The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section
Hon. Robin E. Feder, Section Chair

Quote of the Month

There is an army of angry acronyms out there, and they each have a very specific agenda. And this is not a judgment call on OSHA, or the EPA, or the SPCA or PETA, but they all have their letters and they all have their marching orders and none of them are there to make your life easier. They're there to make you more compliant.

—Mike Rowe, host of Discovery Channel's Dirty Jobs

From the Chair

"We will screw something up. We'll screw many things up. Tell us when this happens. If you have an idea that will improve us please speak up. We'll thank you. Everything we are today, every single recipe, everything we do, has been developed with help from our customers. Read about our adventures: www.cloverfoodlab.com

Follow us for updates: @cloverfoodtruck."
(As seen on Clover Food Lab's take out bags)

L to R Hon. Robin Feder, ILS Section Chair, Hon. Gustavo Gelpi, Immediate Past FBA President, Matthew Moreland, FBA President, Hon. Mimi Tsankov, ILS Section Treasurer and ILS Annual Conference Chair

Dear colleagues,

Zagat, the go-to guide for deciding where to eat and drink, calls Boston's "Clover Food Lab" one of 20 regional chains they wish would go national. If you

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L to R Hon. Robin Feder, ILS Section Chair, Hon. Lawrence Burman, Past ILS Section Chair, Green Card Editor

live or work in Boston, you know what Zagat is talking about. Clover is revolutionary fast food. Fast food is not new, but Clover's conception of fast food is healthy, locally—sourced and completely innovative—and Clover is growing by leaps and bounds.

I am pleased to report that the Immigration Law Section is also growing and prospering. From October 1, 2014, through May 31, 2015, approximately 100 new members joined our ranks. This is an increase of more than 25%. By contrast, FBA National's benchmark measure for Sections, Divisions and Chapters is only 3% growth per year.

Our programs and initiatives are also growing and prospering. We have continued our two-day Annual Conference (Memphis), our day-long Symposium (American University, Washington, DC), our Global Citizenship Conference (Rome, Italy) and our Leadership Luncheons (Washington, DC). We have added and/or supported a Border Law Conference (El Paso), and new CLE programs in New York, Boston, Chicago, and New Jersey. We have added a committee (Chapter/Section Liaison) which is devoted to partnering with every FBA Chapter that wishes to start or seek support for immigration law programming. The Chapter/Section Liaison Committee also handles the ILS Chapter and Section Activity Fund, which operates on the same principles as FBA National's Chapter Activity Fund. An FBA Chapter or Section seeking financial support for a program completes an application for funding and the request is vetted by the Committee, using consistent standards. The Committee has a limited budget which must last through the year. This year, we provided financial support to the Border Law Conference in El Paso, the New Jersey Chapter's immigration CLE, and the Immigration Law Section's Younger Lawyers Division Happy Hour at our 2015 Annual Conference in Memphis. As we did last year, we are also funding a reception at the FBA National Annual Meeting and Convention in Salt Lake City (September 2015), along with many other Sections and Divisions.

In addition to our Publications, Programs (CLE) and Social Media Committees, we now have committees devoted to awards, budget, bylaws, diversity, government relations, law students, membership and sustaining membership, pro bono representation, and younger lawyers. We also have a committee (Substantive Law) that acts as a resource for those whose programs are in need of a speaker or those who need an author on a particular subject.

What is it that makes an organization grow and prosper? Countless books and articles are devoted to the subject. I think that Clover has it about right. In addition to my predecessors—Ray Fasano, Hon. Lawrence Burman and Barry Frager—who laid the groundwork for the growth we are currently experiencing, I also have the members of this Section to thank, for every new program and initiative we have undertaken this year has come from your ideas. When something is not working, tell us. If you have an idea for another program or initiative, share it with us. Tom Peters, the author of "In Search of Excellence," famously said, "[e]xcellent firms don't believe in excellence—only in constant improvement and constant change."

From attending FBA National meetings, I know that our Section is fortunate to have an engaged and passionate Board. Every Officer and Board member is on at least one, and often more than one, Committee. Our Committee Chairs are ILS members who expressed an interest in the business of our Section, and welcomed the opportunity to assume a leadership position. Their enthusiasm for the Section has been contagious; their creativity endless. They welcome the opportunity to learn, to network and work on an idea to which they are committed. Many Section members like yourselves are reaching out and asking to be appointed to committees. This is not surprising, as every Committee offers the best that the FBA has to offer: professional education; leadership opportunities; and networking with colleagues in the public, private, non-profit and academic sectors. As a result of so many Section members taking an ownership interest in the Section, we have grown expansively. If you are not yet actively involved in the Section, please reach out to me and let me know what your interests are. We want to see more of you, welcome you and get to know you.

In the meantime, I wish you a wonderful summer! ◆

Robin

Hon. Robin E. Feder writes in her personal capacity as Chair of the Immigration Law Section of the Federal Bar Association and the views she expresses are her own and not those of the Executive Office for Immigration Review.

Section Events Calendar

First Border Law Conference Huge Success
By Mark Shmuel

The immigration law section lent its support and sponsorship to the El Paso chapter in its Border l Law conference on January 28-29 2015. Held at the University of Texas El Paso the conference featured panels on a myriad of issues surrounding the border including money laundering, child abduction, border patrol excesses and immigration law and policy. El Paso U.S. Congressman Beto O'Rourke participated in an extremely candid and informative panel on the effects of current immigration policy and reentry after removal orders on border communities. Representative O'Rourke reminded the audience that while the major media and many of his colleagues portray border communities as under assault from those risking their lives by fleeing extreme violence and insecurity in Central America, that El Paso was indeed the safest city of its size in the US. This conference was extremely enlightening to those of us not from the border as we saw the realities on the ground. The El Paso chapter arranged for 2 hour tours of the Port of entry conducted by a CPB agent. This tour took us to both the entry points themselves and the inside of the entry port including the detention cells and the room of confiscated items by customs. The amazing link from this conference to the conference on the intersection of criminal law, immigration law and detention was due to the enthusiasm of several of the participants including Federal District Judges Robert Brack of Las Cruces, New Mexico and Richard Hinojosa of McCallan Texas along with ILS board member Assistant Public Defender Kristin Kimmelman of El Paso. The next Border Law Conference is scheduled for December 2016 in Arizona. ◆

American University CLE Second Annual Symposium
By Mark Shmueli

Our second annual collaboration with the America University Washington College of Law focused on the intersection of criminal law, immigration law, and detention. This symposium, which I co-chaired with Immigration Judge Dorothy Harbeck treated these topics, heavily discussed both in the immigration bar and the nation at large, in a unique fashion. Along with immigration judges from throughout the country, the private bar and academia, this symposium featured a focus on immigration detention and prosecution at the U.S./Mexico border. Judge Brack, who has the most convictions of any federal judge in the US due to the astronomical level of arrests for re-entry after removal, described a typical day in his courtroom and the manye many families that the law forces him to separate with these convictions. Judge Hinojisa, the recent chair of the federal sentencing commission, explained that the volume of prosecutions for unauthorized re-entry was much less in his court as prosecutors only brought those cases with aggravating factors or additional charges. Jon Sands and Kristin Kimmelman explained the lack of a ral defense against the charge of unauthorized re-entry and their extremely limited options for their clients. Hearing from these four brought a persepctive and a reality not often seen outside of the border and magnified the differences between immigration enforcement and detention at the border and away from the border. ◆

Immigration Law Conference in Memphis—May 2015
By Mimi Tsankov

In mid-May, the FBA Immigration Law Section held a very successful national section conference. More than 300 participants descended upon Memphis, Tennessee for its annual CLE for two full days of training and networking. The program was comprised of four separate full-day tracks. An impressive roster of national immigration law leaders representing government, non-governmental organizations, academia, and the private sector spoke. The variety of discussion topics included ethics, best-practices, asylum law, crimmigration law, administrative and court procedure, and current events surrounding the recent influx of migrants on the Southern U.S. border.

Conference attendees included attorneys and paralegals, government officials, non-governmental and non-profit attorneys, law students, and law clerks. Of special note was the participation several honored guests and speakers including FBA President Matthew Moreland and former FBA President Hon. Gustavo Gelpi, as well as officials from the U.S. Department of Justice, U.S. Department of Homeland Security, and the U.S. Department of State.

Networking opportunities were abundant with lunchtime and evening events at the Rendezvous Restaurant, the Memphis "Rock 'n Soul" Museum, and the Belz Museum of Asian and Judaic Art. The Section's Younger Lawyer's Division is proud to have launched its inaugural happy hour. The festivities culminated in the announcement of the following national awards:

FBA ILS Lawyer of the Year Award—Professor Karen Musalo
FBA ILS NGO Lawyer of the Year Award—Amelia Wilson, Esq.
FBA ILS Younger Lawyer of the Year Award—Robin Trangsrud, Esq. and Tara Lundstrom, Esq.
FBA ILS Government Lawyer of the Year Award—Hon. Robin Feder

Finally, the FBA ILS Awards Committee announced a number of additional section awards and certificates honoring a select group of FBA members for their sustained service over the past year, as well as those government officials that supported the 2015 Memphis Conference. ◆

Immigration Law Conference in Memphis—May 2015 Photo Recap

Immediate Past FBA President Hon. Gustavi Gelpi and FBA President Matthew Moreland, Esq. conferring during a short break.

FBA ILS Board Member Christina Fiflis and FBA ILS Conference Committee Member Dr. Alicia Triche, Esq. presenting on "Asylum in the Era of Artesia."

Hon. Rebecca Holt and FBA ILS Board Member and Bylaws Committee Chair Hon. Dorothy Harbeck at a networking event.

FBA ILS Board Member and Awards Chair Dr. Alicia Triche, Esq. and FBA ILS Vice Chair Eileen Scofield presenting an award to Professor Karen Musalo.

