferences, as appropriate.⁹⁴ Respondent may fully document alcohol-related incidents, including providing an I-693 that reflects that the respondent fully disclosed the relevant alcohol-related history to the civil surgeon. The respondent can provide evidence to the court of such disclosure—including medical, psychiatric, police, and school reports. The respondent can present records related to enrollment at an addiction treatment center or alcohol rehabilitation program, evidence of addiction counseling, or evidence of participation in recovery activities. An I-693 or other medical/psychological evaluations aid the court in assessing the nature and severity of the alcohol-related incidents. When appropriate, a respondent must present evidence of compliance with any INA § 212(g)(3) waiver significantly in

advance of the hearing, because adjudication of the waiver requires the involvement of the DHS.

Merits Hearings

As a preliminary matter, there are significant concerns about judicial economy when a case scheduled for a merits hearing is unable to proceed. Therefore, employing enhanced case management techniques can reduce the likelihood of an untimely motion to continue. Moreover, in the event that the court is motioned to continue the matter, the immigration judge will have developed a clear record of the responsibilities and expectations to support its decision-making on the motion to continue based on a *Matter of Hashmi* analysis.⁹⁵

Toward a Clearer Legal Framework

Despite the prevalence of alcohol-related issues in immigration court proceedings, there is, nevertheless, a lack of published precedent in this area.⁹⁶ Without clearly articulated standards, this situation can lead to a lack of uniformity in applications across jurisdictions. And, ultimately, lack of uniformity runs antithetical to our most basic instincts about the rule of law that similarly situated individuals should be treated similarly.⁹⁷ Scholars argue that uniformity protects against the feelings of anxiety and degradation aroused by subjecting individuals to unchecked discretionary power and also enhances confidence in the legal system.⁹⁸ Indeed, it can be argued that uniformity rationalizes and humanizes the application of all law, including immigration law. Moreover, greater predictability permits a system to be both analytically richer and more transparent.

Conclusion

In order to increase uniformity of decision-making and provide greater predictability for respondents in removal proceedings, the current statutory, regulatory, and executive branch policy guidance must be reconciled. Under the current scheme, parties may find it difficult to achieve uniformity and relative predictability, because it is not clear how one may sort through the conflicting parameters of the good moral character habitual drunkard bar, the health-related inadmissibility bar related to alcohol-related abuse and dependency, and judicial discretionary authority. All parties may be better served by having this complex and interrelated area more clearly defined. **TFL**

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Endnotes

¹According to a national study prepared in part by the U.S. Department of Health and Human Services, in 2010, an estimated 11.4 percent of persons aged 12 or older drove under the influence of alcohol at least once in the past year, which corresponds to approximately 28.8 million people. *See Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings*, U.S. Dep't of Health & Human Services, available at oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.htm#3.1.4 (last visited Oct. 7, 2011).

²Immigration and Nationality Act (INA) §§ 212(a)(1)(A)(iii)(I), (II).

³INA § 101(f)(1).

⁴INA § 212(a)(2)(A); § 237(2)(A) (for crimes involving moral turpitude).

⁵*See, for example*, INA § 240A(b)(1), § 245(a), § 245(i), and § 240B(a)(1).

⁶*See infra*, pp. 23, 55-58 of this article.

⁷*See infra*, pp. 56-58.

⁸*See infra*, pp. 23, 55-56.

⁹States and localities generally regulate public intoxication through state and municipal criminal laws and ordinances. *See, generally*, National Highway Traffic Safety Administration, *The Role of Alcohol Beverage Control Agencies in the Enforcement and Adjudication of Alcohol Laws, Appendix B*, available at www.nhtsa.gov/people/injury/enforce/abcroleweb/images/ABCFinal.pdf. On the other hand, private intoxication is generally not regulated as a criminal matter. Instead, it is generally regarded as a moral offense, one that offends the populace as a whole rather than a specific victim, and this makes it much more difficult to define. A plain reading of the term “habitual drunkenness” appears to include both private and public intoxication. However, there is no clear definition of how it is defined in the private context, and thus could be evaluated as a reflection of the standards employed in the particular community involved. As a practical matter, the official medical community reports that alcohol use is rampant throughout the country. According to a study conducted by the Centers for Disease Control and Prevention (CDC), during the years 1993 through 2009 “more than half of the adult U.S. population drank alcohol in the past 30 days. Approximately 5 percent of the total population drank heavily, while 15 percent of the population binge drank.” *See CDC, Prevalence of Binge Drinking and Heavy Drinking Among Adults in the United States, 1993–2009*, available at www.cdc.gov/alcohol/index.htm (last visited Oct. 20, 2011).

