The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

H. Raymond Fasano, Section Chair

Quotes of the Month

"If you don't know history, then you don't know anything. You are a leaf that doesn't know it is part of a tree." —Michael Crichton

"Not to know what happened before you were born, that is to be always a boy, to be forever a child." —Cicero

"The past is never dead. It's not even past." —William Faulkner

From the Editor

As you can tell from the above quotes, I love history. I had no expectation that my college history major would prepare me for a job. I knew that I had a four-year Army obligation ahead of me, and never even tried to look beyond that lengthy period. I ignored those who scoffed at majoring in such a "useless" subject. I "followed my bliss" (in that respect, anyway).

But in fact, my knowledge of history has always been an asset, in law school and in the practice of law. When I was appointed an immigration judge in Los Angeles, ancient history came alive. I was confronted with cases from all of the races of the ancient Near East; Jews, Armenians, Egyptians, Persians, Assyrians, Chaldeans, they were all in my courtroom. I never had a Sumerian case, but I'm sure that one was out there somewhere. All of the rivalries, hatreds, victories and defeats of the past 3,500 years are still very much alive. Faulkner was right.

With talk of our "dysfunctional immigration system," and "comprehensive immigration reform" in the air, those of us old enough to remember the 1980's realize that it's "deja vu all over again." Didn't the Immigration Reform and Control Act of 1986 (IRCA) solve the same problems? Well, no; it was total failure by its own terms. It failed to secure the border, failed to prevent unauthorized employment, created a massive and costly bureaucracy, encouraged fraud, and resulted in decades of litigation. True, it helped a large number of deserving people to emerge from the shadows and become Americans, but it also allowed fraudsters and cheats to defraud intending immigrants and the government, it cost a fortune, and the problem is still with us. Only this time we have four times as many "illegal" aliens, and the country is flat broke.

My point is simply this: let's take a good look at why the comprehensive solution of 1986 didn't work, so that we can avoid the same mistakes this time. I'm sure we will make mistakes, but these should at least be new ones. I'm not smart enough to know exactly what will work, but I

Editor continued on page 2

In This Issue

April/May 2013 *Published by the Immigration Law Section of the Federal Bar Association*

Editor continued from page 1

do believe that we should be cognizant of how the system worked pre-IRCA (really not that badly), and draw on that knowledge in crafting intelligent solutions.

I will give one simple example. Cancellation of removal for nonpermanent residents, INA § 240A(b), permits an alien to adjust to lawful permanent resident if he has resided continuously for 10 years, has certain relatives, possesses good moral character, and can show the requisite degree of hardship. This entails extensive (and expensive) preparation by the alien's counsel, a hearing of two or three hours, and likely an appeal as well. Yet, in the olden days (pre-IRCA), we had something called registry. If an alien entered before a certain date, and could demonstrate that he was admissible and deserving, he could file a simple adjustment of status application, and become a permanent resident. A short hearing, far less paperwork, and rarely an appeal. Well, nothing ever goes away in immigration law, so INA § 249 is still there. However, the "registry date" Jan. 1, 1972, has stood still all of these years, like a fly in amber. If the registry date could be periodically advanced, as was the case in the olden days, it would greatly simplify immigration law and take pressure off the immigration courts and BIA.

Just a thought. ◆

Any opinions expressed above are strictly my own, and are not attributable to the Executive Office of Immigration Review or any other agency of the U. S. government. Contact Larry Burman, at LBurman@aol.com.

From the Section Chair

I want to thank the D.C. Chapter for co-hosting the Immigration Monthly Luncheon Series. I feel very fortunate to have had the opportunity to introduce Juan Osuna, director, Executive Office for Immigration Review and to have sat in the audience to hear Director Osuna's insight and reflection on the current state of our immigration system, immigration courts and most importantly, comprehensive immigration reform. The event was made special by Director Osuna's candor in providing unparalleled information that every immigration practitioner and judge would find necessary in their practice and in deciding cases. I look forward to the next luncheon and will work very hard to have it highly attended. You and Prakash deserve praise for your ability to pull this enlightening program together. I am also grateful to Barry Frager, former FBA ILS chair and ILS board member for his assistance in making the luncheon a success. The following are some highlights that I took away from Director Osuna's discussion:

- There were 410,000 cases before the immigration court last year.
- There were 382,000 cases completed last year.
- 36 percent of the docket was detained.
- 25,000 cases are pending before the Board of Immigration Appeals.

Section Chair continued on page 5

Section Leadership

◆◆◆

The Green Card is published by the Federal Bar Association's Immigration Law Section, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201, (571) 481-9100, (571) 481-9090 fax.

For more information about the section, please visit www.fedbar.org/Sections/Immigration-Law-Section.aspx.

There Is No Such Thing as a Tough Immigration Judge

Jason Dzubow

Judge Rex J. Ford

A recent article in the Sun Sentinel (Jan. 5, 2013, Broward County, Fla.) got me thinking about what it means to be a "tough" immigration judge.

The article discusses Judge Rex J. Ford, who will be celebrating (if that is the right word) 20 years on the bench this April. According to the Sun Sentinel, "In 96 percent of the 2,057 proceedings Ford completed in fiscal 2011, he ordered the person removed from the country." Judge Ford told the paper: "I follow the book and I don't get reversed." The article also notes that Judge Ford is a registered Republican who "garnered attention in 2008 with the release of a U.S. Justice Department report that named him as playing a role in recommending the appointment of immigration judges based on their political leanings." Judge Ford denied that he considered party affiliation in advocating for specific job candidates.

First, I suppose the Sun Sentinel mentions that Judge Ford is a Republican because Republicans are considered "tougher" on immigration than Democrats (this, despite the fact that President Obama has deported record numbers of illegal immigrants during each year of his administration). I can't help but think that this is an unfortunate stereotype—at least to some extent. Maybe I will write something about that subject in the future, but for now, I will just note that Judge Ford was appointed during the Clinton Administration. In this post, I am more interested in how we decide which immigration judges are "tough."

The most objective measure of an immigration judges' "toughness" is his asylum denial rate, which can be found at TRAC Immigration, a website affiliated with Syracuse University. The toughest judges are the ones with the highest denial rates. By this measure, Judge Ford is pretty tough. Of the 256 immigration judges examined by TRAC, only three deported people at a higher rate than Judge Ford. Does this mean that he is tough? Or does it mean that he doesn't know what he is doing? Or something else?

Whenever a judge's denial rate deviates significantly from the mean, it raises a red flag. In Judge Ford's case, his denial rate of 93.3 percent is much higher than the *national* average of 53.2 percent. But I think it is more important to compare his denial rate with the *local* average. Why? Because local factors significantly impact denial rates. In Judge Ford's case, the aliens he sees are all detained. Denial rates for detained asylum seekers are much higher than rates for non-detained aliens. In part because such aliens are less likely to be represented by attorneys and have a more difficult time gathering evidence, but mostly (I think) because such aliens often have no valid defense to removal, and so they tend to file weak (or frivolous) asylum claims as a last-ditch attempt to remain in the United States. Also, many detained aliens are ineligible for asylum due to criminal convictions or the one-year asylum bar. Comparing Judge Ford to his local colleagues, his denial rate does not seem particularly unusual. The denial rate for other immigration judges at Miami's Krome Detention Facility (where Judge Ford is listed on the TRAC website) is 89.8 percent. So while Judge Ford is probably not an "easy" judge, if he were relocated to a different court, with a non-detained docket, I bet that he would grant a lot more cases.

Speaking more generally, where an immigration judge with a non-detained docket denies asylum cases at a significantly higher level than his local colleagues, I don't see that as a sign of "toughness." I see it as a failure to properly apply the law. The INA, the CFR, and various precedent decisions from the BIA and the federal courts provide guidance to immigration judges about how to make decisions. They set forth how to determine if an alien is credible (consistent testimony and submission of reasonably available evidence). They define "persecution," nexus, and the different protected grounds. In reaching a decision, an immigration judge is obliged to follow these laws; he is not permitted to "go with his gut." In my experience, most immigration judges do their best to follow the law.

Tough continued on page 5

Motions Practice #3: Motions to Reopen and Motions to Reconsider

Hon. Paul Wickham Schmidt, *U.S. Immigration Judge, Arlington, Virginia*

Motions Practice #3: Motions to Reopen and Motions to Reconsider

Two of the most common and most important motions made to the immigration court and the Board of Immigration Appeals (BIA) are motions to reopen and motions to reconsider. While sometimes erroneously referred to in the conjunctive, motions to reopen and motions to reconsider are *distinct*, and serve *very different* purposes. They also have different legal and procedural requirements. This article will briefly discuss the differences between these two types of motions and the potential problem of so-called "compound motions."

Motion to Reconsider

A motion to reconsider "is based on the existing record and does *not seek to introduce new facts or evidence.*"[1] Accordingly, such a motion "either identifies an error in the immigration judge's prior decision or identifies a change in the law that affects an immigration judge's prior decision and asks the immigration judge to reexamine his or her ruling."[2] For example, a motion asserting that the immigration judge's credibility ruling is inconsistent with precedent decisions would be a proper motion to reconsider; a motion seeking to introduce a newly issued arrest warrant to bolster the respondent's credibility would not be a proper motion to reconsider (but could be an appropriate subject for a motion to reopen).

A motion to reconsider must *specifically* identify the alleged errors of fact or law in the immigration judge's prior decision.[3] If premised upon changes in the law, the motion should attach copies of the new precedent or statutory or regulatory change.[4]

Motion to Reopen

In contrast to the motion to reconsider, which assumes the existing administrative record is complete, a motion to reopen asks the immigration judge to reopen the record to receive and consider new facts or evidence.[5] In the example above, a motion to reopen would be a way to bring to the Immigration Judge's attention a newly issued arrest warrant for consideration in connection with an adverse credibility ruling and to insure that such warrant would be included in any record on appeal.

A motion to reopen "must state the new facts that will be proven at a reopened hearing" and "must be supported by affidavits or other evidentiary material."[6] Additionally, the moving party must demonstrate that the proffered evidence "is material and was not available and *could not have been discovered or presented at an earlier stage in the proceedings*."[7] In other words, the moving party must demonstrate "due diligence."

Moreover, "a motion to reopen based on an application for relief will not be granted if it appears that the [respondent's] right to apply for that relief was fully explained and the [respondent] had an opportunity to apply for that relief at an earlier stage in the proceedings (unless the relief is sought on the basis of circumstances that have arisen subsequent to that stage of the proceedings)."[8]

For example, if the respondent was married to a U.S. citizen at the time of the merits hearing, and the Immigration Judge explained the application for adjustment of status and offered the respondent a continuance, but the respondent decided to proceed with asylum instead, reopening to apply for adjustment of status based on that marriage probably would be unavailable. On the other hand, if a respondent was unmarried at the time of the hearing, but got married to a U.S. citizen following the conclusion of the proceedings, a motion to reopen might be possible (assuming that the respondent could meet the other eligibility requirements for adjustment).