Welcome Session – FBA ILS Chair, Hon. Robin Feder, FBA President Matthew Moreland, Esq., FBA ILS Programs Chair Christine Poarch, Esq., and FBA ILS Conference Chair Mimi Tsankov.

EOIR Director Juan Osuna addressing the conference attendees.

Immigration Law Conference in Memphis—May 2015 Photo Recap

FBA ILS Conference Committee Member Mark Shmueli, Esq., FBA ILS Vice Chair Eileen Scofield, Esq., Tina R. Goel, Esq., and Jeff Joseph, Esq. at a networking event.

FBA ILS Young Lawyers Division Chair Robin Trangsrud receiving an award from FBA ILS Committee Chair, FBA ILS Board of Directors and FBA ILS Awards Committee member Hon. Amiena Khan.

FBA ILS Board Member George Terezakis, Esq., Immediate Past FBA President Hon. Gustavi Gelpi, FBA ILS Board Member Justin Burton, Esq. on "crimmigration."

Cyrus Mehta, Esq. and Ari Sauer, Esq. presenting on the issue of CSPA.

Regina Germain (CIS), Karen Donoso-Stevens (ICE) and Hon. Jack Weil (EOIR) presenting at the conference on asylum for unaccompanied minors.

Congress: Asylum System Letting in Terrorists

By Jason Dzubow

According to a letter from four members of Congress to DHS Secretary Jeh Johnson, a "recent disclosure [by USCIS] regarding the number of aliens found to have a 'credible fear' in cases where the terrorism bar to asylum eligibility may have applied raised the concern that hundreds of known and suspected aliens with terrorist connections may be attempting to take advantage of our country's asylum system."

The "recent disclosure" from USCIS to the House Committee on Oversight and Government Reform revealed that "the terrorism bar to asylum eligibility may be applicable to 299 aliens who were found to have a 'credible fear' of persecution in the first four months of Fiscal Year (FY) 2015, and to 339 aliens who were found to have a 'credible fear' in FY 2014." The four Congressman–Bob Goodlatte (R-VA), Jason Chaffetz (R-UT), Trey Gowdy (R-SC), and Ron DeSantis (R-FL)–requested more information about the 638 aliens in question, including each aliens' confidential A-file and whether and by what authority each alien was released from detention.

First, what's this all about?

When an alien arrives at the border (or at an airport), she can request asylum. Rather than admit her into the U.S., the alien is usually detained and scheduled for a "credible fear" interview–a preliminary evaluation of eligibility for asylum. The large majority of aliens "pass" the credible fear interview. Their cases are then transferred to an Immigration Judge and–in most, but not all, cases–they are released from detention. Aliens who do not pass the credible fear interview are deported.

In 638 credible fear interviews, conducted since October 2013, the alien said something or the U.S. government had some information that may have implicated a Terrorism-Related Removal Ground ("TRIG"). This could have been something relatively benign (the alien paid extortion money to a gang) or something of great concern (the alien is Osama bin Laden's best friend). We don't know–the TRIGs are very broad.

One piece of information that we do have is the list of countries that send us the most credible fear applicants: El Salvador, Mexico, Guatemala, Honduras, and Ecuador. These are not normally countries we associate with terrorism. However, these nations have major problems with gang and cartel violence, so we might suspect that many of the TRIG issues raised in credible fear interviews relate to paying extortion to criminal groups. Again, though, we really don't know.

So what's the solution? In their letter, the four Congressman request more information from DHS about the TRIG issues raised during credible fear interviews. This seems to me a perfectly reasonable request. We need to know more so we can better understand what is happening, who is coming here, and how we can make more appropriate policy decisions.

I do have a few concerns about the letter, however. At least some of the Congressmen making the request have demonstrated a clear bias against asylum seekers. Since everything these days is subject to spin, I worry that the Congressmen will use the data–no matter how benign–to stir up more anti-immigrant feelings and place further restrictions on asylum seekers. DHS should not let that happen. DHS can do its own evaluation of the data and release a report to the public (it would be difficult to make the raw data publicly available due to confidentiality issues).

Another concern I have is that the Congressmen are requesting the A-files for individual asylum seekers. Pursuant to 8 C.F.R. § 208.6, these files are confidential, though they can be shared within the government for legitimate purposes. While I believe that the Congressmen have no intention of breaching confidentiality, we do not know what safeguards they have put into place to protect the individual asylum seekers. Who will be reviewing the 638 files (that will be a big job)? Interns? Regular staff members? What training do they have? Do they have a security clearance? Where will the files be kept? How will the results of the study be released so as to ensure confidentiality for individuals? What will happen to the files at the end of the process? These questions need to be answered *before* DHS releases the A files to Congress.

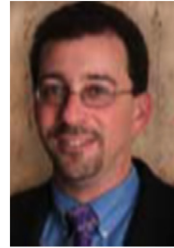
From the Editor

Please send all news items to me at LBurman@aol.com. We really want to know what is happening in the Section, and in the professional lives of our members. We especially would appreciate photographs. Kindly send submissions in Word format.

Larry Burman, editor

Finally, the letter demands that the files be turned over before COB on June 3, 2015–two weeks after the letter was written. How the Congressmen expect DHS to gather this information and turn it over on time–while ensuring confidentiality–is beyond me. The seemingly impossible time frame attached to the letter detracts from its credibility. If the Congressmen are serious about gathering and analyzing this data (which is a very worthy goal), they should approach the problem in a more reasonable way. For example, they could involve the Congressional Research Service, which has the expertise to review and analyze raw data from USCIS.

We certainly need more data about who is seeking asylum in the United States, how they get here, why they are requesting asylum, and the decision-making process itself. Such information would make our country safer and our asylum system better. Congress has an important role to play in this process and so does DHS. Hopefully, for once, the two can play nice together and get the job done. ◆



Jason Dzubow is one of the founders of Dzubow & Pilcher, PLLC. His practice focuses on immigration law, asylum, and appellate litigation. In 2011 and 2013, Washingtonian magazine recognized him as one of the best immigration lawyers in Washington, DC. He is an adjunct professor at George Washington University Law School in Washington, DC. His blog, the Asylumist, is the only blog in the U.S devoted exclusively to asylum law.

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Memphis CLE, Hon. Mimi Tsankov
New York CLE, Amy Gell
Rome CLE, Margaret (Peggy) McCormick

Universal Representation Initiatives Gain Ground, Marking A Win For Detained Indigent Respondents

By Amelia Wilson

Deportation has been characterized by the Supreme Court as a "particularly severe 'penalty,'"[1] similar to banishment or exile, and often entails substantial physical, financial or other harm.[2] Despite that, respondents in removal proceedings do not have the right to a court-appointed attorney. For detained and indigent individuals, the challenges associated with mounting a skilled and competent defense while *pro se* are particularly pronounced. Respondents are hobbled by language barriers, lack of commissary funds to make expensive phone calls to potential witnesses in the U.S. and abroad, lack of internet access in detention facilities for conducting country-condition research, lack of legal training to understand complicated forms and regulations, and myriad other challenges that make self-representation nearly impossible.

Existing and emerging programs are responding to the pressing need for improved access to legal services for noncitizens facing deportation. A 2011 report published by the Study Group on Immigrant Representation convened by Honorable Robert A. Katzmann, Chief Judge of the U.S. Court of Appeals for the Second Circuit, found that 60 percent of New York's detained immigrants did not have legal representation. Of those, only 3 percent won their cases in court.[3] This number was in stark contrast to rates for detained, represented respondents—who won their cases 18 percent of the time. (Non-detained, represented respondents won relief 74 percent of the time.)

As a result of that groundbreaking study, a one-year "universal representation" pilot program was initiated in 2013 in New York City with funds from the City Council and administered by the Vera Institute of Justice, a nonpartisan, nonprofit center for justice policy and practice. The Immigrant Family Unity Project (NYIFUP) sought to create the first ever public defender model in immigration proceedings for indigent respondents who had their cases heard before the Varick Street Immigration Court in downtown New York City. The pilot had a cap of 150 cases accepted over the one-year period. In 2014, with significant additional financial backing from the New York City Council, NYIFUP expanded to cover each and every case heard before the Varick Street court for New York City residents who could not afford an attorney and desired legal assistance in their defense.

While NYIFUP continues to serve respondents who were residents of NYC prior to detention, gaps remain nationwide throughout the 250 detention centers housing approximately 400,000 non-citizens. Good news continues to roll in, that said. In the fall of 2014, the Immigrant Rights Program of the American Friends Service Committee (AFSC) in Newark, New Jersey, received a generous grant from the David Tepper Charitable Foundation to launch a mirror universal representation model in New Jersey for indigent detained respondents facing deportation. AFSC's program, called the Friends Representation Initiative of New Jersey (FRINJ), is the second such public defender model of its kind.

FRINJ's objective—like that of NYIFUP—was to create a "merits-blind" model of representation for detainees who cannot afford attorneys and who are appearing *pro se* before the Elizabeth Immigration Court in Elizabeth, NJ. The Elizabeth Court was chosen because it is a smaller court servicing two detention centers (Delaney Hall and the Elizabeth Detention Center).

The grant also enabled AFSC to hire a staff attorney uniquely designated to expanding legal representation to indigent communities in Monmouth and Ocean Counties. Those counties were selected because there was only one non-profit immigration legal service provider in that area with limited capacity to take on complex cases. As a result, residents were required to travel for legal services.

FRINJ was formally launched in March of 2015. Lawyers for the project accept cases for representation not based on the merits of the case but on income eligibility. All detainees who do not have an attorney, are unable to afford an attorney (assessed at 250% of the poverty line), and who consent to representation are eligible for free legal services. This represents a shift in common non-profit models, which measure success by achieving legal status for a high percentage of clients. With a universal representation model, success is gauged by increasing the number of individuals with counsel, which also leads to an increase in gra given data that shows higher approval rates for d who have representation.