¹⁰*See infra*, pp. 23, 55-58.

¹¹*See* INA § 240B(b).

¹²*See infra*, p. 58.

¹³*Immigration Court Practice Manual (ICPM)*, § 4.18(a) and (b).

¹⁴*Id.* § 3.1(d)(ii).

¹⁵Juan P. Osuna, director, Executive Office for Immigration Review, Testimony Before the Committee on the Judiciary, U.S. Senate, Hearings on “Improving Efficiency and Ensuring Justice in the Immigration Court System,” May 18, 2011, available at www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf.

¹⁶*Id.*

¹⁷*See* Hon. Dana Leigh Marks, president, National Association of Immigration Judges, Testimony Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office for Immigration Review, June 17, 2010, available at judiciary.house.gov/hearings/pdf/Marks100617.pdf.

¹⁸ICPM. § 1.2(a).

¹⁹*See infra*, pp. 55-56.

²⁰*See* W. Yates, *DHS Memorandum, Requesting Medical Re-examination: Aliens Involved in Significant Alcohol-Related Driving Incidents and Similar Scenarios* (Jan. 16, 2004), published on AILA InfoNet at Doc. No. 04022362 (posted Jan. 23, 2004) (hereinafter cited as “Yates Memo”).

²¹The Administrative Appeals Office has ruled on appeals of USCIS decisions, generally with respect to requests for waivers under INA § 212(g); however, the authors were unable to locate any BIA or circuit law on the issue.

²²*See infra*, pp. 23, 55.

²³*Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001) (under Arizona law, the offense of aggravated DUI with two or more prior DUI convictions is not a crime involving moral turpitude); but *see Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) (under Arizona law, a conviction for aggravated DUI that includes a scienter element requiring the driver to know that he or she is prohibited from driving under any circumstances is a crime involving moral turpitude).

²⁴*Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that felony DUI resulting in serious bodily injury to another is not an aggravated felony in the crime of violence context when the statute in question has no mens rea element).

²⁵*See* Naturalization Act of 1790, 1 Stat. 103 (superseded by the Naturalization Act of 1795).

²⁶Support for expansive immigration that had begun, in part, as a means of attracting cheap labor, had waned with the completion of the transcontinental railroad in 1869. Studies show that the reduction in the need for this cheap labor tolled the beginning of the end of an era that had been founded on liberal immigration policies.

²⁷Page Act of 1875, ch. 141, 18 Stat. 477 (repealed in 1974).

²⁸See, e.g., U.S. Constitution, Amendment 18 (repealed in 1933).

²⁹See Immigration Act of 1917, 39 Stat. 874.

³⁰Harry G. Levine, *The Discovery of Addiction: Changing Conceptions of Habitual Drunkenness in America*, 15 *J. OF STUDIES ON ALCOHOL* 143, 143-174 (1978).

³¹E.M. Jellinek, *THE DISEASE CONCEPT OF ALCOHOLISM* (1960).

³²In a 1992 *JAMA* article, the Joint Committee of the National Council on Alcoholism and Drug Dependence and the American Society of Addiction Medicine published this definition for alcoholism: "Alcoholism is a primary chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortions in thinking, mostly denial. Each of these symptoms may be continuous or periodic." Levine, *supra* note 30.

³³AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994).

³⁴*Traynor v. Turnage*, 485 U.S. 535 (1988).

³⁵See Levine, *supra* note 30.

³⁶*Id.*

³⁷INA § 101(f).

³⁸INA § 101(f)(1).

³⁹6 I&N Dec. 614 (BIA 1955).

⁴⁰*Id.* at 615.

⁴¹BLACK'S LAW DICTIONARY 640 (5th ed. 1979).

⁴²*Id.*

⁴³Levine, *supra* note 30.

⁴⁴INA § 212(a)(1)(A)(iii).

⁴⁵*Id.*

⁴⁶42 C.F.R. § 34.2(b) (defining "communicable diseases of public health significance") and § 34.3 (scope of medical examination).

⁴⁷*Id.*

⁴⁸See *CDC Immigration Requirements: Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders* (June 1, 2010), available at www.cdc.gov/immigrantrefugeehealth/pdf/mental-health-cs-ti.pdf (hereinafter cited as Technical Instructions).

⁴⁹See *Form I-693, Report of Medical Examination and Vaccination Record, Part 2, Question 3*.

⁵⁰APA, DSM-IV, *supra* note 33. The DSM-IV does not use the term "alcoholism." Rather it defines the mental disorder as "alcohol abuse" and "alcohol dependence" and defines "alcohol abuse" as repeated use despite recurrent adverse consequences. The DSM-IV defines "alcohol dependence" as alcohol abuse combined with tolerance, withdrawal, and an uncontrollable drive to drink.