Compound Motions

"A compound motion is a motion that combines a motion to reopen or a motion to reconsider with another motion (or with each other)."[9] This is a generally undesirable format because, as noted above, motions to reopen and motions to reconsider have different purposes and distinct characteristics. Most important, they are governed by distinct time and number limitations and different exceptions, topics that I will discuss in later articles.[10]

Consequently, only that portion of a compound motion that is *not* time or number barred will be considered by the Immigration Judge or the BIA.[11] For example if a "compound" motion to reopen and reconsider is filed, the time for reconsideration has expired, but the time for reopening has not, the immigration judge will consider *only* the motion to reopen portion of the compound motion.[12]

The *Board of Immigration Appeals Practice Manual* (*BIAPM*) specifically warns: "The board construes a motion according to its content, not its title, and applies time and number limits accordingly." [13] The same would be true before the immigration court.

Summary and Conclusion

In this article I have described the different attributes of a motion to reconsider and a motion to reopen. The motion to reconsider basically addresses the existing administrative record while the motion to reopen seeks

to augment the existing administrative record. I have also warned about the potential pitfalls of "combined motions." In the next installment of this motions series, I will address time and number limitations on motions to reopen and motions to reconsider. ◆

NOTE: *These are my views, and they do not represent the official position of the Attorney General, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, The Federal Bar Association, my colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. They also do not represent my position on any case that I decided in any capacity in the past, that is pending before me, or that might come before me in the future. They also are not legal advice and are not a substitute for reading the applicable statutes, regulations, precedents, and practice manuals. These articles are an expansion of my remarks at a D.C. Bar CLE program on September 22, 2011*.

Endnotes

[1]*Immigration Court Practice Manual* (*ICPM*) § 5.8(a) (emphasis supplied).

[2]*Id.*

[3]*ICPM* § 5.8(f).

[4]*Id.*

[5]*ICPM* § 5.7(a).

[6]*ICPM* §5.7(b)(ii).

[7]*Id.*

[8]*Id.*

[9]*Board of Immigration Appeals Practice Man*ual (*BIAPM*) § 5.3.

[10]Compare *ICPM* § 5.6 (Motions to Reopen) with *ICPM* § 5.7 (Motions to Reconsider).

[11]*See BIAPM* § 5.3.

[12] *Id.*

[13]*BIAPM* § 5.2(b).

Section Chair continued from page 3

- 56 percent of non-detained cases are represented by lawyers, whereas the detained docket only has 12 percent of cases represented by a lawyer.
- There is an EOIR policy regarding the immigration judge's discretion and implementation of the board's decision in Matter of Avetisyan, 23 I & N Dec. 688 (BIA 2012). Matter of Avetisyan explains under what circumstances an immigration judge may administratively close a case without the consent of the government.
- The Obama Administration is committed to the policy of making non-criminal cases a low priority for deportation. The best use of Immigration and Customs Enforcement's resources is to deport dangerous criminals.
- The current immigration system is broken and must be reformed. This ushered in the discussion about Comprehensive Immigration Reform (CIR).
- CIR is necessary because it is impossible to deport 400,000 people per year.
- CIR will consist of (1) Legalization Program. At this moment, it is unknown what the financial penalty will be to register for legalization; (2) Work authorizations/employment verification. Sanctions against employers who hire and exploit unauthorized workers. Implement a workable biometrics system for employment identification purposes; (3) Reform the immigration system. Reform is needed in the employment and family based system. A guest worker provision has not been worked out but there has been a need expressed for high tech workers; and (4) Enforcement both interior and at the border. ◆

Tough continued from page 3

Therefore, if one immigration judge stands out in terms of her denial rate (whether it is too high or too low), something is wrong.

In deciding an asylum case, it is not the immigration judge's job to be tough or easy; it is her job to analyze the facts in the context of the law. Where an immigration judge's denial rate differs significantly from the local average, it may be a sign that the immigration judge is not following the law. In such a case, the immigration judge's supervisors should determine what is happening and whether additional training or some other corrective action is necessary. ◆

Jason Dzubow is a partner in Dzubow, Sarapu & Pilcher PLLC, an immigration law firm in Washington D.C. His blog, "The Asylumist," is the only blog in the United States devoted to asylum law.

Article

What To Do When the Constable Blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings

KATE MAHONEY

With increasing regularity, immigration judges are asked to decide whether evidence obtained in violation of the Fourth Amendment to the U. S. Constitution should be excluded from removal proceedings in their courtrooms. In motions to suppress, respondents challenge the nature and circumstances under which immigration officers obtained the evidence giving rise to their removal proceedings, usually urging that the Record of Inadmissible/Deportable Alien (Form I-213) be suppressed. For example, a respondent may allege that, while executing an arrest warrant at a suspect's home, Immigration and Customs Enforcement (ICE) officers entered her apartment without consent and arrested her after she admitted alienage. Another may assert that ICE officers entered his workplace and questioned employees who could not speak English, arresting the respondent along with other undocumented workers. In another motion, a respondent may claim that she was arrested as a result of a stop predicated only on her "Hispanic appearance."

If these scenarios resulted in criminal proceedings, the result would be undisputed: under the "exclusionary rule," the criminal court would exclude any evidence obtained in violation of the Fourth Amendment's guarantee against warrantless search and seizure. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). However, in civil immigration proceedings, the consequences of officer actions that violate the Constitution are far less clear. The source of this confusion may lie in the fact that civil removal proceedings bear similarities to criminal cases which, according to some, justify heightened procedural protections like the exclusionary rule. For example, the penalties levied in immigration proceedings—deportation or removal from the United States—are arguably more akin to criminal sanctions than civil ones. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010). Additionally, as in the criminal context, immigration proceedings are often initiated by an arrest, which inevitably carries with it the risk that the arresting officer's conduct will come under scrutiny.

In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984), the Supreme Court announced what appeared to be a clear rule: in general, Fourth Amendment violations would not result in exclusion of evidence from immigration proceedings.1 However, circuit courts have since struggled to delimit that prohibition, attempting to give meaning to what is now known as the "egregiousness exception." *See id.* For its part, the Board of Immigration Appeals has assumed that an exception exists, but it has declined to articulate the contours of the exception. In light of the compelling policy interests weighing in favor of and against application of the exclusionary rule in immigration proceedings, it is unsurprising that nearly three decades after *Lopez-Mendoza*, immigration judges still find themselves with little guidance when faced with requests for suppression. In an attempt to assist immigration judges facing increasingly frequent motions to suppress, this article examines the current state of the law against the backdrop of a protracted debate among the board and reviewing courts. After a brief summary of early board case law and *Lopez-Mendoza*, the article examines the development of case law in the circuit courts over the past three decades, in particular the controversial discord between the 9th Circuit and the other courts of appeals.

Board Law Prior to *Lopez-Mendoza*

Beginning in the 1970s, the board consistently denied requests for suppression based on the facts of each particular case. *See, e.g.*, *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971) (denying a request for suppression but acknowledging that the remedy may be available in some cases); *see also Matter of Wong*, 13 I&N Dec. 820, 821-22 (BIA 1971) (same). By 1979, however, the Board changed gears. *See Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979). In *Sandoval*, the respondent lived in a house that had been divided into several separate apartments. Immigration officers entered and searched her apartment without consent, and the respondent was taken into custody and held for eight hours until she signed an affidavit admitting alienage and illegal entry. In her deportation proceeding, the government conceded that the detention and arrest were the result of a warrantless search in violation of the Fourth Amendment. The board assumed that if the exclusionary rule applied in deportation proceedings, her illegally obtained admissions would be suppressed.

Rather than ordering the evidence suppressed, however, the board embarked on a lengthy analysis of the costs and benefits of applying the exclusionary rule in deportation proceedings, tracking *United States v. Janis*, 428 U.S. 433, 448-53 (1976), a then-recent Supreme Court case that addressed a similar question in the context of tax proceedings. *See Sandoval*, 17 I&N Dec. at 76. The board emphasized that the primary benefit of the rule in criminal proceedings is its deterrent value: officers are discouraged from engaging in unconstitutional misconduct by the knowledge that tainted evidence will be useless in criminal court. The board noted that because deportation proceedings are often collateral to criminal investigations, the additional deterrent effect of applying the exclusionary rule twice—in both the criminal and the deportation proceeding—would be minimal. The board then weighed this slight benefit against substantially greater societal costs: suppressing evidence

from deportation proceedings would result in unnecessary delays and waste of resources; would distract from the real controversy, namely, the individual's illegal presence; and would encourage parties to forego more efficient challenges through existing bureaucratic channels, such as filing a complaint with the officer's supervisor. Perhaps most importantly, the board highlighted the fundamental difference between the rule's operation in criminal and civil proceedings: while exclusion in a criminal case allows "immunity for past conduct," exclusion in deportation proceedings would sanction "a continuing violation of this country's immigration laws." *Id.* at 81. Concluding that the costs substantially outweighed the benefits, the Board held that neither "legal [nor] policy reasons dictate the exclusion of unlawfully seized evidence" from deportation proceedings. *Id.* at 83. For the moment, it seemed that the case for suppression in immigration courts was closed.

***Lopez-Mendoza* and the Egregiousness Exception**

For several years, the rule prescribed by *Sandoval* remained the last word on suppression. *See, e.g.*, *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980). However, in *Lopez-Mendoza*, the Supreme Court took up the question in a case involving two petitioners arrested in workplace operations. 468 U.S. at 1035-37. During both respondents' arrests, officers of the former Immigration and Naturalization Service (INS) obtained evidence of alienage that the INS used to initiate deportation proceedings. In proceedings, both respondents sought suppression of their Forms I-213 and verbal admissions. Following *Sandoval*, the board denied both motions, but the 9th Circuit disagreed and found that the exclusionary rule should have applied in both cases. The INS appealed to the Supreme Court.

In an opinion by Justice Sandra Day O'Connor, the court began by highlighting a critical distinction between criminal and civil proceedings: technically, a deportation proceeding is not designed to "punish an unlawful entry" but to determine an individual's "right to remain in this country in the future." *Lopez-Mendoza*, 468 U.S. at 1038. The court also highlighted the procedural differences between deportation proceedings and criminal trials: deportation proceedings lack certain protections; the government bears a lesser burden in proving its case; and traditional rules of evidence do not apply. In short, the court stated, "[A] deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more." *Id.* at 1039.

Against this backdrop, the court conducted its own *Janis* analysis, balancing the costs and benefits of excluding evidence from deportation proceedings, and it ultimately held that the benefits did not justify allowing suppression in immigration courts. *Id.* at 1042, 1050. While five justices signed the majority holding of *Lopez-Mendoza*, only four agreed with the final paragraph of Justice O'Connor's opinion, which stated, "[W]e do not deal here with *egregious* violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050-51 (emphasis added). The remaining four justices dissented, arguing that the exclusionary rule should apply to all Fourth Amendment violations challenged in deportation proceedings. The effect of *Lopez-Mendoza*, in particular the weight and meaning of this final paragraph, remains a subject of dispute today.