At the same time, detainees who are not eli remain in the U.S. will receive accurate informatio their cases, support in the steps they need to take to to leave the U.S., and representation before the Imm Court and ICE. In this way, they will spend shorter periods of time in detention and will better understand their options.

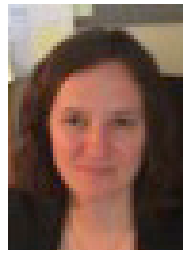
Like NYIFUP, FRINJ is currently in pilot format and will be limited in scope, with a plan to grow with additional funding and possibly partnering with other organizations. Prior to the pilot, AFSC represented approximately 60 detained clients (15 clients per year) before the detained court in Elizabeth, with a similar number before the detained court in Newark. In 2015, AFSC expects to represent at least 200 immigrants before the Elizabeth Immigration Court. These cases include clients with short hearings to accept deporta-

tion orders or voluntary departure as well as clients with longer, more intensive cases who are seeking relief including asylum, Cancellation of Removal, and so on.

These innovative new programs may present the future of immigration defense before detained courts nationwide. They not only ensure fairness for those they affect by providing free, high-quality legal representation and in many cases preventing deportation, but they also expose the staggering financial incentives in providing counsel. It costs the U.S. government roughly $164 a day to detain non-citizens.[4] Where parents and spouses of US Citizens are deported, those who remain struggle financially and often rely on public benefits for basic needs to be met, and the emotional impact on families and their communities is felt for years after the deportation.

NYIFUP and FRINJ will certainly serve as models for the rest of the country to follow. Providing counsel to indigent detained respondents not only makes financial sense for the government, but is the fair and equitable thing to do. Universal representation is critical to protecting the rights of uniquely vulnerable populations, and promotes the integrity of the immigration system. ◆

Amelia Wilson is the Senior Detention Attorney with the Immigrant Rights Program of the American Friends Service Committee (AFSC) located in Newark, NJ where she represents indigent individuals before the detained courts of New Jersey and New York. She specializes in competency hearings for the mentally impaired, asylum law, and deportation defense for individuals with elevated criminal backgrounds. Ms. Wilson is an adjunct faculty member at Rutgers School of Law in Newark, NJ where she teaches immigration law, and an adjunct faculty member at Seton Hall University School of Law in Newark, NJ where she teaches trial skills. She is published in academic and professional journals and speaks nationally on complex issues of immigration law. Ms. Wilson graduated from the University of Minnesota Law School in 2004.



Endnotes

[1]Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

[2]*Id.* at 1486 (*citing* Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)).

[3]Steering Committee of The New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357, 393 (2011) (available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf)

[4]Detention Watch Network, *About The U.S. Detention And Deportation System* (available at www.detentionwatchnetwork.org/resources).

Federal Bar Association

Annual Meeting and Convention

Sept. 10-12, 2015 ▲ Salt Lake City

Article

HOLISTIC LAWYERING:
To Benefit Lawyers and Their Clients
By Lisa Johnson-Firth

Representing immigrant clients is refreshing, exciting, enjoyable, challenging and life-changing. It is like traveling the world without leaving your office. Much of my emotional and spiritual growth has come from working with clients from the around the world and hearing their stories. They bear their hearts and souls, their joys, sorrows, and cultural treasures in a uniquely vulnerable and open way. I see my clients at their highest and lowest points, such as when they are reuniting with family, when they are becoming naturalized, or when they are pressing to stay in the United States in the face of deportation proceedings so that they may secure their freedom, security and family unity. No matter the legal reason that my clients have come to see me, most, if not all, need much more than a lawyer. They need a social worker, minister, caretaker, mentor, healer, doctor, dentist, life coach, and, quite often, a miracle worker, but most of all they need to work with a person who is fully present.

While our primary role as lawyers is to be a zealous advocate for our clients by using the law in our favor, we can accomplish this goal through much broader and holistic means than just using our mental lawyering skills. When we "tune-in" to the greater situation, using all of our senses, heart and intuition, more opportunities open for us to achieve excellent legal results for our clients as well as healing in ways that can only be described as miracles. And, when law is practiced on the mental, intuitive and heart level, it makes practicing law a much deeper, more meaningful and sustaining experience for us as lawyers.

"Holistic" can mean many things to many people, but for purposes of this article it means the following:

1. Seeing your client as a whole person – more than just a client and more than a pay check. It includes taking note of their physical situation (health, housing, finances); their emotional situation (separation from family, post traumatic stress, acculturation issues); their mental abilities; and the cultural and spiritual traditions that they draw upon for strength and identity.

2. Representing the legal case while maintaining awareness of the other factors of a client's situation that is impacting the case and addressing those factors either by handling them directly or referring the client to additional sources of support.

3. Recognizing that everything around us is an energy vibration – including our thoughts and the words we speak. What we think, say and do make a profound difference in our lives and the lives of our clients. This may seem obvious, but becoming aware of or "awakened to" the life force energy within you, and that there is more dimensionality in this world than just the physical reality we see and touch, will help you become fully present in the moment. You will also become aware of how your "energy" as it is expressed through you, creates a vibration into the world that can make the difference between successfully representing your client or not. It is this third point – the thoughtful recognition and use of energy – that is the focus of this article.

My Path to Holistic and Awakened Lawyering

My father was a lawyer. He was an example of a typical lawyer: left-brained, analytical, precise and logical – very much in his head and skeptical of anything that could not be seen or touched. As a child I was naturally intuitive and right-brained; I was an artist, musical and connected with nature. Notwithstanding these traits, I had a strong calling to work towards the ideals of freedom, liberty and justice for all persons, and especially for those most disadvantaged. I determined at the age of ten years I would be a lawyer and I applied myself diligently to that task through college and two law degrees in both England and the United States.

For the first seven years out of law school I worked in top corporate law firms in the UK and United States. My mind felt sharp, brilliant and superbly intellectual as I worked in high-pressure environments demanding peak performance and efficiency for long hours. While these attributes of intellect and hard work served very well in the corporate world, I managed to utterly crush out of me the part that was "sensing:" my right-brained, artist and intuitive nature, especially as my world became very materialistic.

In my early thirties, after becoming a mother, I shifted my focus from corporate law to nonprofit work in human labor and sex trafficking, becoming one of the first lawyers working with T and U visas and drafting a nation-wide manual on the steps lawyers should take when representing victims of human trafficking. From there, I went to work at a nonprofit specializing in gender-based human rights claims for women.

When working with immigrant clients fleeing torture, persecution and all manner of horrific circumstances, I quickly realized that my legal skills, so carefully honed after 20 years of preparation and hard work, were no longer sufficient to meet my needs or those of my clients. I was being called to meet my clients at a heart level that

was both exhilarating and excruciating. There was much more going on with my clients than "met the eye." Their lives were visibly affected by things I could not see, put down on paper or analyze. Working with these clients day after day soon overwhelmed me and within a few years I was experiencing clear signs of secondary trauma and burn out.

More hurtful than experiencing the trauma symptoms was that fact that my heart was becoming hard. My spirit was dead. I was cynical that any good could exist in humanity because I had failed to rationalize through my intellect how bad things could happen to good people. I was angry at the state of the world and I realized I might have to leave practicing law in order to find my happiness again. However, I did not want to choose that option because law and helping people *were* my chosen path. So, I had a choice. I could continue to close my heart and be angry, miserable and traumatized, or I could begin a path of awakening and exploring the "more" of what was going on with me and my clients.

This new path involved an ever-expanding opening of my heart, in a conscious way, and learning about the energy that makes up all of life – the energy that breaths our beings. I began studying and experiencing spiritual practices from around the world and developing my extra-sensory awareness that have allowed me to function at all levels of my being.

This energy, indeed, the energy that is within each of us, is known around the world by different names: in Christianity as *the holy spirit*; in India as *prana* and *kundalini*; for the Chinese as *chi*; and for high performers as "fire in the belly." When you become conscious of the fact that everything and everyone is energy that can be influenced significantly through your own energy expressed as thoughts, words and actions, then you have developed consciousness and awareness. The world becomes an exciting place because you begin to realize that each of us really has a significant role to play in shaping our realities.

Importantly, you do not have to believe in God or have any religious belief system to acknowledge or sense this energy. It is present whether you feel it or believe in it or not. Science has already proved its existence many times over, and if you take a moment now to breathe in, close your eyes, and come into the present moment, most likely you will sense it. Whoever you are, whatever your tradition, the *conscious use* of the energy within you and around you has the power to transform your life and, in turn, the lives of those around you, including your clients.

Through practices such as deep meditation, prayer, yoga, and other intentional practices that use affirmative and conscious thought and word (vibrational energy) to change the vibrational frequency of the circumstances around us, I became tuned in to the larger world around me and I began operating at these other levels of awareness. It was no longer that I had to just use my mental abilities to win a case for a client, I now had many other tools at my disposal to shift the energy and circumstances of each case, thus producing optimum results. This is not to say that each client does not have his own path to walk. We cannot save our clients from their path, but we can facilitate a clearing of their path for the highest and best outcome for them. My view is that if a client has come to me as a lawyer, there is always something that I can do to assist them on their way, even if it is just a reality check, and even if they are facing certain deportation.

Through being an expanded and awakened person, I have grown, and you can too, into a holistic person and lawyer – meaning that I sense and give consideration to myself and clients as whole beings functioning simultaneously on spiritual (energetic), emotional, mental and physical levels of being. Through this expanded awareness, I have experienced a greater sense of wellbeing and an allowing of what appear to be miracles, or the positive use of energy to shape the world, that happen with great frequency. This path has helped me maintain my passion and purpose for my work as well achieve an extraordinary high rate of success in my clients' cases.