⁵¹APA, DSM-IV, *supra* note 33.

⁵²*Id.*

⁵³See generally 42 C.F.R. § 34.3.

⁵⁴*Technical Instructions* at 11.

⁵⁵See 42 C.F.R. § 34.3(f).

⁵⁶*Technical Instructions* at 16.

⁵⁷42 C.F.R. § 34.2(d).

⁵⁸*Id.* at § 34.2(e).

⁵⁹*Id.* at § 34.8(a).

⁶⁰*Id.* at § 34.8(c).

⁶¹*Id.* at § 34.8(c)(4).

⁶²*Id.* at § 34.8(k).

⁶³8 C.F.R. § 1245.5; 42 C.F.R. § 34.1(d).

⁶⁴ICPM § 4.18(a).

⁶⁵Yates Memo, *supra* note 20.

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹Dep't of State cable no. 072132Z (June 07, 2007), available at travel.state.gov/visa/laws/telegrams/telegrams_3267.html (last visited Oct. 20, 2011).

⁷⁰*Id.* (emphasis added.)

⁷¹INA § 212(g)(3); 8 C.F.R. § 212.7(b)(4).

⁷²See generally *Form I-601, Application for Waiver of Grounds of Inadmissibility, Instructions (revised June 8, 2011)*.

⁷³A review of the Board of Immigration Appeals' precedent and nonprecedent decisions reflects no cases on point.

⁷⁴16 I&N Dec. 581 (BIA 1978); see also *Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998) (applying Marin factors to cancellation of removal cases).

⁷⁵*Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).

⁷⁶See, e.g., *Marin*, 16 I&N Dec. at 585.

⁷⁷Wilson G. Khazetyan, A28 142 402 (BIA April 1, 2008).

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹See *id.*

⁸²Luis Alonzo Gonzales-Figeroa, A29 013 696 (BIA Feb. 10, 2006).

⁸³Pawel Sienkiewicz, A089 013 624 (BIA Oct. 20, 2009) ("In light of the respondent's two undisputed incidents of driving under the influence of alcohol, we also agree with the Immigration Judge's discretionary denial of voluntary departure ...").

⁸⁴*Le v. Elwood*, 2003 WL 21250632 (E.D. Pa. 2003).

⁸⁵8 C.F.R. 1003.23(a); see also, *Immigration Judge Bench Book, Tools, Introductory Guides, Motions*, available at www.justice.gov/eoir/vll/benchbook/tools/Motions%20to%20Reopen%20Guide.htm.

⁸⁶*Immigration Judge Bench Book, Tools, Introductory Guides, Introduction to the Master Calendar*, available at www.justice.gov/eoir/vll/benchbook/tools/Purpose%20and%20History%20of%20MC.htm, where it is stated that during the setting of the master calendar, "the immigration judge has great flexibility

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to identify issues, make preliminary determinations of possible eligibility for relief, resolve uncontested matters, and schedule further hearings.”

⁸⁷“The general rule with respect to evidence in immigration proceedings favors admissibility as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980), *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Lam*, 14 I&N Dec. 168 (BIA 1972); *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983); *Tashnizi v. INS*, 585 F.2d 781 (5th Cir. 1978); *Trias-Hernandez v. INS*, 528 F.2d 366 (9th Cir. 1975); *Marlowe v. INS*, 457 F.2d 1314 (9th Cir. 1972).” See *Immigration Judge Bench Book, Tools, Introductory Guides, Evidence*, available at www.justice.gov/eoir/vll/benchbook/tools/Evidence%20Guide.htm; see also 8 C.F.R. §§ 1240.7(a) and 1240.46(c), which provide that an immigration judge “may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.”

⁸⁸See *id.* In applications for relief from deportation, the burden of proof is on the respondent to show eligibility for the relief sought. See, e.g., *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007); and *Matter of Jean*, 27 I&N Dec. 373 (BIA 2002).

⁸⁹ICPM § 4.15(e).

⁹⁰*Id.*

⁹¹*Id.*; see also § 4.16(b)(iii).

⁹²*Id.*

⁹³*Id.*

⁹⁴ICPM § 4.15(e).

⁹⁵*Id.*

⁹⁶24 I&N Dec. 785 (BIA 2009).

⁹⁷See *Khanzetyan supra* note 77.

⁹⁸See ICPM, *Letter from the Office of the Chief Immigration Judge*.

⁹⁹See generally Ryan Terrance Chin, *Moving Towards Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1859–1906 (2011); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635, 1704–1705 (2010).

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