Following this caveat, Justice O'Connor cited two cases, *Rochin v. California*, 342 U.S. 165 (1952), and *Matter of Garcia*, 17 I&N Dec. 319, the import of which remains a topic of speculation among courts today. In *Rochin*, the Supreme Court ordered the exclusion of evidence obtained after police forcibly pumped the defendant's stomach to yield evidence of possession of an illicit substance. 342 U.S. at 166. The court ruled that this conduct "shock[ed] the conscience" and warranted exclusion despite the evidence's reliability. *Id.* at 172. In contrast, in *Garcia*, the respondent had admitted alienage under conditions so coercive that the board found his statements involuntary and excluded them as unreliable. *See* 17 I&N Dec. at 321. Since *Lopez-Mendoza*, the circuits have looked to *Rochin* and *Garcia* for guidance, and some have held that the Court intended them to illustrate the types of violations that the Supreme Court considered to be "egregious." *See Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234-35 (2d Cir. 2006); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994).

In the years that followed *Lopez-Mendoza*, the Board, without explicitly acknowledging *Lopez-Mendoza*, established a process for immigration judges to evaluate motions to suppress. In *Matter of Barcenas*, 19 I&N Dec. 609, 610-11 (BIA 1988), the board refined a framework for adjudicating motions to suppress previously laid out in *Tang*, 13 I&N Dec. at 692, and *Wong*, 13 I&N Dec. at 821—cases that it had not cited since *Sandoval*. First, if a respondent's affidavit establishes a prima facie case meriting suppression, he must then support his affidavit with oral testimony. *Barcenas*, 19 I&N Dec. at 611. Only if the respondent's written and oral statements support exclusion of the evidence does the burden shift to the government to "justify[] the manner in which it obtained the evidence." *Id.* (quoting *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975)) (internal quotation mark omitted). Despite providing this procedural roadmap, however, the board declined to interpret *Lopez-Mendoza* or state what might constitute an "egregious" violation. Thus, although circuit courts apply the *Barcenas* framework, the outcomes yielded by that framework diverge dramatically.

The Exception in the Circuits

Nearly 30 years after *Lopez-Mendoza*, two tests have emerged in the courts of appeals. The majority of circuits, led by the First and Second, apply a conduct-based analysis that focuses on whether the offending officers' actions were egregious. This test can also be termed an "aggravating-factors" test because it relies on the presence of certain factors that might render a violation egregious. Meanwhile, the Ninth Circuit applies a "bad-faith" test that turns on the reasonableness of the alleged violation. Not all circuits have

Constable continued on page 8

Constable continued from page 7

had occasion to weigh in on the question, but at least one has declined to find any exception at all.

The Conduct-Based Approach

In *Almeida-Amaral*, a case arising in the Second Circuit, the petitioner was walking in a public parking lot at night when he was stopped by a border patrol agent, questioned, and placed in removal proceedings. 461 F.3d at 232-33. The petitioner moved to suppress the resulting evidence, arguing that because no other justification was apparent, the sole suspicion for the stop was his ethnicity. Noting Justice O'Connor's reference to *Rochin* and *Garcia*, the Second Circuit posited that *Lopez-Mendoza* carved out two types of egregious violations: those that "transgress notions of fundamental fairness" and those that "undermine the probative value of the evidence." *Id.* at 234 (quoting *Lopez-Mendoza*, 468 U.S. at 1050-51) (internal quotation marks omitted). Whether a violation is fundamentally unfair, the court reasoned, turns on the "characteristics and severity of the offending conduct," and not just whether the stop violated the Constitution as a technical matter. *Id*. at 235. The court stated that a stop based purely on ethnicity or race is always egregious, but it implied that a respondent must provide facts or evidence beyond his own speculation that the stop was race based. *Id.* at 237. The court also listed other aggravating factors that might be egregious, such as an unreasonable use of force or a particularly lengthy illegal stop. *Id.* at 236; *see also Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131-33 (2d Cir. 2008) (approving the conduct-based test but denying the petition for review in the absence of any Fourth Amendment violation). The Second Circuit found no evidence that the stop was based on race, and in the absence of other aggravating factors rendering the arrest egregious, it denied the petition for review. *Almeida-Amaral*, 461 F.3d at 236-37.

In *Kandamar v. Gonzales*, the First Circuit applied a similar conduct-based test in a case challenging the National Security Entry-Exit Registration System. 464 F.3d 65, 71-72 (1st Cir. 2006). Noting that the petitioner had failed to proffer evidence of "any government misconduct by threats, coercion or physical abuse . . . that would constitute egregious government conduct," the court found that the petitioner had not adequately justified suppression of evidence. *Id.* at 72. Perhaps reading *Lopez-Mendoza* more narrowly than the Second Circuit, the *Kandamar* court stated that the Supreme Court left open only a "glimmer of hope of suppression" in removal proceedings. *Id.* at 70 (quoting *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004) (internal quotation marks omitted). Still, the court's characterization of the egregiousness question as a conduct-based inquiry was clear. *Id.* at 74 (noting the "lack of egregious government misconduct" when denying the petition for review). Interestingly, in *Kandamar* the court noted that *Lopez-Mendoza* viewed favorably the board's holding that evidence may be excluded if its admission would violate the due process requirements of the Fifth Amendment. *Id.* at 70. Thus, in the First Circuit, it may be that only Fourth Amendment violations that are so egregious as to violate due process are "egregious" enough to merit suppression. *Id.*

More recently, the Eighth Circuit has joined the First and Second Circuits in applying the conduct-based approach. First, in *Puc-Ruiz v. Holder*, police arrested the petitioner during a warrantless operation at the restaurant where he worked. 629 F.3d 771, 775 (8th Cir. 2010). Citing *Almeida-Amaral*, the Eighth Circuit noted that while egregious violations need not involve physical brutality, a mere violation alone will not suffice. *Id.* at 778. Comparing the facts of its own case to those of *Rochin*, the court focused on the absence of evidence showing that the officers' conduct shocked the conscience or offended the "community's sense of fair play and decency." *Id.* at 778 (citing *Rochin*, 342 U.S. at 172-73). The court noted that the arrest in question involved no unreasonable use of force, no race-based stop, and no other severe police misconduct. *Id.* The following year, the court narrowed the window for suppression even further when it noted that violations by state law enforcement officers will rarely justify suppression of evidence in an immigration proceeding, even when characterized by egregious conduct. *See Lopez-Gabriel v. Holder*, 653 F.3d 683, 686 (8th Cir. 2011). This sentiment finds support in other circuits as well, and the issue may arise more frequently as States attempt to implement their own immigration enforcement statutes. *See United States v. Guijon-Ortiz*, 660 F.3d 757, 769-70 (4th Cir. 2012) (finding that no Fourth Amendment violation occurred where a local law enforcement officer prolonged a routine traffic stop to call ICE to verify a suspect's immigration status); *see also Arizona v. United States*, 132 S. Ct. 2492, 2510-11 (2012) (invalidating some provisions of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, Ariz. Senate Bill 1070, but allowing enforcement of a provision that requires state police to confirm the immigration status of certain detainees and arrestees).

The Ninth Circuit's Bad-Faith Approach

In contrast to the First, Second, and Eighth Circuits, the Ninth Circuit has consistently applied a test that turns on whether the offending officers acted in bad faith, either by deliberately or unreasonably violating the Fourth Amendment. *See generally Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008), *petition for rehearing en banc denied*, 560 F.3d 1098 (9th Cir. 2009); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *Gonzalez-Rivera*, 22 F.3d at 1449. The Ninth Circuit's test has also been characterized, both by supporters and critics, as an "objective test," because it focuses on what reasonable officers would have done rather than the subjective reprehensibility of the officers' conduct.2 In *Orhorhaghe*, INS officers, acting on a tip from a private financial investigator, went to the petitioner's home without a warrant, but they obtained the respondent's consent to enter his apartment. 38 F.3d at 491. After questioning, an officer opened the petitioner's briefcase without permission and found evidence of alienage and

illegal presence. *Id.* at 492. The petitioner was placed in deportation proceedings, where government witnesses testified that their tip was based on the petitioner's "Nigerian-sounding" name. *Id.* at 491.

The Ninth Circuit began by noting that in *Lopez-Mendoza*, while only four Justices had signed onto the "egregiousness" language, the four dissenters stated that they would have applied the rule to all Fourth Amendment violations, regardless of their severity. *Orhorhaghe*, 38 F.3d at 493 n.2. Thus, in theory, eight Justices supported "leaving open the possibility that the exclusionary rule might apply to egregious violations" at the very least. *Id.* The court interpreted this as evidence of the Supreme Court's clear intent to allow suppression in some cases. *Id.* The court set forth a two-part test for determining when a violation is egregious. *Id.* at 493. First, immigration judges should inquire whether the Fourth Amendment was violated. If so, the violation is egregious if it was committed "deliberately or by conduct a reasonable officer should have known would violate the Constitution." *Id.*. The *Orhorhaghe* court concluded not only that the officers violated the Fourth Amendment by entering the apartment and seizing the petitioner without a warrant, but that their actions were egregious because they were "based on the unfounded and unwarranted assumption that people with certain foreign-sounding names are likely to be illegal aliens." *Id.* at 501. The same year, the court applied this rule to a second case involving a seizure based on ethnicity, again finding that the violation ran afoul of well-settled constitutional law and thus constituted an egregious violation. *See Gonzalez-Rivera*, 22 F.3d at 1452. The Ninth Circuit has continued to apply the bad-faith test since *Orhorhaghe* and *Gonzalez-Rivera*, even in cases not involving race-based stops. *See Lopez-Rodriguez*, 536 F.3d at 1016-19 (finding that a warrantless entry without consent constituted an egregious violation of the Fourth Amendment).

Other Circuits

The majority of remaining circuits have not addressed the question whether suppression may apply to egregious Fourth Amendment violations in immigration proceedings. For example, the Fifth Circuit, citing *Lopez-Mendoza*, has held that the "Supreme Court has specifically refused to extend the exclusionary rule to immigration proceedings." *Ali v. Gonzales*, 440 F.3d 678, 681 (5th Cir. 2006). *But see Aziz v. Gonzales*, 185 F. App'x 349, 350 (5th Cir. 2006) (holding that the exclusionary rule does not apply in immigration proceedings, but noting that an "egregious" violation may be found where the respondent can demonstrate "substantial prejudice"). The 10th Circuit has also suggested that *Lopez-Mendoza* never requires suppression following a breach of the Fourth Amendment. *See Luevano v. Holder*, 660 F.3d 1207, 1212 (10th Cir. 2011) ("In *INS v. Lopez-Mendoza*, the Supreme Court decided the exclusionary rule does not apply in civil deportation proceedings."). Instead, the 10th Circuit, like the First Circuit in *Kandamar*, suggested that evidence may be excluded only where admission would be "fundamentally unfair," limiting so-called "egregious" Fourth Amendment violations to those that offend due process. *Id.* The 7th Circuit has also offered this limited interpretation of *Lopez-Mendoza*. *See Kairys v. INS*, 981 F.2d 937, 941 (7th Cir. 1992) (holding that *Lopez-Mendoza* requires admission of evidence obtained contrary to the Fourth Amendment unless the evidence is unreliable). The remaining circuit courts have not squarely addressed *Lopez-Mendoza*'s effect on admissibility of evidence in removal proceedings.