Below are suggestions for expanding yourself and your law practice to bring joy, connection and a sense of the miraculous into your life and that of your clients.

Suggestions to Creating a Conscious and Awakened Law Practice:

1. *Create a Nurturing Environment*. Create a nurturing environment for yourself and your clients. Your office is a home away from home. Make it a place that is pleasing esthetically and energetically to you. Have it be a place that brings calmness and retreat even in the midst of the chaos that often accompanies a law practice where sudden emergencies (deportations, clients getting picked up by ICE) can take over. Your clients will also sense the nurturing environment and will be more at ease and receptive to you. Offer your clients amenities that help them feel nurtured: have tissues available, offer tea, coffee and the like. This may be the first place they have felt "welcomed."

2. *Practice Presence*. At the start of each day, develop a practice of bringing your full presence and gratitude to yourself and your office environment before you go into the office and throughout the day. Before I come into the office I sit in my car for about five minutes and I feel the energy running through my body – coming through the crown of my head and running through my feet into the ground. I practice grounding myself into my body and taking slow deep breaths to relieve tension and a rapidly racing mind. I close my eyes and visualize my body and mind being filled with golden energy or liquid gold. My feet become like the roots of a tree buried deep into the earth. I consciously open myself to a sense of deep gratitude for all that I am and all that is around me. I open myself up to be of the highest and best service to myself and my clients and to have clarity at all times.

3. *See the Divine in Every Person*. Practice seeing and

sensing the divine in each person that comes through your door and know that they are there for a reason. They have been guided and led to you for a special purpose that you are uniquely suited to fulfill. Let go of worry, fear and doubt about making a law practice run and achieving a certain number of clients through the door each day. Let go of competition and measuring yourself against other lawyers. Trust that the right clients who need your services will be led to you and that you are capable, through your legal skills and divine (self) guidance, to meet their needs or to have the wisdom to refer them to other professionals that can assist them.

4. *Find Purpose in All that You Are and Do*. By practicing presence, intentionality and by being aware that who and what you are affects yourself and everything around you, you will naturally seek ways to be of service to others. It is through service in the world that most of us find our greatest meaning and purpose, and what gives us the gifts of love, passion and happiness.

5. Keep Your Space Energetically Clear. Learn to sense the energy in your office, yourself and those around you. As lawyers we pick up a lot of debris from the lives of our clients. Many clients have experienced grave difficulties. They bring themselves and all their baggage to our office and often leave much of it behind. They also tend to energetically cling to us – tap our energy. This can create a very draining environment in which to work and can cause us to feel depressed or tired without realizing that it is actually not us at all, but the energy left from our clients. There are many ways to clear this energy depending on your belief system and experience. Visualizing yourself in the light – always – is one of the most effective ways of keeping yourself and your space clear. Other ways are described below.

Draw upon your own traditions for clearing and protection. If you don't have a spiritual tradition, clearing can be done quite simply by visualizing light flowing through every room and corner of your office and visualizing breathing in fresh clean air. This effective practice can be done unbeknown to anyone else anywhere and anytime, including at court and in prisons.

How is this possible to clear space just through visualizing light energy, through prayer or meditation? Because your thoughts and intentions are energy vibrations and they really are that powerful. Most of us have had the experience of being in a room that felt weird or felt good. The difference was the vibration present. You can impact that vibration significantly through your own intentionality to create a positive environment, because all things are energy, all things are vibration, and all things respond to intention and thoughts, which are also energy. It is this principle of all things being energy that makes prayer effective, because prayer is simply the positive affirmation and shaping of energy through intention. Prayer, mediation and visualization of light can clear the space for the highest and best to come through and be available, as well as influence the hearts and minds of those you are helping and working with. Praying before court or before entering a prison can make a positive difference in you and in your case. This "secret" of all things being energy and being influenced by energy has been cloaked in religion and traditions for thousands of years but is finally being made known and used in the most practical and simple ways. Other suggestions for intentional clearing include burning sage or sweet grass (a Native American tradition of clearing) and using sound vibration such as Tibetan or crystal signing bowls, chanting, singing or even playing chakra mediation music from YouTube or your computer.

6. *Keep Yourself Energetically Clear*: Nothing is more important in law than keeping a clear mind and spirit. When we get cluttered, we become confused and can miss important issues in our clients' cases.

Essential oils are very effective to use with yourself and your client (with their permission and if you sense they are open to it) for clearing and emotional stability. Lavender oil, for instance, is used around the world for calming and stress relief. Peppermint and eucalyptus oil can bring an openness to your mind and great clarity. Cinnamon oil and heavier-scented oils can be grounding.

If you feel a particularly heavy attachment to a client after a meeting, close your eyes and visualize or look to see if there are any chords or attachments running between you and that client. If so, gently visualize cutting the cord and returning the attachment to the client. Visualize the healing of yourself and your client. Attachments between you and your clients are not appropriate and can be very draining. Allow any darkness you may feel in your body or energy system to fall or drain away and be replaced with vibrant flowing light.

Take a shower in the evening, especially if you have been at a jail or the court. There are a lot of energy attachments around and on us after being in crowded and especially highly-charged emotional places. When you take a shower, take it with the intentionality of the water clearing your body and energy field. It can be helpful to visualize the water as silver or crystalline light.

Allow client experiences and what you hear from your clients to pass through you. Gruesome stories of abuse and torture can get stuck in us, especially if we have been wounded emotionally or physically ourselves. Holding the experience inside can create an energetic infection or "disease." And, instead of building walls against the pain, visualize yourself as a screen door and allow the experiences to pass through like the wind. Welcome the feelings that arise in you and notice them without attachment. Recognize your clients' experiences as their path, that they have chosen, and begin to see them not as victims but as sentient beings who have chosen their paths, as difficult as the paths may be. Your job is to assist them on their path, not save them from it.

Taking a few minutes to meditate, breathe, and ground yourself at the end of the day, letting thoughts of the day float off and completing with a prayer of gratitude for all

that is and your ability to be of service in the world.

Most important! Take time to enjoy your life and exercise and eat right. Putting good food, good thoughts and good energy into yourself through exercising is essential. Limit alcohol as a way to reduce pressure and learn to be consciously present and meditative throughout the day as an alternative. I was impressed when I volunteered at the AILA Artesia Project for all the women and children, and one of the long-time volunteers made sure she got her run in every day, even though she was working about 18-20 hour days. And, know when you have had enough. If immigration law is not for you anymore, know when to quit before risking your health and wellbeing.

7. *Remain Keenly Present and Open When Handling Clients Cases and Expect Miracles*. What does this mean? It means bringing all your lawyer skills, listening and intuitive skills to the table in full presence and attention. After getting all the facts and doing your legal homework, trust your gut feelings about the right course of action. Discover ways of testing your intuition through your body (known as kinesiology). Simple techniques can be used to verify a gut call without your mind getting in the way. Even in tough cases, prepare for the worst and hope for the best. Having a positive attitude and trusting your gut can make the difference between winning and losing a case. I have had many cases that should have lost based upon the law, but won because all the parties felt the true path and inspiration of the case. One judge actually said from the bench that he honestly did not know why he was granting my client cancellation of removal because legally she was far from meeting the requirements. But, I knew why he was granting the case: when "feeling" the case it simply did not feel right to deport her (and I don't feel that way about every client!). Keeping her in the United States was the best outcome, regardless of the law.

8. *Enjoy the Growth You Will Experience and Your Clients' Successes as a Result of being Expanded and Awakened in Your Law Practice.* Here are some of my experiences:

I just got prosecutorial discretion (PD) recently for a case that had initially been denied by DHS because my client had lost TPS through multiple DUIs. My client had given up hope on the case and he had no money to pay me, due to being out of work and his long-term partner's expensive medical bills. When I had been in court with him six weeks earlier, at the time of the DHS denial for PD, he was despondent and just wanted to be deported. Yet I had a strong gut feeling that it was worth filing a motion for administrative closure with the judge. At the second court hearing, before the judge came in, a new DHS attorney was on the case and she agreed to PD. In the end, the client achieved a favorable outcome and had a second chance at life despite what seemed to be a desperately losing situation. I attribute part of this success to prayers for my client, the judge and DHS, all of whom were open to finding the best outcome for the government, the client and his partner.

Other situations have been more dramatic. For instance, a few months ago I had a client's wife, from whom I was taking a declaration, be healed in my office of rheumatoid arthritis. That morning she had come to my office to offer a statement as to why it would be extreme hardship for her if her husband was not granted a waiver. She was in great pain that day, barely able to sit in her chair. I offered her my full presence and felt into her energy. At some point, as she was talking, I asked very expectantly and knowingly if there was anything more she would like to discuss, sensing that she was holding back on information that while not directly relevant needed to come out (I feeling a lot of anger and resentment in her). She looked surprised, but within seconds began spilling out how for ten years she had been severely sexually abused by her father from the ages of five to 15 years and that she had never told anyone, not even her husband. I consciously held space for her to pour out her tears and words, and as she was talking, the emotional pain that she had held for so many years, and that had frozen her body stiff, left her and she experienced immediate relief from all pain. She was in disbelief as she began moving freely. She wiggled her hands and fingers and smiled. The pain that had gripped her for years was gone. This was not a planned part of the declaration or my day. Indeed, it was a day I did not really have time in my schedule to diverge from the course. However, to see the relief and joy on her face from being pain free was worth the extra time I had with her. Now she is free from pain, and we have since won her husband's waiver case.