Criticism of the Bad-Faith Approach

Despite its consistent application of the bad-faith approach in a comparatively large docket of immigration cases, the 9th Circuit has come under scrutiny from sister circuits, as well as internally. The 8th Circuit recently criticized the objective approach in *Garcia-Torres v. Holder*, 660 F.3d 333, 337 n.4 (8th Cir. 2011). The court first noted that *Lopez-Mendoza* did not address an "egregious" violation; indeed, Justice O'Connor found that the violations at issue were not so severe as to require suppression. *See id.* at 336; *see also Lopez-Mendoza*, 468 U.S. at 1050-51. Thus, the court reasoned, any exception that exists today is arguably based on dicta, rather than binding precedent. *See Garcia-Torres*, 660 F.3d at 336. Next, the court argued that the 9th Circuit's bad-faith test functionally allows for suppression any time the Fourth Amendment is violated because the Fourth Amendment prohibits only "unreasonable" searches and seizures. *Id.* at 337 n.4. According to the 8th Circuit, the 9th Circuit's test would "eviscerate" *Lopez-Mendoza* by allowing the exception to swallow the rule. *See id.*

At least some judges in the 9th Circuit are also troubled by their court's refusal to align with the First and Second Circuits. *See Lopez-Rodriguez*, 536 F.3d at 1018. In *Lopez-Rodriguez*, the 9th Circuit found a bad-faith violation where officers entered the petitioner's residence without a warrant or consent. Although the petitioner made no allegations of racial motivation, the court still applied the bad-faith test from *Orhorhaghe* and *Gonzalez-Rivera*, and it found that the violation was egregious because "reasonable officers would not have thought it lawful to push open the door to petitioners' home simply because [another resident] did not 'tell them to leave.'" *Id.* at 1018. Reciting the well-settled precedent prohibiting warrantless entry without consent, the court held that the tainted evidence should have been excluded from the record. *Id.* at 1016-19. In a concurrence, Judge Bybee compared the bad-faith standard to the test for "qualified immunity" from civil liability for constitutional violations by Government officials. *See id.* at 1019-20 (Bybee, J., concurring); *see also Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009) (holding that an officer is only liable for a constitutional violation when "clearly established law" rendered the conduct unconstitutional at the time the violation occurred). Like the 8th Circuit, Judge Bybee criticized the court for diluting the limited scope of the egregiousness exception by extending it to all unreasonable or deliberate violations. *Lopez-Rodriguez*, 536 F.3d at 1019-20 (Bybee, J., concurring).

The 9th Circuit subsequently denied a petition to

CONSTABLE **continued on page 10**

Constable continued from page 9

rehear *Lopez-Rodriguez*. *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1099 (9th Cir. 2009). In a fiery dissent, Judge Bea also compared his colleagues' interpretation of *Lopez-Mendoza* to the test for qualified immunity, and he criticized the court for veering off track in its early applications of *Lopez-Mendoza*. *Id.* at 1101 (Bea, J., dissenting). Judge Bea characterized *Lopez-Rodriguez* as flatly in conflict with Supreme Court precedent and every other circuit, and he applauded the First and Second Circuits' conduct-based approach. *Id.* at 1101-05. However, despite Judge Bea's admonitions, the majority of the 9th Circuit appears unwilling to depart from its interpretation absent a mandate to the contrary.

Conclusion

Despite being the first court of appeals to interpret *Lopez-Mendoza*'s purported egregiousness exception, the 9th Circuit has not found support for its bad-faith test in any other circuit. Nevertheless, the court's recent refusal to rehear *Lopez-Rodriguez* suggests that it will continue to apply the bad-faith test until instructed to do otherwise, a stance that creates a dramatic circuit split in the outcomes of motions to suppress. Meanwhile, since the Supreme Court spoke nearly three decades ago, the board has remained silent on the question.

The Supreme Court and the Ninth Circuit have each acknowledged that at the heart of the debate is the importance of preventing racial profiling in law enforcement and protecting the rights of ethnic minorities in the United States. *See Lopez-Mendoza*, 468 U.S. at 1045-46; *Gonzalez-Rivera*, 22 F.3d at 1449. Additionally, the 9th Circuit has emphasized that excluding illegally obtained evidence protects judicial integrity by sending a message that "Federal courts cannot countenance deliberate violations of basic constitutional rights." *Gonzalez-Rivera*, 22 F.3d at 1448 (quoting *Adamson v. Comm'r*,745 F.2d 541, 546 (9th Cir. 1984)) (internal quotation marks omitted). Finally, courts continue to grapple with the rule's deterrent effect, or lack thereof, particularly where the actions of non-immigration officers are at issue. *See Garcia-Torres*, 660 F.3d at 336; *Pinto-Montoya*, 540 F.3d at 130. To the extent that the exclusionary rule deters officers from engaging in racially motivated immigration-enforcement actions, courts seem to agree that extension of the rule to immigration proceedings is practical. *See Almeida-Amaral*, 461 F.3d at 237. However, the realities of an already overburdened system suggest that the deterrent effect of suppression is minimal. Given that only a small percentage of regulatory arrests result in court proceedings, the likelihood that exclusion would influence officers' conduct in the field is perhaps slim. *See, e.g.*, *Lopez-Gabriel*, 653 F.3d at 686.

Courts have also identified some clear costs that weigh against allowing exclusion of evidence from immigration proceedings. *See Lopez-Rodriguez*, 560 F.3d at 1103 (Bea, J., dissenting). Today, as in 1984, excluding evidence from immigration proceedings effectively sanctions an ongoing violation of U.S. immigration laws, while the rule in the criminal context offers immunity for past conduct. As Justice O'Connor stated, "The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime." *Lopez-Mendoza*, 468 U.S. at 1047. That concern continues to trouble critics of the exclusionary rule, especially as the immigration debate becomes increasingly politicized.

Amidst this policy crossfire, immigration judges are left to decide ever more common motions to suppress without clear guidance. The regulations and the Fifth Amendment's guarantee of due process ensure that certain types of severe violations do not unfairly prejudice respondents in removal proceedings, but even these protections leave unaddressed certain Fourth Amendment violations that may challenge the legitimacy of immigration enforcement. *See Garcia-Flores*, 17 I&N Dec. 325, 328 (BIA 1980); *Garcia*, 17 I&N Dec. at 321. Until the board or the Supreme Court provides greater clarification, however, immigration judges must continue to apply the law of the circuit in which they sit. ◆

Kate Mahoney is a law clerk in the U. S. district court. She was previously an attorney advisor at the San Francisco Immigration Court. This article was reprinted from the Immigration Law Advisor, *Vol. 6 No. 8.*

The Immigration Law Advisor *is a professional newsletter of the Executive Office for Immigration Review (EOIR) that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the immigration courts and the Board of Immigration Appeals. Any views expressed are those of the author and do not represent the positions of EOIR, the Department of Justice, the attorney general, or the U.S. government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the* Immigration Court Practice Manual *and/or the* Board of Immigration Appeals Practice Manual.

Endnotes

[1]It is undisputed that evidence obtained in violation of certain regulations or the Fifth Amendment's guarantee of due process cannot be considered in removal proceedings. *See, e.g.*, *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980) (announcing a three-part test for exclusion of evidence obtained as a result of certain regulatory violations that prejudiced the respondent); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (excluding the respondent's admissions of alienage because they were made involuntarily under coercive conditions). This article does not address the law on these types of violations.

[2]Interestingly, the 9th Circuit drew on board language to justify its objective test, noting, "It appears that the BIA has also adopted a reasonableness standard to determine whether an officer has engaged in a bad faith constitutional violation." *Gonzalez-Rivera*, 22 F.3d at 1449 (citing *Toro*, 17 I&N Dec. at 343).

Memo to Immigration Reformers: "First Catch Your [EB-5] Hare!"

ANGELO A. PAPARELLI

Winston Churchill, whose mother was American (Jennie Jerome of Brooklyn), could just as well have been speaking about the components of comprehensive immigration reform. Instead he was commenting on the Allies' post-World War II plans for world governance when, in the summer of 1942 with the war yet unwon, he said:

> I hope these speculative studies will be entrusted mainly to those on whose hands time hangs heavy, and that we shall not overlook Mrs. [Hannah] Glasse's Cookery Book recipe for the jugged hare—"First catch your hare." — *The Last Lion: Winston Spencer Churchill: Defender of the Realm, 1940-1965*, by William Manchester and Paul Re.

This quote came to mind as I pondered two recent developments, one widely reported and the other probably unseen by most. The first involves the various and sundry cart-before-the-horse discussions in the House and Senate and at 1600 Pennsylvania Avenue about essential elements of comprehensive immigration reform (CIR). The second is a Securities and Exchange Commission (SEC) press release announcing the filing of a civil complaint against a promoter and two LLCs alleging a scam involving over 250 Chinese investors reportedly duped into entrusting a total of $155 million in the hopes of gaining U.S. permanent residency under the EB-5 employment-creation immigrant visa category.

What's the connection? Well, as everyone knows, Congress, the White House and the pro- and anti-immigration advocacy groups are busy arguing the pillars of immigration reform: border security, employment-based visa reforms, a path to citizenship for unauthorized immigrants, and future flows of legal immigrants and sojourners. Given much less, if any, attention, however, is whether the government's immigration bureaucracy can competently manage, regulate and enforce all these laws. Are the immigration bureaucrats, judges and police up to the task?

To answer that elemental question, first consider the wisdom of Jim Collins in *Good to Great* who maintains that leaders of organizations that "go from good to great":

> … start not with "where" but with "who." They start by getting the right people on the bus, the wrong people off the bus, and the right people in the right seats. And they stick with that discipline—first the people, then the direction—no matter how dire the circumstances.

I submit—as I've argued elsewhere and often in this blog—that:

- The immigration agencies need more of the new breed of leaders who are just as passionate about customer service in the immigration-benefits sphere as they are about border security and the integrity of the system ("boarding the right people onto the bus");
- The heel-draggers and naysayers among the immigration bureaucracy, the cultists of "No," the feather-bedding careerists, and the power-mongers—all must be exited ("getting the wrong people off the bus"); and, especially important,
- Our immigration leadership must be deployed strategically and intelligently ("putting them in the right seats on the bus").