Another client, who had watched her father be tortured to death in front of her eyes at the age of ten, froze and dissociated when giving her declaration. She had told me all about how her husband had been killed in front of her, but when it came to describing her father being killed, she reverted to memories as a child that were unspeakable. We sat in silence for a minute and I "tuned in." I looked at her and softly asked, "Did you ever have an opportunity to honor your father's death?" She shook her head no. I lit a candle for him and we sat in silence for awhile. But, she remained distant and unable to talk. After several more moments of sitting in silence, I was feeling there was a need for me to assist her further. I asked her if she felt like drumming. Her eyes lit up and she said, "Yes." I had a few drums and we each took a drum. For a half-hour we lost ourselves in drumming and for every moment that went by I felt her despair, grief and sadness lifting. When it felt complete to me, I asked her if we could continue the declaration. She agreed and after the drumming she was able to talk about every horrible detail of her father's death with no problem. We won her asylum case.

One last recent example was so astounding that I still get tears in my eyes thinking about it. A few months ago, I had an African client who had experienced FGM and was facing forced marriage if she was returned to her country. She had suffered severe domestic violence in her country from her father and in the U.S. at the hands of her

American husband. We were doing a gender-based asylum and VAWA case for her. I was concerned about the VAWA case because of a potential marriage fraud issue that had arisen and so I preferred to move forward on the asylum case. I really needed to get evidence of the FGM, but for two years she had refused to get a medical examination. Finally, a week before our court filing deadline, after the entire rest of the case had been prepared, I pleaded with her in desperation to get a medical, telling her that the FGM case was her best chance of success for gaining status. She continued to refuse me. It was a Saturday and I was at the office wanting to get through cases. I was feeling irritated that a case I had worked so hard on was likely going to fail because I could not get the evidence I needed.

In a moment of surrender I sat and looked at my client. I saw the visible scars across her face, her hair wrapped in a tight scarf, and I thought about her dominating brother out in the car waiting for her. I did not know what else to do except sit and look at her, hoping with my eyes I could convince her to get a medical. Finally, she stated that she could not get a medical because of the shame she felt at being cut. She did not want a doctor looking at her genitals and making comments or being surprised at what he saw. I assured her that the doctor I was referring her to would never behave so unprofessionally. But she said, "No."

By inspiration, I asked if she would be willing to take a few moments of silence with me and close her eyes. We sat for about ten minutes with our eyes closed. As we sat, I began to feel and see a vision of her as the huge, magnificent goddess being who had a very important life purpose and who was incredibly strong. I peaked open my eyes and asked her how she was doing. She started giggling, with her eyes still closed, and said she felt great.

When we both opened our eyes, my client looked completely different. I was shocked – so shocked, in fact, by her beauty and brilliance and the seeming disappearance of her scars and the battered woman I always saw, that I took her to the bathroom for her to see herself in the mirror. As she stood looking at herself in amazement, she smiled. She said, "Welcome back, Amal," (not client's real name). "I always knew this day would come when I would see you again." She started laughing with joy and stood looking at herself in the mirror for about 15 minutes. Her transformation was unbelievable. My client had utterly, totally reclaimed herself, her power, and who she was. It was beautiful. When she came back to my office she agreed to get the medical and we won her asylum case through stipulation from the government.

This is Just the Beginning . . .

There is so much more that can be said, so many more experiences to share, so many other ways to experience your law practice from a deeper, wider, higher perspective that can bring you greater meaning and purpose, and more success for your clients. This article offers just a taste of what can be. I wish you well on your journey and my hope is that more and more lawyers will expand their vision of who and what they are and how they can broaden and enjoy their practice for themselves and their clients. ◆

Sample Alternative Health References

All publications by Louis Hay www.louisehay.com and Christine Northrup, MD www.drnorthrup.com are outstanding

National Center for Complementary and Alternative Medicine. An Introduction to Reiki. http://nccam.nih.gov/health/reiki/ (accessed December 2007).

Miles P, True G. (2003). Reiki – Review of a biofield therapy history, theory, practice, and research. Altern Ther Health Med 2003; 9: 62–72.

Shore AG. (2004). Long-term effects of energetic healing on symptoms of psychological depression and self-perceived stress. Altern Ther Health Med 10: 42–8.

Olson K, Hanson J, Michaud M. (2003). A phase II trial of Reiki for the management of pain in advanced cancer patients. J Pain Symptom Manage; 26: 990–7.

Wirth DP, Barrett MJ. 199 Complementary healing therapies. Int J Psychosom 4; 41: 61–7.

Waber SL, Kile GLM, Gillespie BW. Energy healing research. In: Jonas WB, Crawford CC, eds. Healing, Intention and Energy Medicine. London: Churchill Livingstone, 2003: 83–101.

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Article

Section 13 Adjustment: An Asylum Alternative for Former Diplomats?

By Betsy L. Fisher

Section 13 adjustment of status[1] provides one possible alternative to asylum for individuals who had diplomatic status in the United States. However, Section 13 adjustment is very rarely granted and is legally distinct from an application for asylum.

This article contributes to immigration lawyers' understanding of this little-used provision for adjustment of status to legal permanent residence by explaining the basic legal requirements and procedure and providing notes of difference between Section 13 adjustment and applications for asylum. This article is based on Freedom of Information Act (FOIA) responses received by the author and a survey of hundreds of Section 13 opinions from USCIS' Administrative Appeals Office.

Section 13 Adjustment of Status: The Basics

Section 13 allows former diplomats to adjust their status to legal permanent residence (LPR) if they meet each of several conditions:

1. The applicant must have had a nonimmigrant visa issued under 8 U.S.C. 101(a)(15)(A)(i) or (ii) or (G)(i) or (ii).
2. The applicant must have performed diplomatic or semi-diplomatic duties in the United States on the while on (A)(i), (ii), (G)(i), or (ii) status.
3. The applicant must have fallen out of that visa status.
4. The applicant must have compelling reasons why she cannot return to the country accrediting her.
5. The applicant must have good moral character.
6. The applicant must be admissible.[2]
7. Adjusting the applicant's status must be in the national interest of the United States.[3]

The first difference between Section 13 and asylum is the consequence of acceptance: a successful asylum applicant receives status as an asylee and is eligible to apply for LPR status after one year. A Section 13 applicant is applying directly for LPR status without the year-long waiting period. Secondly, only fifty applicants can have their status adjusted each year.[4] Individuals who are rejected in the first instance by the National Benefits Center can apply to the Administrative Appeals Office (AAO) rather than the Board of Immigration Appeals.[5]

In fiscal years 2009-13, 769 applications for Section 13 adjustment were filed. Only 42 were approved, 86 were still pending, and the remaining—about 650 applications—were denied. Appeals to the AAO faced even bleaker odds; of 182 appeals filed in the same period, none were approved and six were pending. [6] Initial decisions approving or rejecting Section 13 applications are not published, so there is much better public information on what is *not* enough to win approval than what is. Nonetheless, here is a brief examination of the elements of a Section 13 claim.

Termination of Diplomatic or Semi-Diplomatic Status

First, an applicant for adjustment must had a visa issued under INA Section 101(a)(15)(A)(i) or (ii) or 101(a)(15)(G)(i) or (ii). Second, that status must have terminated; the State Department has sole authority to determine when diplomatic or semi-diplomatic status has terminated.[7] Neither the statute nor accompanying regulations state that the individual must currently be in another legal status.[8] In at least one case, removal proceedings were halted until the Section 13 application was adjudicated.[9] Thus, it appears that an applicant could apply for adjustment of status while in removal proceedings.

Compelling Reasons

Most applications are rejected on the third element, that of "compelling reasons" why the applicant cannot return to the country issuing the applicant's diplomatic credentials. In my review of more than 200 recent AAO decisions, compelling reasons were established in only two applications, and both of those were rejected on other grounds.[10] The standard boilerplate rejection reads, in part:

> The legislative history of Section 13 shows that Congress intended that "compelling reasons" relate to political changes that render diplomats and foreign representatives "stateless or homeless" or at risk of harm following political upheavals in the country represented by the government which accredited them. Section 13 requires that an applicant for adjustment of status under this provision have "compelling reasons demonstrating that the alien is *unable* to return to the country represented by the government which accredited the" applicant. (Emphasis added [by the AAO]). The term "compelling" must be read in conjunction with the term ""unable" to correctly interpret the meaning of the words in context.[11]
>
> [T]he plain meaning of the term "unable" is "lacking the necessary power, authority, or means." Thus, the "compelling reasons" standard is not a merely subjective standard.[12]
>
> For reasons to be "compelling," they must be 1) thor-

oughly corroborated[13] 2) specifically targeted at the applicant or a derivative family member in the application for adjustment[14] and 3) directly related to the applicants' diplomatic position or political activities rather than a greater risk of harm because of the applicant's diplomatic services or political activities than the general population.[15] No matter how desperate the applicant's reasons for wanting to leave, "there are no humanitarian exceptions to the requirement"[16] that the applicant must actually be unable to return to the applicant's country.[17] "Desiring to establish a life in the United States is not a compelling reason,"[18] nor are pressing medical needs.[19]

This standard is significantly different from the asylum standard of a well-founded fear of persecution on account of the five protected grounds.[20] The applicant for Section 13 must demonstrate objective reasons why she cannot return to their country of origin, which in practice appears to be held to a higher bar than the standard of well-founded fear. While a Section 13 applicant does not need to prove a nexus to one of the five protected grounds as an asylum applicant would, the applicant must make a narrower showing: that the reason she is unable to return to her country of origin is because of her diplomatic service.