So what's this got to do with the SEC's civil suit against some reputed EB-5 scammers? Everything; because it illustrates fundamental structural problems with the way Congress established the architecture for immigration management and oversight.

The SEC has expertise in enforcing the securities laws, a statutory scheme developed to protect investors from unscrupulous promoters. The agency's professionals understand capital formation and are far more adept (the Madoff fiasco notwithstanding) than USCIS at determining whether adequate disclosures are made and representations about investment opportunities are grounded in fact or fantasy. Similarly, the Department of Commerce understands business, entrepreneurship, start-ups and the promotion of America's goods and services.

The Departments of Homeland Security and State, on the other hand, are expected to apply and enforce the Immigration and Nationality Act. Until recently, with the advent of the Entrepreneurs in Residence program, they have had precious little training in the ways of business. Indeed, near-term history has shown that the DHS and state department components tasked with determining whether individuals and businesses qualify for immigration benefits or should be debarred from participation or admission to the United States—U.S. Citizenship and Immigration Services (USCIS) and U.S. consular officers in state, respectively—have no special expertise in assessing legitimate or illegitimate business practices.

For examples in the EB-5 context see the following blog posts:

- "Immigration's NannyStateGate: Picking EB-5 Winners and Losers"
- "The EB-5 Investor Immigration Program: Green Shoots or Chutes and Ladders?"
- "Immigration-Agency Lawbreaking Revealed: USCIS's EB-5 'Tenant-Occupancy' Scandal"
- "What Are We Paying for? USCIS and the I-526

REFORMERS continued on page 12

Reforming continued from page 11

Exemplar Process"

- "Dollars and Jobs for EB-5 Green Cards: A Challenging Route to U.S. Residency"
- "The Relevance of U.S. Securities Laws to Immigrant Investors, Eb-5 Regional Centers and Their Advisors"
- "Investing in America through the E-2 and EB-5 Visa Categories."

If the immigration adjudicators have neither training nor expertise in business analysis, why then do the immigration reformers in Congress, acting with the professed intention to spur business activity, job creation and economic prosperity, continue to entrust business-related issues arising under the immigration laws to USCIS adjudicators and American consular officers? Witness, as two examples among many, the allocation of power in recent employment-based immigration initiatives: The StartUp Visa Act and the Startup Act 2.0. These legislative proposals ask the Homeland Security Secretary to determine whether capital has been invested and jobs have been created.

The StartUp Visa Act asks DHS to decide if "a qualified venture capitalist, a qualified super angel investor, or a qualified government entity … has invested "at least $100,000 on behalf of a "qualified immigrant entrepreneur … whose commercial activities" in two years will "create not fewer than 5 new full-time jobs in the United States," and "raise not less than $500,000 in capital investment in furtherance of a commercial entity based in the United States; or … generate [at least] $500,000 in revenue."

Similarly, the Startup Act 2.0 expects DHS to assess whether a "qualified alien entrepreneur … [has] register[ed] at least 1 new business entity in a State; … employs … at least 2 full-time employees … , invest[ed], or raise[d] [a] capital investment of, not less than $100,000 in such business entity; and … during [a]3-year period … employ[ed], at such business entity in the United States, an average of at least 5 full-time employees …"

I propose that Congress re-visit the Homeland Security Act and determine whether it makes sense to house USCIS in the Homeland Security Department, rather than in the Justice Department, given that justice is a better alignment of USCIS's mission in terms of weighing the scales and meting out a fair decision grounded in facts and law.

As for business and investment cases, particularly the EB-5 immigrant and E-2 nonimmigrant categories, decisions about investment sufficiency, investor protection, and job creation prospects should be vested in the Commerce Department or a similarly qualified department or agency of government. See, "Economic Prosperity—The Missing Immigration Mission," and Feb. 19, 2010 Memorandum of the Alliance of Business Immigration Lawyers to Alejandro Mayorkas, director, U.S. Citizenship and Immigration Services, Headquarters (USCIS) Re: "Employment-Based Immigration Proposals for Inclusion in Comprehensive [Immigration] Legislation":

Existing Executive-Branch Departments protect and promote important national interests: foreign policy (state), Homeland Security (DHS), Labor (DOL). No department performs a similar function to support and defend the economic benefits of immigration as a means of fostering innovation and prosperity. "Fortress-America" policies and those that go too far in protecting domestic labor interests without recognizing the job-creating capabilities of employment-based immigration do a disservice to important national interests. CIR should create within the Department of Commerce or another suitable department an agency to support and protect the economic benefits of immigration. Meantime, USCIS should take steps to espouse, protect and defend encroachments on the job-creating power of business-related immigration laws.

If and when commerce or another qualified federal component approves the business-based facts as warranting immigration benefits prescribed under the immigration laws, only then would USCIS, DHS's immigration inspectors and state's consular officers determine the question whether the individual investor or family member is or is not admissible to the United States. In other words, USCIS's role would be to run the security screens, document biometrics, keep out the unwelcome, and issue fraud-proof plastic green cards and work permits to deserving recipients under the employment-based immigration roles.

For this to occur, however, Congress must really think big. It must create a new cabinet post, the Secretary of the Department of Immigration, charged with overarching authority to harmonize and reconcile immigration law and policy among the other federal departments and agencies, and accorded a budget and staff adequate to the task.

Quoting another famous Brit, John Lennon, who likely would likely have become an American had he not been murdered before qualifying for naturalization, "you may say that I'm a dreamer, but I'm not the only one." For as Winston Churchill also said:

> We shall not fail or falter, we shall not weaken or tire. Neither the sudden shock of battle, nor the long-drawn trials of vigilance and exertion will wear us down. ◆

Angelo A Paparelli is a partner in the Business Immigration Practice Group of Seyfarth, Shaw LLP, based in Los Angeles, CA. He writes an entertaining blog, "Nation of Immigrators," on America's dysfunctional immigration system.

A Personal Essay—Challenges in Immigration: Ugandan Orphans

BY CHRISTINE LOCKHART POARCH

His name is Isaac. He's a precocious, smart Ugandan four-year-old. He has lots of questions. He likes eye shadow. He has only ever known one mother and father—"Mama" and "Poppy"—two Caucasian U.S. citizens who have four natural born children. Like so many others, Mama and Poppy were moved to adopt abroad. In this case, Mama is a librarian with an inexplicable love of teen dystopian novels—*Hunger Games* and the like. Poppy is a native New Yorker and a stonemason. Together, they decided to adopt a sibling set—Isaac and his sister Grace. After two trips and more than 64 days in Uganda, Mama and Poppy returned home to the United States with Isaac and Grace.

When McLane Layton, a fellow attorney and President of Equality for Adopted Children, asked me to accompany her on a twelve-day trip to learn more about issues with international adoption in Uganda, the thought of falling in love with kids like Isaac and Grace was the only thing that made me terrified to travel. Our family travels a lot, so it wasn't leaving home that gave me pause or the 21-hour in-flight time or even the overnight layover in Dubai. In fact, the prospect of finding a deal at Dubai's famous gold market made me a little giddy. Rather, I was concerned that I would want to adopt.

In the practice of law, we cultivate a necessary and healthy "safety" on our empathy response in order to execute our jobs effectively. We have to be empathic and passionate but also be able to stop ourselves short of becoming enmeshed. I was uncertain whether the emotional boundaries I carefully crafted as an attorney would hold when faced with children—lots of them—who are in desperate need.

I have yet to synthesize everything I learned on our trip, so this article is not intended to be a compendium of action items or conclusions but rather, a simple report of our very brief observations of the inherent difficulties and challenges of international adoption in Uganda. Disclaimers aside, it's important to first put Ugandan adoptions in context.

Ugandan Adoptions in Context

While we were in Uganda, the Addis Ababa-based group African Child Policy Forum held a conference during which the organizers called Africa the "new frontier for inter-country adoption," and claimed that 41,000 children were removed from their African home countries since 2004. *Africa: The New Frontier for Intercountry Adoption*. Addis Ababa: The African Child Policy Forum (2012).

I'm not a statistics wonk and haven't investigated the truth or falsity of the group's assertion, but I am confident that the U.S. Embassy in Kampala has a fairly good count of Ugandan children who have been successfully processed through their ranks as orphans. The number is surprisingly small: only 207 in 2011. *FY 2011 Annual Report on Intercountry Adoption* (2011).

United Nations International Children's Emergency Fund (UNICEF) alleges that in Uganda alone, there are 40,000 children in *known* institutions. Why *known*? Because it's not uncommon that some well-meaning individuals (and some not) set up impromptu "schools" or "homes" behind churches or residences to care for children. Consultants working with UNICEF in Uganda with whom we met conducted substantial investigation into the circumstances of inter-country adoption in Uganda and assert that only a small number of babies' or children's homes are registered with the local district counsels and estimate that many other unregistered homes exist around Uganda.

U.S. Adoptions from Non-Hague Countries Like Uganda

Prior to leaving on this trip, I was frequently asked to help families marshal evidence and draft support for orphan petitions when the families encountered snags with either the Department of State or U.S. Citizenship and Immigration Services. An orphan petition, once predicated and properly proven on one of seven statutory grounds, permits a foreign child to enter the U.S. as a child of a U.S. citizen adoptive parent. This process allows the child to claim lawful permanent residence and automatic U.S. Citizenship under the Child Citizenship Act—a law that McLane Layton initially drafted in the late nineties when she was Legislative Counsel for former U.S. Senator Don Nickles of Oklahoma.

Absent true, willful "fraud"—which I believe is rare—snags are usually easy to resolve once the family understands their legal burden and how to best demonstrate that their child is an "orphan" under U.S. law. Attorneys like McLane and I are a bit like Poppy, the stone mason. We chisel away the inessential facts of the case to sand and polish the facts that are relevant to support that a child meets the definition of an "orphan." We can't rely on a thin factual veneer to carry the case. The legal burden is high.

To qualify as an orphan in non-Hague Convention countries, the applicant-child must have been unequivocally abandoned or deserted by, lost or separated from his parent. INA § 101(b)(1)(F). Alternatively, the parent may also simply have died or disappeared. *Id.* Each of these six grounds has a specific meaning in U.S. regulations. 8 C.F.R. § 204.301, et seq. Alternatively, a single or surviving parent who is unable to provide proper care for the child may, in writing, irrevocably release the child for emigration and adoption. INA § 101(b)(1)(F).

Typical Problems Proving the Non-Hague Case

Issues arise in non-Hague adoptions independent of the country in which they originate and the issues are almost always related to the sufficiency of evidence, that is,

the clarity or obscurity of the relevant underlying facts. In Uganda, any number of cultural and historical issues complicate the adjudication of these petitions and meticulous identification of facts surrounding the child's origins.