Diplomacy

The applicant must have received a visa under 101(a)(15)(A)(i), (A)(ii), (G)(i), or (G)(ii), but having held this visa is insufficient. Applicants must also have served in a diplomatic or semi-diplomatic capacity. [21]

> Both section 101(a) (15)(A) of the Act and the Vienna Convention recognize that certain accredited employees or officials admitted to serve within embassies or other diplomatic missions are not "diplomatic" staff. The Vienna Convention refers to such personnel as administrative and technical staff, service staff, or personal servants.[22]

Applicants admitted on these visas who worked as a religious teacher,[23] a security guard,[24] an ambassador's secretary,[25] a scientist,[26] and a conference attendee[27] were all rejected for having served in non-diplomatic functions. By contrast, a Pakistani national who arranged travel to promote Pakistani-American trade was initially denied for serving in a non-diplomatic role. The AAO overturned on that point, finding that promoting trade "is an essential component of diplomatic representation."[28]

National Interest

Even where the applicant shows specific, compelling reasons that the applicant is unable to return, that those reasons apply specifically to the applicant and are connected to diplomatic service, the applicant must further show that that adjusting the applicant's status is in the national interest of the United States.[29] While asylum applicants must receive a favorable exercise of discretion, they do not need to demonstrate that granting their application would advance the U.S. national interest.[30]

Burden of Proof and Procedure

The applicant bears the burden of proof in an application for adjustment, and must corroborate her testimony with additional evidence.[31]

USCIS considers only evidence submitted on the record in the initial application.[32] USCIS will consider an argument waived if it is first raised on appeal. On appeal the applicant "must specify the factual and legal issues . . . that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision." [33] New facts can be submitted if supported by evidence that is "newly submitted, previously unavailable, and could not have been discovered or presented in the previous proceeding. In addition, new facts have to be relevant and have probative value."[34]

Among other technical requirements, motions to reconsider must also be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding,"[35] and can be dismissed if an applicant does not "comply with this requirement for properly filing a motion."[36]

Conclusion

It seems that the best case for adjustment of status under Section 13 would arise when a diplomat's government experiences a change in power such as coup d'état and the diplomats of the previous regime come under specific target because of their affiliation. Given the minute numbers of applications that are approved and the stringent adjudication of these visas, former diplomats would do well to consider other options, including asylum, before submitting an application for adjustment under Section 13. ◆

The content of this article does not constitute legal advice and should not be relied upon as such. If you need legal advice on a specific matter, please contact a lawyer.

Betsy L. Fisher, J.D. and M.A. Middle Eastern and North African Studies, University of Michigan, is a Bates Fellow and staff attorney at the Iraqi Refugee Assistance Project. This article expresses the views of the author only. *Editor's Note: The great remaining question is: if a Section 13 application is denied by CIS, may the alien apply in removal proceedings? The regulations (8 CFR 245.3, 1245.3) certainly don't seem to contemplate Immigration Judge jurisdiction, but see 8 CFR 1245.2(a)(1)(i). There isn't much caselaw, but take a look at Maalouf v. Wiemann, 654 F. Supp 2d 6 (DDC 2009). A fascinating issue that the BIA will have to decide someday.*

Editor's Note: The great remaining question is: if a Section 13 application is denied by CIS, may the alien apply in removal proceedings? The regulations (8 CFR 245.3, 1245.3) certainly don't seem to contemplate Immigration Judge jurisdiction, but see 8 CFR 1245.2(a)(1)(i). There isn't much caselaw, but take a look at Maalouf v. Wiemann, 654 F. Supp 2d 6 (DDC 2009). A fascinating issue that the BIA will have to decide someday.

Endnotes

[1]This provision is so called because it was created in Section 13 of the 1957 Immigration and Nationality Act. The provision is currently codified at 8 U.S.C. § 1255b.

[2]I do not address admissibility or good moral character since those phrases do not differ from their meaning in immigration law generally. Note that applicants under Section 13 are not subject to the labor certification ground of inadmissibility. 8 C.F.R. § 245.3 (1994).

[3]8 U.S.C. § 1255b(b) (1988).

[4]8 U.S.C. § 1255b (1988); 8 C.F.R. § 245.3 (1994).

[5]8 U.S.C. § 1255b(d) (1988).

[6]On file with author.

[7]2013 WL 8117732 (INS), Dec. 9, 2013.

[8]See 8 U.S.C. 8 § 1255b; 8 C.F.R. § 245.3.

[9]See 2009 WL 2138016, April 21, 2009.

[10]See 2014 WL 3795795 (DHS), Jan. 6, 2014; 2013 WL 8117953 (INS), Nov. 6, 2013.

[11]2013 WL 8117734 (INS), Dec. 9, 2013.

[12]2014 WL 3795822 (DHS) May 12, 2014.

[13]One Salvadoran applicant received death threats from criminal gang members after his work with his country's embassy facilitating deportations. Even so, the AAO found "no substantive [or] probative evidence that shows compellingly that he is unable to return to El Salvador . . . because of his past government employment." 2013 WL 8117870 (INS), Nov. 4, 2013.

[14]In one rejection, the applicant's father was a diplomat under an overthrown regime. The claim was rejected because the applicant herself had not shown that she was unable to return to her country of origin. 2013 WL 5504755 (DHS), Feb. 13, 2013; see also 2013 WL 4775009 (INS), March 4, 2013.

[15]General conditions of violence are insufficient; applicants must show that they would be "specifically targeted" because of past diplomatic service. 2013 WL 8118024 (INS), Oct. 29, 2013; 2014 WL 3951170 (DHS), Jan. 6, 2014.

[16]2014 WL 3795816 (DHS), March 21, 2014.

[17]For instance, a Saudi diplomat's wife called the police after her husband "once again attempted to rape one of her nannies." The husband, after being sent back to Saudi Arabia, threatened to kill her. However, the AAO held that "the applicant has provided no credible evidence to establish that she is at greater risk of harm because of her spouse's past government employment, political activities, or other related reason." 2013 WL 8117958 (INS), Nov. 6, 2013.

[18]2014 WL 3795812 (DHS), June 19, 2014.

[19]2012 WL 8593436 (INS), Sept. 17, 2012.

[20]8 U.S.C. § 1101(a)(42)(A).

[21]2014 WL 3795802 (DHS), Jan. 17, 2014.

[22]2014 WL 3795817 (DHS), March 25, 2014 (citing the Vienna Convention on Diplomatic Relations, Art. 1 (April 18, 1961), 500 U.N.T.S. 95).

[23]2014 WL 3951751 (DHS), July 7, 2014.

[24]2012 WL 8593530 (INS), Sept. 26, 2012.

[25]2013 WL 4775009 (INS), March 4, 2013.

[26]2013 WL 5504591 (DHS), Feb. 5, 2013.

[27]2012 WL 9161305 (INS), Oct. 2, 2012.

[28]2013 WL 5504748 (DHS), Feb. 13, 2013.

[29]See 2014 WL 3795795 (DHS), Jan. 6, 2014; 2013 WL 8117953 (INS), Nov. 6, 2013.

[30]8 U.S.C. § 1157(b)(1)(A).

[31]8 C.F.R. § 245a.2(d)(6); 2013 WL 8117726 (INS), Dec. 9, 2013 (citing 8 U.S.C. 1361).

[32]8 C.F.R. § 103.2(b)(16)(ii); 2014 WL 3795781 (DHS), Feb. 25, 2014.

[33]2014 WL 3951690 (DHS), July 1, 2014 (citation omitted).

[34]2014 WL 3795820 (DHS), March 25, 2014 (citation omitted).

[35]8 C.F.R. § 103.5(a)(1)(iii).

[36]2014 WL 3888327 (DHS), Feb. 7, 2014.

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Article

Statutory Interplay: The Immigration Consequences of a Burglary Conviction

By Lindsay M. Vick

Over the past several decades, the consequences of burglary convictions in immigration proceedings have become more varied as State courts have applied burglary statutes to an increasing range of criminal conduct. The differing treatment of burglary convictions in immigration proceedings is likely a direct result of States broadening their burglary statutes and expanding the elements of burglary. Long gone are the days when burglary was narrowly defined under State law as the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. *See Taylor v. United States*, 495 U.S. 575, 592–93 (1990); *see also* 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.1 (2d ed. 2014). Instead, modern burglary statutes inflate the scope of almost every element of common law burglary, thereby increasing the criminal conduct to which burglary statutes may apply.

This article will explore how modern burglary statutes are interpreted in the immigration context and will include a discussion of how a burglary conviction might be treated as either a crime involving moral turpitude ("CIMT") or an aggravated felony. To begin, the article will explore the historical definition of burglary by tracking the development of its elements from the common law to current State and Federal definitions of the crime. The article will then examine the treatment of State residential, commercial, and vehicular burglary statutes in immigration proceedings.

The Expanding Definition of Burglary in State and Federal Court

As previously mentioned, burglary was defined at common law as the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. *See Taylor v. United States*, 495 U.S. at 580 n.3, 592–93. However, common law burglary has evolved far from its roots into a flexible offense covering a greater scope of conduct. *See* Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 Ind. L. Rev. 629, 630 (2012). By the end of the nineteenth century, the core elements of common law burglary—nighttime, entry, breaking, and the structure entered—contrasted greatly with the elements found in State penal codes. *See id.* at 635. These variations have only continued in recent decades.

For example, just a handful of contemporary State burglary statutes require a "breaking." *See* LaFave, *supra.* Instead, the majority of States now require that the entry must be unlawful, unauthorized, or without consent. *Id.* *But cf*. Cal. Penal Code § 459 (West 2014) (containing an unqualified entry element, thereby permitting punishment of conduct involving lawful entry). Likewise, some modern burglary statutes have expanded the entry element so as to implicate a burglar who either enters or remains on the premises unlawfully. *See* LaFave, *supra*. Only a few States require that the burglary be committed at night or retain the nighttime element as part of a higher degree of the crime. *Id.* Further, a majority of States have discarded the "intent to commit a felony" element and have replaced it with the intent to commit any offense. *Id.* Finally, most contemporary burglary statutes expand the "dwelling" element to include buildings or other structures. *Id.*

In order to achieve some degree of uniformity with respect to the Federal sentencing guidelines, the United States Supreme Court set forth a generic definition of burglary in the context of the sentence enhancement provisions of 18 U.S.C. § 924(e) in *Taylor v. United States*, 495 U.S. at 598. The Court based this definition on its analysis of the statute's legislative history and its construction of modern State criminal statutes. *Id.* at 593–98. According to the Court, "the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598. This current generic formulation of burglary is therefore broader than the common law definition in that it: (1) does not require a "breaking," as long as the entry is unlawful or unprivileged; (2) implicates an offender who "remain[ed]" in the building; (3) covers any "building" or "structure"; (4) expands the intent requirement to implicate an intent to commit any "crime"; and (5) does not require that the offense occur at night.