First, there is a persistent problem of accurately documenting the number of births or deaths in the northern part of the country where intense fighting and displacement are common. We have seen cases where a baby was found beside a slaughtered parent and others where the fathers could not be identified because they were separated from the family by regional conflicts. Prostitutes don't always know who fathered a child or the father is reluctant to come forward. In all of these cases, there is a problem of proof and notice. For the purpose of procuring a U.S. adoption, the family has the burden of demonstrating one of the seven statutory grounds and must demonstrate that they tried to find missing parents by advertising or hiring private investigators to prove that the mother isn't lying about the father's absence.

The timing of a child's placement in a children's home also causes serious heartburn to U.S. officials adjudicating these cases. These problems arise from the realities of Ugandan life. Police, who may literally receive the child from someone who found them in the street, do not routinely engage in an exhaustive search for the parents. There is no "Department of Social Services" agency that will undertake such an inquiry either. Rather, the police simply deliver the child to the children's or babies' home they know or that is closest to them. Depending on the home, that investigation into the circumstances of the child's abandonment may or may not take place prior to referring children to prospective adoptive families.

Likewise, there are issues in which the parent or another relative arranges ahead of time to leave a child at a children's home and the home refers the child to an adoptive parent before the child's feet have even pattered across the threshold. Bad practices in making referrals of children result in serious problems once the case arrives at the U.S. Embassy for processing of the orphan determination.

By the time most families encounter a hiccup or a course-changing wrench in their child's case, they have often not only met their prospective adopted child, but have been granted guardianship or adoption by the local court in-country. Not being able to bring their child "home" creates financial and emotional strain and stress in families, resulting in spouses and families straddling oceans waiting for issues surrounding the child's proper relinquishment or identity to be resolved in non-Hague countries. The dichotomy between the family's complete legal rights over the child in-country and the family's inability to get the visa to bring the child to the U.S results in a strong sense of entitlement and inevitable frustration in most families, even when the Embassy or regional USCIS is properly exercising its authority.

Before exploring some possible solutions, however, it's important to understand and identify the various interested parties to an international adoption in the context of the international adoption process from start to finish.

The International Adoption "Players"

In every case, there are a number of institutional and individual personalities at play from the time the adoptive family decides to adopt until they actually succeed in bringing their child home to the United States.

The prospective adoptive parent(s) normally chooses an agency in the U.S. to help facilitate the adoption of a child from a country of their choice. Most agencies only work in specific countries where they have established a program and have developed relationships with one or more orphanages in that country.

The parents go through a process with U.S. Citizenship and Immigration Services (USCIS) stateside in which they are "approved" as having the qualifications that the U.S. requires to adopt a child including the ability to support the child, a current home study, fingerprinting, criminal background check and other requirements.

Typically after the U.S. family is "approved" by USCIS for advanced processing of the adoption, the U.S. adoption agency in conjunction with the local (Ugandan) children's or babies' home, refers a child to the parents. The parents then accept that referral and begin the process of adopting the child in Uganda.

The best agencies properly qualify a child as an orphan prior to this referral by conducting their own thorough and independent investigation into the child's history and parentage prior to referring that child to the prospective parent, but even the best agencies have cases that go awry. The parents typically arrive in country to appear in the local Ugandan court and procure the necessary guardianship order to permit them to take custody of the child in Uganda and hopefully (if the order is properly crafted) travel with the child and formally adopt him or her in the United States.

This process can be tedious because the local Ugandan courts do not simply rubber-stamp these cases. The judges sometimes engage in aggressive questioning of the biological mother or father regarding the child's origins and their reasons for relinquishing or abandoning the child. The Ugandan courts then issue a guardianship order that meets the necessary legal predicate in Uganda. If the Ugandan attorney handling the case is not aware of the U.S. requirements, however, the Ugandan order may fall short of the U.S. legal standard. This often occurs when the order fails to include the necessary language about the purposes of the guardianship, which is to permit the child to emigrate to the U.S. and be adopted. As a result, it is not uncommon for a local Ugandan family court judge to bristle upon being informed that his or her order doesn't meet U.S. legal requirements. Moreover, it's not hard to imagine why he or she might buck a foreign sovereign (the U.S.) rejecting his or her authority. This leaves the family (and the local attorney) stuck in the middle, unable to always secure better, satisfactory language in the order without angering a judge who has his or her own opinions of the propriety of international adoptions in general.

The most obvious institutional personality to the adoptive family is the U.S. Embassy (Department of State) and the regional U.S. Citizenship & Immigration Services Field Office, which, for western Africa, is in Nairobi, Kenya. The families do not often deal with USCIS personally because

the Department of State has been delegated authority to adjudicate orphan cases that are clearly approvable. 8 CFR 204.3(k)(2). If the embassy personnel believe that the case is not clearly approvable, then the Department of State in West African Nations like Uganda refers the case to USCIS-Nairobi for adjudication that often results in issuance of a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). 8 CFR 103.2(b)(8). The most difficult dynamic in the relationship between the U.S. Embassy and USCIS is that the Embassy may take statements, marshal evidence or otherwise make factual findings without notifying the petitioning parents, who are not aware of all of the issues identified by the Department of State until they receive an RFE or NOID from Nairobi. This is problematic because the family has severely prescribed time periods (typically 87 days for RFEs, 33 days for a NOID) within which to respond to either an RFE or a NOID. Moreover, the family must sometimes defend a case without access to the complete record of facts on which the U.S. Embassy based its referral to USCIS.

Even if one sets aside the obvious points of friction between these individual and institutional "personas," it still does not account for the wide divergence of perspectives on the problems and challenges facing international adoptions in Uganda.

Perceptions of International Adoption in Uganda

Within hours of landing in Entebbe, I was wading knee-deep into a river of opinion running with all sorts of currents, undertones, rumor and innuendo. I can't begin to reconcile all the opinions and serve up some Pollyanna synthesis of the ideals and opinions we encountered because there are issues on which there is little congruence of opinion. Those who believe that foreign families are adopting children for organ harvesting or slavery (long-promulgated myths about international adoption in nearly every country) are not easily dissuaded. Likewise, those who are motivated by religious ideals to protect the orphan are also resolute. Although these beliefs represent extreme viewpoints, there are areas of agreement.

First, there is a fundamental definitional difference about the meaning of "orphan" compared to the U.S. legal definition. Second, underlying social issues necessitating adoption like poverty and victimization of women contribute to the perception that international adoption is an economically coerced culling of future generations. Third, allegations of corruption undermine the designation of children as "adoptable." Fourth, there is a strident debate over where international adoption should fit in the hierarchy of child welfare options—specifically whether international adoption should be considered before or after foster care and other in-country options. Although there are countless other issues, these were the ones that were most prominent in our discussions with leaders and others in Uganda. I'll take each on in turn.

Who Is the Orphan? The U.S. defines orphan broadly to include not only children without living parents, but also "homeless" children who are no longer being actively cared for by a biological parent. 58 Fed. Reg. 59200-01 (1993) (codified at 8 C.F.R. 204 et. seq.). The original legislation, drafted after World War II to assist abandoned and deserted immigrant children torn from their homes and families, places the law's fundamental purpose in historical context. Id. While later legislation added certain safeguards, such as a required home study of prospective adoptive parents, Congress nonetheless continues to refer to the orphan statute as "pertaining to homeless children," thereby distinguishing it from the provisions of the adopted child statute under section 101(b)(1)(E) of the act (adopted under age 16 with two years of physical and legal custody). Id. The very terms that are the basis for orphan status—voluntary written relinquishment by a sole parent or abandonment, desertion, disappearance, separation, and loss of both parents—emphasize "the permanent severance of all ties between an orphan and his or her parents." Id.

On the other hand, few Ugandans and perhaps, few Africans, would define a child who was institutionalized in a children's home but with living parents as an "orphan." Moreover, culturally, many Ugandans we spoke with objected to the idea that children with no parents were "orphans" because of the strong cultural tendency to provide for other relatives' children. In spite of this semantic objection, these individuals acknowledge that there are a number of children without any parent or relative willing to care for them who can and even should be adopted.

While the word "orphan" may be part of the Luganda lexicon, the Ugandan culture simply doesn't embrace an Oliver Twist archetype. In fact, it is offensive to Ugandans that the United States labels these children "orphans." Even once these children are adopted, there is an expectation that any biological relatives will carry on a relationship with the child. Some adoptive families are fine with this expectation. Others are eager to cut ties, thus further cementing what many call the adoption "lie"—that the child's name change, and the separation of the child from his or her original country—is the lie at the fundamental heart of the individual's history.

However, it is often clearly evident that the child is adopted because it is very common for the adoptive parents to be of a different ethnic origin. Most adoptive parents, these days, are culturally sensitive to their adopted child's country of origin and raise the child accordingly.

Victimization or Depletion of a Nation. The assertion that adoption creates a preconscious "lie" with which the child must struggle into adulthood is not unique to Uganda and is compounded by local resistance to international adoption on the basis that it culls away future generations from a country. This was an issue that arose frequently in our conversations with a number of individuals opposed to international adoption. There was a palpable distaste and fundamental distrust of family members who relinquish rather than raise their own children or their children's children. Sometimes the presumption was that the family succumbed to economic "coercion" or that the family had been duped into relinquishing the child. While there have been cases in which this has occurred, one of which was

publicized in the local papers during our stay, these cases are the exception and not the rule.

Moreover, economic "coercion" is itself a strange concept in this context because the coercion, by definition, must have a source. In the context of international adoptions, economic coercion of a certain kind is necessary for a sole parent to relinquish a child—U.S. law requires that the sole parent must be "incapable of providing the proper care." INA §101(b)(1)(F). If the adoptive family and the various agencies are not paying the parents, then it's possible we're not talking about economic coercion, but merely the inconceivably difficult choices parents living in poverty make in order to allow their child a chance at survival.

While it is unfortunate that every parent cannot properly care for his or her child and myriad programs are underway in Uganda to assist parents in economic distress avoid family separation, what about the parents who simply reject their obligation to parent? Certain individuals we spoke with still objected to the adoption of these "unwanted" children. As one official stated, "They are still ours and they should stay here."

Institutional Inadequacies and Alleged Corruption. Part of the reason that we were in Uganda was to address potential Ugandan legal reform that would effectively shut down international adoptions from Uganda by requiring a two-year residency requirement prior to permitting judicial guardianships. The proposal was in response to, but did not address, the perceived underlying falsification of documents that made international adoptions suspect to Ugandans in the first place.

The problem is simple when understood by comparison to the American system of child welfare. In the United States, if a child is found on the street, the state's department of child services immediately places the child with a temporary custodian and begins to investigate the identity and parentage of the child. A social worker is paid a salary by the state and gets a per diem for gas and incidentals to investigate the child's history by contacting everyone with connections to that child. The child's history is, for the vast majority of cases, known since birth records are kept for all children born in the United States. If the police originally found the child or if the child was in need of services (let's say, removed from an abusive home) then the social worker undertakes a different investigation. The court holds a removal hearing within a certain period of time, witnesses are called, and the Department of Social Service must prove the abuse, neglect, or abandonment.