The Consequences of a State Burglary Conviction in Immigration Proceedings

An alien convicted of burglary may be removable or inadmissible in immigration proceedings based on multiple grounds. Namely, a burglary offense may constitute a CIMT that renders the individual inadmissible pursuant to section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A) (2012), or deportable pursuant to section 237(a)(2)(A)(i) or (ii) of the Act, 8 U.S.C. §1227(a)(2)(A)(i) or (ii) (2012). Further, a burglary offense may render the alien removable pursuant to section 237(a)(2)(A)(iii) for a conviction of an aggravated felony crime of violence or a burglary offense under section 101(a)(43)(F) or (G) of the Act, 8 U.S.C. § 1101(a)(43)(F) or (G) (2012). When analyzing the offense under these provisions of the Act, courts have

focused their analysis on the nature of the building or structure that the offender entered. Accordingly, varying immigration consequences apply depending on whether the individual entered a residential building, a commercial building, or a vehicle.

Residential Burglary

Residential Burglary as a CIMT

The Board has historically treated residential burglary as a CIMT. *See, e.g.*, *Matter of M-*, 2 I&N Dec. 721 (BIA, A.G. 1946) (holding that a burglary offense may be deemed to involve moral turpitude only if it is accompanied by the intent to commit a morally turpitudinous act).[1] Board decisions prior to 1996 held that a burglary offense is morally turpitudinous only if accompanied by the intent to commit a CIMT, most often larceny. *See, e.g.*, *Matter of Frentescu*, 18 I&N Dec. 244, 245 (BIA 1982); *Matter of De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981); *Matter of Leyva*, 16 I&N Dec. 118, 120 (BIA 1977); *Matter of L-*, 6 I&N Dec. 666, 669 (BIA 1955); *Matter of Z-*, 5 I&N Dec. 383, 385–86 (BIA 1953); *Matter of M-*, 2 I&N Dec. at 721; *Matter of R-*, 1 I&N Dec. 540 (BIA 1943).

More recently, the Board adopted a different approach in *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009), indicating that residential burglary involving an occupied dwelling is categorically a CIMT. The Board examined the statutory elements of the crime and concluded that there was no realistic probability that the Florida burglary statute at issue would be applied to reach conduct that did not involve moral turpitude. *Id.* at 758–59. In this regard, the Board found that "moral turpitude is inherent in the act of burglary of an occupied dwelling itself" and that entering the dwelling of another "with the intent to commit *any crime* therein is a [CIMT]." *Id.* at 759; *cf. Matter of Frentescu*, 18 I&N Dec. at 247 (finding that even though the alien was convicted of the CIMT of residential burglary, the offense was not a "particularly serious crime" for purposes of asylum and withholding of deportation).

The Board distinguished the burglary offense in *Matter of Louissaint* from that involved in *Matter of M-*, 2 I&N Dec. 721, where it had held that a burglary offense is a CIMT only if the crime accompanying the breaking and entering is morally turpitudinous. 24 I&N Dec. at 755–56. In particular, the Board noted that *Matter of M-* involved third-degree burglary of a building—presumably nonresidential—while *Matter of Louissaint* involved an occupied dwelling. *Id.* Therefore the Board concluded that burglary of an occupied dwelling involves "'reprehensible conduct' committed 'with some form of scienter' as required by *Matter of Silva-Trevino*." *Id.* at 758 (quoting *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 & n.5 (A.G. 2008)).

In a concurring opinion, one Board Member observed the possibility that *Matter of Silva-Trevino* may not withstand review in the courts of appeals but noted that residential burglary should nevertheless be considered categorically a CIMT. *Id.* at 760 (Pauley, concurring). Five circuit courts have since rejected *Matter of Silva-Trevino*'s analytic framework because it allows the Immigration Judge to look beyond the record of conviction as a third step of the modified categorical approach. *See Silva-Trevino v. Holder*, 742 F.3d 197, 200–01 (5th Cir. 2014); *Olivas-Motta v. Holder*, 716 F.3d 1199, 1209 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1310 (11th Cir. 2011); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 473 (3d Cir. 2009). These decisions do not, however, impact the Board's holding in *Matter of Louissaint* that residential burglary constitutes a categorical CIMT. Further, no circuit courts have specifically rejected the Board's holding in *Matter of Louissaint*. *But cf. Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1018 (9th Cir. 2005) (following the Board's reasoning in *Matter of M-* and finding that the act of entering a residence is not itself morally turpitudinous, but rather it is the nature of the accompanying crime that renders residential burglary a CIMT).

Residential Burglary as an Aggravated Felony

Additionally, an individual convicted of residential burglary may be removable as having been convicted of an aggravated felony. *See* sections 101(a)(43)(F), (G) of the Act. In 1994, Congress made a burglary conviction carrying at least a 5-year term of imprisonment an aggravated felony. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320. The associated term of imprisonment for burglary as an aggravated felony was later reduced to at least 1 year. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., § 321(a)(3), 110 Stat. 3009-546, 3009-627 (codified as section 101(a)(43)(G) of the Act, which provides that "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year" constitutes an aggravated felony that renders an individual removable). The Board has adopted *Taylor*'s generic definition of burglary for the purpose of determining whether a State crime constitutes a burglary offense under the Act. *See Matter of Perez*, 22 I&N Dec. 1325, 1327 (BIA 2000). Additionally, three circuit courts have applied the *Taylor* definition of burglary upon making that determination.[2] *See, e.g.*, *Sareang Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (vehicular burglary); *Lopez-Elias v. Reno*, 209 F.3d 788, 792 (5th Cir. 2000) (same); *Solorzano-Patlan v. INS*, 207 F.3d 869, 874–75 (7th Cir. 2000) (same).

Notably, in *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013), the Supreme Court analyzed whether the burglary offense defined in section 459 of the California Penal Code falls within the generic definition of burglary provided in *Taylor v. United States*. The Court found that section 459 defines burglary more broadly than the generic definition of the offense and contains a single, indivisible set of elements. *Id.* at 2285–86. Based on its holding that courts are not permitted to apply the modified categorical approach in these circumstances, the Supreme Court found that California's burglary offense in section 459 does not correspond to the generic crime of

burglary. *Id.* at 2286. Adjudicators should thus carefully consider the Supreme Court's analysis in *Descamps* when determining whether a State burglary offense falls within *Taylor*'s generic definition of burglary for purposes of section 101(a)(43)(G) of the Act.

Despite the inclusion of burglary in the aggravated felony definition at section 101(a)(43)(G) of the Act, however, courts often analyze burglary convictions under the crime of violence definition at section 101(a)(43)(F), particularly where the elements of an alien's State burglary conviction do not correspond with the elements of "generic burglary." *See Taylor v. United States*, 495 U.S. at 599–600. Section 101(a)(43)(F) incorporates the crime of violence definition set forth in 18 U.S.C. § 16 (2012), which provides that "crime of violence" means:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The discrete definition of the term "crime of violence" under the Act has allowed some State burglary crimes to be treated as aggravated felonies, even when they do not qualify as burglary offenses under the Act. For example, the Fourth, Fifth, and Ninth Circuits have held that residential burglary is categorically a crime of violence pursuant to 18 U.S.C. § 16(b) and therefore an aggravated felony under section 101(a)(43)(F) of the Act.[3] *See, e.g.*, *United States v. Avila*, 770 F.3d 1100, 1105 (4th Cir. 2014); *United States v. Ramos-Medina*, 706 F.3d 932, 936–37 (9th Cir. 2013); *Kwong v. Holder*, 671 F.3d 872, 877–88 (9th Cir. 2011); *United States v. Echeverria-Gomez*, 627 F.3d 971, 976 (5th Cir. 2010); *United States v. Guardardo*, 40 F.3d 102, 103–04 (5th Cir. 1994). These courts reasoned that in the ordinary case where a burglar enters a dwelling with intent to commit a felony or larceny, there is always a substantial risk that the burglar will use force against an occupant to accomplish his criminal task.[4] *See Avila*, 770 F.3d at 1106; *Ramos-Medina*, 706 F.3d at 937; *Echeverria-Gomez*, 627 F.3d at 977; *Guardardo*, 40 F.3d at 104.

Commercial or Nonresidential Burglary

The Board generally treats commercial burglary, or burglary of a building or structure that is not necessarily a dwelling, as a CIMT when the crime the offender intended to commit involves moral turpitude. In these cases the Board has looked to the record of conviction to determine whether the intended crime was morally turpitudinous.[5] *See, e.g.*, *Matter of De La Nues*, 18 I&N Dec. at 141, 145 (stating that burglary of a store with intent to commit theft or larceny was a CIMT based on the applicant's admission of the underlying criminal intent); *Matter of M-*, 2 I&N Dec. at 724–25 (holding that burglary of a building was not a CIMT where the record of conviction did not indicate the accompanying crime); *Matter of V-T-*, 2 I&N Dec. 213, 214 (BIA 1944) (holding that burglary of a store was a CIMT where the information charged the respondent with entering with intent to commit larceny).