By contrast, there is no similar process in Uganda. If a child is identified by a local police officer, the child may be taken directly to a children's home with little to no documentation of the child's identity and parentage. There is no database of children in the care and custody of private babies' or children's homes. If the social welfare officer (known as a probation officer) is asked to investigate the child's parentage and prepare a report for the court, they will do so. Even then, the investigation is dependent on the payment of what some would call bribes, and Ugandans call gas money. Probation officers do not have a per diem or an expense account and their pay is very low. To provide the same level of effort as their American counterparts, probation officers would have to spend what they earn to investigate the circumstances of a child's abandonment. Consequently, they often do not make the effort because no one would specifically underwrite their efforts. Often they will rely on information provided them by orphanage or the adoption attorney handling the case.

In response to these issues, two solutions immediately arose in our discussions with Ugandan officials. First, the investigatory aspect of a child's history should be delegated to guardians *ad litem*. Even though Ugandan code permits the court's appointment of attorneys in this capacity, there is no money in the court's chest to pay them. Because the determination of adoptability (or eligibility for guardianship) usually only occurs in the context of children who are internationally adopted, foreign adoptive parents should be required to pay a "filing fee"—let's say $500—to the court or other treasury to be held and used to pay the guardians *ad litem* to investigate the circumstances of the children's birth, orphan status and eligibility under Ugandan law for guardianship or adoption.

The second solution requires greater resources from the babies' and children's homes, but can be done because we have seen it in practice. The best babies' and children's homes involved in international adoptions conduct their own investigations, document the child's circumstances, the parent's identity and location, any police reports, history of parental visits, parental intent to unconditionally relinquish, refusal to parent and the like. Given that the reputation of foreign and U.S. adoption agencies are at stake, they should take responsibility if they refer a child for adoption. Documents created contemporaneously with the child's abandonment or desertion or relinquishment are always more compelling than those created months later to fill the vacuum of actual records in a particular case. I believe agencies that do a better job of preemptively documenting and investigating the children in their care have fewer problems with the U.S. Embassy.

As for the issue of true corruption and fraud, that is a matter of human nature and can't be solved. It can, however, be minimized by lending credibility to the process between the time of the child's appearance at a home and an international adoption by undertaking the two proposals above.

The Hierarchy of Care Options. Everyone agrees that absent abuse or neglect, the best thing for a child is to remain with his or her family in his or her home country. The debate occurs when one considers what options follow from this ideal. Proponents of international adoption would place it as an option after domestic adoption but before foster care and other institutionalized placement. Because of national and ethnic interests, not all Ugandans feel the same. For example, groups of huts called "children's villages" are growing in popularity and offer what many Ugandans consider an attractive alternative to international adoption. These villages allow eight to 10 children to live in a house run by a Mama. The children live in that house until they turn 18 and then they are released. A number of individuals in Uganda put institutionalized placement above international adoption on the care hierarchy, presumably because

it keeps the children in their home country. Foster care and domestic adoption do not exist in Uganda in the same form as they do in the U.S., but even here, peer-reviewed studies confirm the long-term harm of foster care and domestic adoptions of older children from foster care are infrequent. Accordingly, a preference system that places temporary in-country solutions over permanent international placements raises strong sentiments from both Ugandans and adoption agencies and other interested organizations.

Conclusion

Since I've been home, a number of people asked me to describe my trip—what we saw, what we learned, and our perceptions. I am not known for being laconic, but I have no words to describe our experience. I can share what happened and express my intellectual observations but I didn't return home with a steely resolve toward any end. I believe intense experiences have to settle before we can articulate them clearly.

I also believe that where there are true orphans—cases where both parents are dead or terminally ill or mentally ill or cases in which the parents are harming children or simply do not want them—every child is better served by a family rather than an institution. Beyond that, I am only certain that as much as I guard myself against it, children—especially children in need—have a natural and effortless bypass of one's "guard."

The shadow—and the light—of this experience is simply still too fresh to gain any real perspective on what it all means or what my next work will be in this arena. Moreover, I was in Uganda for 12 days—hardly enough time to formulate entrenched positions on the social issues affecting international adoption in that country. I can only articulate what I have already assimilated as truth. Raising a child who is not "yours" is truly a calling. Whether one believes the source of the desire to adopt is a biological mandate of the human heart or a more divine inspiration, my husband was relieved that I didn't return home seized with that particular calling. I was right, however, that in spite of my professional commitment to the importance of international adoption, my stoic emotion boundaries did not hold up against the deeply personal and honest conversations we had with judges, lawyers, government leaders, non-governmental organizations (NGO) representatives, babies' home directors and adoptive families. When discussing the needs of Ugandan children and the contentious structure in place to help them, it was difficult not to be affected.

Fortunately for me, Isaac and Grace live only four hours away and they, along with McLane, are visiting later this month for a mini-Ugandan reunion. We will gather 7,000 miles away from the hills of Uganda but the adobe-tiled roofs and tin houses and clapboard lean-to's may as well still be in sight. Empathy and compassion create a kind of breach in the normal rules of proximity. Far away things feel close. ◆

In addition to her adoption policy work and orphan advocacy, Christine Lockhart Poarch manages Poarch Law, a full service immigration law practice in southwestern Virginia. Poarch Law assists individuals, families and businesses with affirmative petitions for immigration benefits, defends individuals in complex removal proceedings and aids underserved populations like battered women, victims of crime and unaccompanied children.

Taxes 101: What Immigration Lawyers Should Know About Taxes

BY KAVITA KAPUR

The flurry of requests for year-end charitable donations and the proliferation of advertisements for preparation services are unavoidable reminders that the 2012 tax season is underway. Whether your own tax process makes you giddy with excitement or prompts shudders of fear, the start of the tax season is an opportune moment to consider how tax issues[1] arise in the immigration law context in which we work.

In immigration proceedings, it is not uncommon for tax returns to be used as evidence of good moral character, to demonstrate residence in the United States or the bona fides of a marriage, or even to sway a discretionary decision. But given the complexity of federal tax law, which has been recognized as the only area of law more complicated than immigration law,[2] the presence or absence of a tax return may not always be probative of what it is submitted to prove. Perhaps a noncitizen who did not submit a return for a particular tax year was not required to do so under the filing requirements. Or maybe the noncitizen who listed as a dependent his mother who lives overseas fell within one of the exceptional situations in which this is appropriate. Just as many areas of immigration law are dictated by an intricate web of rules, exceptions, and technical definitions of common words that apply only "for immigration purposes," many concepts in tax law are more complicated than they might appear.

This article introduces some of the frequently misunderstood areas of tax law that affect noncitizens. Although it may seem daunting, those tasked with representing the interests of noncitizens or with analyzing their claims should be familiar enough with basic principles of tax law to identify the seemingly simple tax issues that often demand more nuanced analysis. Given the complexity and highly technical nature of tax law, this article is intended only to prompt further inquiry into tax issues that arise in the context of immigration law and is not by any means an exhaustive discussion of the subjects addressed or an authoritative assertion of tax rules. As with immigration law, the many exceptions and qualifications to various tax rules should direct readers to consult the Internal Revenue Code (Code) or official publications of the Internal Revenue Service (IRS) for more precise information.

Filing Requirements: "Someone told me I didn't have to file"

Regardless of immigration status, any individual who earned money in the United States may be taxed by the federal government.[3] However, not everyone who earns money in the United States is required to file a federal tax return. In fact, each year the IRS promulgates filing requirements dictating who, in general, must file a federal tax return.[4] As a result, when a noncitizen fails to file taxes during a particular year, whether or not they have failed to fulfill their tax obligations requires some analysis.

Gross Income

The federal tax filing requirements are based on tax filing status, age, and amount of gross income earned during the tax year.[5] Notably, immigration status is not one of the factors that affects whether or not someone must file a tax return. Thus noncitizens without lawful status are subject to the same tax obligations as citizens and lawful permanent residents of the same filing status, age, and gross income levels. Filing status is discussed in detail below, but the key to understanding tax filing requirements is that an individual's income level can often dictate whether or not they must file a return. Thus, for example, if a forty-year-old unmarried man with no children or other dependents has less than $9,750 of gross income during 2012, he will generally not be required to file a tax return.[6] Similarly, a married couple who are both over sixty five and elect to file their taxes jointly would only be required to file for 2012 if their combined gross income was at least $21,800.[7] Being aware of how filing requirements are determined by gross income levels can clarify why someone may or may not have filed a tax return in a particular year.

Self-Employment

While referring to the published list of filing requirements by gross income level will resolve most inquiries as to whether a particular individual should file, there are important exceptions to these general filing requirements, including one that arises frequently with noncitizens. Federal tax law provides that all individuals who earned at least $400 from self-employment during the tax year must file a return, regardless of whether they would be required to file under the standard filing requirements based on their filing status, age, and gross income.[8] Self-employment includes maintaining one's own business, including earning income from informal work activities, such as cleaning homes, landscaping, and providing child care, even if the person providing those services does not do so under the auspices of an established business.[9] Thus, under this rule, the forty-year-old unmarried man in the example above who earned less than $9,750 during 2012 would still be required to file if he earned $400 or more from any type of self-employment. Similarly, a day laborer with no lawful immigration status who was able to secure work only for a couple of weeks during 2012 for which he earned a total of $400 would be required to file a tax return.

In order to determine whether income was earned from self-employment, it is useful to know whether or not the

individual concerned received a Form W-2 reflecting their earnings. If so, then the earnings are likely based on the individual's status as an employee of an employer who transmitted Form W-2 to the IRS on their behalf and not on self-employment. Alternatively, some individuals who are self-employed receive Form 1099-MISC from the payer, which is an acknowledgment of services performed, but also a denial of any employer-employee relationship for tax purposes. It is thus evidence of self-employment. Additionally, many individuals who are paid in cash or "under the table" will be considered to be self-employed.[10] The main point here is that any self-employment that generates more than $400 in income also produces a filing requirement, regardless of the general rules on gross income.

Because many noncitizens work in the so-called informal economy, often because of various barriers to formalized employment, this filing requirement is likely to arise frequently in the immigration context. The lack of formality associated with many forms of self-employment, however, often means that noncitizens who engage in this type of work are entirely unaware of the filing requirement or have been misinformed that the absence of any formal work contract corresponds to the absence of a tax obligation. Taxpayers considered to be self-employed may be surprised at the amount of taxes due upon filing their returns as taxes have been withheld and submitted to the corresponding federal and state authorities during the tax year. Attention to the self-employment filing requirement is particularly important to ensuring tax law compliance for noncitizens. Prior failure to file based on ignorance of this rule may be rectified through preparing appropriate returns and paying back taxes.