In contrast, the Ninth Circuit addressed the question whether a conviction for commercial burglary under California law was for a CIMT and held that it was not. *See Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1109 (9th Cir. 2011). The court found that a burglary conviction under section 459 of the California Penal Code requires three elements: (1) entering (lawful or unlawful); (2) a commercial building; (3) with the intent to commit larceny or any felony. *Id.* at 1107. The offense was not categorically a CIMT because the statute did not punish conduct that was necessarily "morally reprehensible" or that was "base, vile, or depraved." *Id.* at 1108 (internal quotation marks omitted). Applying the modified categorical approach, the Ninth Circuit found that the record of conviction did not reveal any additional elements to which the alien pled guilty, so his conviction was not for a CIMT. *Id.* at 1110. However, the court noted that if the conviction required proof of *theft* or *unlawful* entry into a *residence*, then his offense would have qualified as a CIMT. *Id.* at 1107.

It is important to note that *Hernandez-Cruz* was decided prior to *Descamps v. United States*, 133 S. Ct. 2276. As previously discussed, the Supreme Court concluded in *Descamps* that the crime defined in section 459 of the California Penal Code is broader than the generic definition of burglary, so the modified categorical approach cannot be applied to determine whether a conviction under the statute is for a burglary offense. *Id.* at 2286–87. The Third, Eighth, and Ninth Circuits have since applied the Supreme Court's reasoning in *Descamps* in the context of the CIMT analysis. *See supra* note 5. Thus, adjudicators should consider the *Descamps* analysis when determining whether a State commercial burglary statute defines a CIMT or an aggravated felony that renders the respondent removable.

Vehicular Burglary

There appears to be consensus among the Board and the circuit courts that vehicular burglary does not come within the ambit of a burglary offense under section 101(a)(43)(G) of the Act because vehicular burglary does not involve a building or structure in accordance with the generic definition of burglary set forth in *Taylor*. *See Lopez-Elias v. Reno*, 209 F.3d 788, 792 (5th Cir. 2000); *Matter of Perez*, 22 I&N Dec. 1325. However, several circuits, including the Fifth and Seventh, have held that vehicular burglary presents a substantial risk of physical force against person or property that renders such an offense an aggravated felony crime of violence under the Act. *Solorzano-Patlan v. INS*, 207 F.3d at 875; *United States v. Ramos-Garcia*, 95 F.3d 369, 371 (5th Cir. 1996). In contrast, the Ninth Circuit has found that burglary of a vehicle is neither a burglary offense nor a crime of violence. *Sareang Ye v. INS*, 214 F.3d at 1134.

In *Matter of Perez*, 22 I&N Dec. at 1327, the Board held

that burglary of a vehicle under a Texas statute was not a "burglary offense" for purposes of section 101(a)(43)(G) of the Act because to come to such a conclusion would be inconsistent with the common law, the generic definition of burglary set forth in *Taylor*, the Model Penal Code, and the laws of many States. Notably, the Board indicated that it was not determining the precise scope of a burglary offense within the meaning of section 101(a)(43)(G) of the Act. *Id*. Rather, it simply found that the term "burglary offense" did not include burglary of a vehicle. *Id*.

Similarly, the Fifth Circuit held in *Lopez-Elias v. Reno*, 209 F.3d at 792, that an alien's conviction for burglary of a vehicle under the same Texas statute at issue in *Matter of Perez* was not a burglary conviction for purposes of section 101(a)(43)(G) of the Act. Citing *Taylor*, the court reasoned that because the alien was convicted of burglary of a vehicle, as opposed to a building, his crime did not qualify as a burglary offense under the Act. *Id*. However, the Fifth Circuit also noted that it had previously held that burglary of a vehicle constitutes a crime of violence under the Act. *Id.* at 792–93 (citing *United States v. Ramos-Garcia*, 95 F.3d 369; *United States v. Rodriguez-Guzman*, 56 F.3d 18 (5th Cir. 1995), *abrogated on other grounds by United States v. Charles*, 301 F.3d 309, 314 (5th Cir. 2002) (en banc)); *see also United States v. Guzman-Landeros*, 207 F.3d 1034 (8th Cir. 2000). For example, in *United States v. Rodriguez-Guzman*, 56 F.3d at 20, the court noted that a crime of violence as defined in 18 U.S.C. § 16(b) is broad in scope and includes offenses involving a substantial risk that physical force *may* be used against person *or property*. Thus, it concluded that because burglary of a vehicle often involves "the application of destructive physical force to the property of another," it qualifies as a crime of violence as defined in 18 U.S.C. § 16(b) and is therefore an aggravated felony.[6] *Id*.

The Seventh Circuit came to a similar conclusion in *Solorzano-Patlan v. INS*, 207 F.3d at 875, when it held that an alien's vehicular burglary conviction under an Illinois statute was not for a burglary offense under section 101(a)(43)(G) of the Act because it did not involve burglary of a "building or structure." However, the court held that the offense might qualify as an aggravated felony crime of violence under section 101(a)(43)(F) because the statute encompassed conduct that both did and did not involve a substantial risk of the use of physical force. *Id.*

In contrast, in *Sareang Ye v. INS*, 214 F.3d at 1134, the Ninth Circuit held that an alien's California vehicular burglary did not constitute either a burglary offense under section 101(a)(43)(G) of the Act or a crime of violence under section 101(a)(43)(F). Agreeing with the Fifth and Seventh Circuits, the Ninth Circuit found that burglary of a vehicle, which does not involve a building or structure, does not constitute a burglary offense. *Id.* at 1132. However, the court found that vehicular burglary was not "violent in nature" given the low risk of violence against person or property presented by such an offense. *Id.* at 1134 (internal quotation marks omitted). Thus, the question remains whether more circuit courts will follow the path of the Fifth and Seventh Circuits or whether they will instead align with the Ninth Circuit in holding that vehicular burglary does not constitute a crime of violence.

Conclusion

The State and Federal definitions of burglary have evolved from the common law definition of the offense. Accordingly, the offense of burglary often implicates a broader range of conduct in criminal proceedings than it once did. In the context of immigration proceedings, an individual's conviction for the offense of burglary may render him or her removable, either as an alien convicted of a CIMT or an aggravated felony crime of violence or burglary offense. However, because the many State and Federal definitions of burglary differ, the immigration consequences will vary greatly depending on the specific elements of the statute under which an individual was convicted. Although the Board and the circuit courts appear to agree that residential burglary qualifies as a CIMT, many questions remain regarding the immigration consequences of State residential and commercial burglary offenses in light of the Supreme Court's decision in *Descamps v. United States*. Further, while the Board and some courts agree that vehicular burglary is not an aggravated felony burglary offense, disagreement remains regarding whether it is categorically an aggravated felony crime of violence. Consequently, as the elements of burglary continue to evolve, so too will the immigration consequences associated with burglary convictions. ◆

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Endnotes

[1]The concept of deportation of aliens convicted of CIMTs after entry into the United States was first introduced by the Immigration Act of 1917, ch. 29, § 19(a), 39 Stat. 874, 889 (repealed 1952). Notably, the dissenting Board Member in *Matter of M-* observed that for 29 years after the passage of the Immigration Act of 1917, the Board consistently held that the offense of third-degree burglary in New York involved moral turpitude. *Matter of*

M-, 2 I&N Dec. at 728 (Charles, dissenting).

[2]The Board and the circuit courts apply a categorical or modified categorical approach, as set forth in *Taylor v. United States*, to determine whether a particular conviction falls within the ambit of a ground of removal in the Act. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185–87 (2007). Under the categorical approach, the court will look only to the elements of the statute of conviction and compare them with the elements of the generic offense under the Act. *See Taylor v. United States*, 495 U.S. at 600–02. Where a particular statute contains a divisible set of elements that do not criminalize a broader swath of conduct than the generic offense, the court will apply the modified categorical approach and will therefore look beyond the applicable statutes to the record of conviction to determine whether a conviction qualifies as a removable offense. *See id.*; *see also Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (observing that a burglary statute that involves entry into a building or automobile would be divisible).

[3]The circuit courts have also generally held that residential burglary is a crime of violence under the modified categorical approach in cases involving the unlawful reentry sentencing guidelines. *See e.g. United States v. Murillo-Lopez*, 444 F.3d 337, 339–40 (5th Cir. 2006). Under the unlawful reentry sentencing guidelines, an offense qualifies as a crime of violence if it falls within a categorical list of generic crimes, including "burglary of a dwelling," or if it is an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S. Sentencing Guidelines Manual § 2L1.2 cmt. n.1(B)(iii) (2014). Given the divisible nature of most State burglary statutes, which set out in the alternative numerous types of structures that may be burglarized, the circuit courts apply the modified categorical approach to determine whether a burglary offense qualifies as "burglary of a dwelling" under the sentencing guidelines. *See e.g. Reina-Rodriguez v. United States,* 655 F.3d 1182, 1191–92 (9th Cir. 2011).

[4]In *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004), the Supreme Court intimated that burglary is a classic example of a crime of violence under 18 U.S.C. § 16(b) but did not specify whether it envisioned all types of burglary or just residential burglary in its example.

[5]The Third, Eighth, and Ninth Circuits have since applied the holding of *Descamps* in the context of a CIMT analysis. *Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715, 2014 WL 5801416, *3 (9th Cir. Nov. 10, 2014); *Avendano v. Holder*, 770 F.3d 731, 734 (8th Cir. 2014); *Mahn v. Att'y Gen. of U.S.*, 767 F.3d 170, 174 (3d Cir. 2014). Adjudicators should consider these cases before looking to the record of conviction for the purpose of making a CIMT determination.

[6]*Rodriguez-Guzman* also involved a conviction for burglary of a nonresidential building, which the Fifth Circuit likewise concluded qualified as an aggravated felony crime of violence under the Act.

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