Filing When Not Required

While gross income and the characterization of certain work as "self-employment" are two factors affecting whether or not an individual has a filing requirement, there are various reasons why even people who are not required may want to file a tax return. In most cases, this involves a monetary incentive, such as being refunded overpaid income tax that was withheld during the tax year or receiving certain refundable tax credits. Additionally, noncitizens may find that tax returns provide documentation of residence or demonstrate positive equities that may be relevant in immigration proceedings. Accordingly, the fact that a particular individual is not *required* to file does not mean that they cannot or should not file a federal tax return.

Taxpayer Identification: "I couldn't file taxes—I didn't have a Social Security number"

Individual Taxpayer Identification Number. Tax returns are typically filed under a taxpayer's Social Security number in order to allow the IRS to properly identify who has filed the return.[11] Many noncitizens, including those without lawful immigration status in particular, do not have Social Security numbers and are not eligible to receive them. The lack of a Social Security number, however, does not prevent or excuse tax filing when it is otherwise required (*See* "Filing Requirements," above). Instead, the IRS has developed a process for issuing an Individual Taxpayer Identification Number (ITIN)[12] for individuals who are required to report their income, regardless of their immigration status.[13]

Not all noncitizens will require an ITIN. Any noncitizen who possess an Employment Authorization Document from U. S. Citizenship and Immigration Services, or who is otherwise authorized to work, is eligible to obtain a Social Security number and should apply for one from the Social Security Administration.[14] Only if an individual is ineligible for a Social Security number or has had an application denied by the Social Security Administration should she apply for an ITIN.[15] By law, a noncitizen cannot have both an ITIN and a Social Security number.

Application for an ITIN can be made on Form W-7 and requires the applicant to submit a federal income tax return, as well as proof of identity and foreign status.[16] Once acquired, an ITIN can facilitate filing of prior year returns when a noncitizen was required to file but did not.[17]

"Borrowed" Social Security Numbers

Another issue that arises when considering taxpayer identification for noncitizens is the use of borrowed Social Security numbers for employment purposes. Noncitizens who are not authorized to work in the United States sometimes use Social Security numbers that are not their own for the purposes of securing employment. When this happens, tax documents provided by an employer, including Form W-2, will report wages paid to and taxes paid on behalf of the "borrowed" Social Security number. In this situation, the IRS requires that earnings from Form W-2 still be reported. The taxpayer will use their ITIN on the tax return, but report all income earned using the "borrowed" Social Security number. Although this creates a mismatch wherein the return is being filed under the ITIN and the wages were earned on the "borrowed" Social Security number, this is a technical requirement of the IRS.[18] This mismatch will alert both the IRS and the Social Security Administration and will allow them to dissociate the taxpayer's earnings from the "borrowed" Social Security number on which their employment was based. This ensures that the individual from whom the Social Security number was "borrowed" does not incur taxes on income that they did not actually earn.

Additionally, filing in this manner allows the IRS to credit the taxpayer for the federal taxes that were already withheld on the "borrowed" Social Security number, notwithstanding the fact that they are filing their return with an ITIN. This is not the case, however, with most state tax systems. In those systems, because employment was based on a "borrowed" Social Security number, taxes withheld during the tax year may be understood by the state tax agency to have been paid by the individual who rightfully possesses that Social Security number. The mismatch is unlikely to be detected by state agencies in the same way as it is by the IRS. As a result, the state tax agency will consider that no taxes have been withheld from a noncitizen who has used a "borrowed" Social Security number and a tax obligation will be assessed

accordingly. This may result in double payment, insofar as taxes would have been withheld during the year but are not considered to have been paid by the taxpayer and so must be paid again upon the filing of the tax return. In this way, use of a "borrowed" Social Security number can cause additional complications for taxpayers.

Residency Status: "She cannot receive tax credits because she does not have a green card"

U.S. citizens may have tax obligations regardless of whether they resided in the country, but for noncitizens, filing requirements will vary depending on where an individual has lived and, more particularly, their residency status for tax purposes. This is because the code delineates two different tax regimes for noncitizens: one for "resident aliens" and another for "nonresident aliens."[19] Any noncitizen who meets the tax law definition of "resident alien" will be taxed on the same basis as U.S. citizens, following the general tax rules discussed throughout this article.[20] This includes the obligation to pay tax on all income, regardless of whether it was earned within the United States or in some other country. By contrast "nonresident aliens" are taxed only on income earned from business or another source located in the United States.[21] Residency status also affects eligibility for various tax benefits, including some refundable tax credits.[22]

Thus, whether a particular individual is a "resident alien" for tax purposes will have a significant effect on their tax responsibility. Those familiar with immigration law concepts may assume that a "resident alien" is the tax law equivalent of an individual with lawful permanent resident status. This is *not* the case, as under the tax law, "resident alien" is actually a broader category. It includes both noncitizens who at any time during the year were lawful permanent residents and thus satisfied the so-called "green card test," as well as any noncitizens who were not lawful permanent residents but who satisfy the IRS's "substantial presence test." Under the "substantial presence test," any noncitizen who has been physically present in the United States for a specified number of days spread across a three-year period (calculated according to a complicated formula under which a fraction of the total presence in each year is considered) will be considered a "resident alien." Under this test, a noncitizen without lawful immigration status who has been in the United States for at least 183 days during the tax year will be considered to have met the "substantial presence test" and will be deemed a "resident alien."[23]

The code further elaborates the scope of "in the United States" as well as "presence" and provides certain categories of noncitizens who are exempt from accruing physical presence for the purpose of being deemed a "resident alien." Notably, various nonimmigrant visa holders, including students, are exempted such that the period that they spend in the United States pursuant to that visa is not meaningful physical presence which could result in them being considered "resident aliens" and subject to general taxation rules.[24]

Under this residency status test, an undocumented individual who has been continuously present in the United States for a sufficient amount of time would be considered a "resident alien," in the same way as an individual with Temporary Protected Status or some other nonexempt category of immigration status. These rules function to impose some tax responsibilities and benefits on those people who have forged sufficient ties to the United States through their residence here, regardless of what their immigration status may be. A noncitizen who does not meet the requirements of a "resident alien," will nonetheless be required to file pursuant to the standards for "nonresident aliens" if he earned income in the United States during the tax year.[25]

Filing Status: "My spouse is undocumented, so I just file as single"

The code delineates a number of filing statuses which place an individual taxpayer in a category which determines his tax obligation and eligibility for tax benefits.[26] Like most other legal categories, tax filing statuses correspond to particular circumstances that do not necessarily reflect an intuitive or common sense understanding of their names. Many people are confused by the process of determining their filing status and the added factors of immigration status and the phenomena of mixed-status families often complicate things further.

If a taxpayer is legally married, he may *not* file as "single," even if his spouse lacks lawful immigration status or is not physically present in the United States, until a legal separation or a formal dissolution occurs.[27] Instead, married taxpayers may file in one of the other available tax statuses. If the couple elects to file their taxes jointly, they would do so in the "married filing jointly" category.[28] This is the generally thought to be the preferred tax category, but taxpayers may nonetheless opt to file separately from their spouses. The fact that one spouse may lack lawful immigration status is inconsequential to a couple's ability to file a joint return.

If a married couple does not wish to file a joint return, an individual partner may file as "married filing separately" or, if the circumstances[29] allow, as "head of household."[30] Because of the implications for tax obligations and eligibility for tax benefits, "married filing separately" is a disfavored tax status whereas "head of household" is considered highly favorable, second only to "married filing jointly." Amongst the requirements for married taxpayers to file as "head of household," is living in a separate residence from one's spouse for the last six months of the year.[31] It would appear thus that an individual with an undocumented spouse would not be able to file as head of household, even if all of the other requirements were met, unless she lived apart from her spouse for the last six months of the year. However, the IRS provides an important qualification to this rule under which a taxpayer who is a U.S. citizen or a "resident alien" under the Tax Code (*See* Residency Status, above) and who is married to a "nonresident alien" is deemed to have lived apart from her spouse for the purpose of "head of household" status.[32] Thus, a U.S. citizen who lives with her noncitizen husband and meets all of the other requirements for "head of household" status will be able to use that status so long as her husband does not

satisfy the "green card test" or the "substantial presence test" which would prevent him from being considered a "nonresident alien."[33] So long as her husband remains a "nonresident alien," the requirement that she live apart from him for the last six months of the year will be satisfied and she will be able to file as "head of household." If, however, her husband has been present in the United States for a sufficient amount of time, such as for 183 days out of the tax year, and has thus satisfied the "substantial presence test," the taxpayer cannot file as "head of household." As a general rule, only one taxpayer per home can claim "head of household" status.[34]

Claiming Dependents: "I send money home to support my mother"

Exemptions serve to reduce a taxpayer's taxable income and by doing so, lessen the amount of tax owed. The amount of an exemption is a fixed value published by the IRS which is excluded from gross income for the purpose of assessing a tax obligation.[35] Generally, each taxpayer can take a personal exemption for himself, as well as his spouse if filing a joint return, and can take additional exemptions for dependents.[36] Because of the significant monetary benefits that dependency exemptions can yield, most people are inclined to take exemptions for everyone that they support.

However, determining who qualifies as a dependent requires more than a superficial consideration of whether the taxpayer provides financial support for another person. Whether someone can claim another as a dependent is based on various factors, including residence in the taxpayer's household, relationship to the taxpayer, age and student status, disability status, and income levels.[37] The biggest determinant of dependency is whether the purported dependent provides the majority of their own support or whether more than half of their total support is provided by the taxpayer who seeks to claim them.[38] Each factor contains various qualifications.

Applying these standards to consider whether noncitizens can be claimed as dependents produces various unexpected outcomes. Notably, the rules for dependency require that the claimed dependent be a U.S. citizen, a "resident alien," a U.S. national, or a resident of Canada or Mexico.[39] Thus taxpayers, whether they are U.S. citizens or not, can claim family members in Mexico or Canada as dependents if the taxpayer provided more than half the support for those family members and if the family members themselves earned below a certain level of income.[40] This rule is a specific exception to the general rule that dependents must reside with the taxpayer who claims them. Indeed an entire category of relatives may still be claimed as dependents even if they do not reside with the taxpayer.[41] Accordingly, taxpayers trying to claim dependents who reside in Canada or Mexico may be authorized to do so.

Additionally, because "resident aliens" can be claimed as dependents, a taxpayer can claim a relative as a dependent even if they are not lawfully present in the United States, so long as they meet either the "green card test" or the "substantial presence test" in order to be a "resident alien" under the Code (*See* Residency Status, above).[42] This is so regardless of the purported dependent's country of nationality and of whether they resided in the United States for the entire tax year. So long as they had the requisite number of days of presence in the United States under the "substantial presence test," and satisfy the other requirements for dependency, they can be claimed as the taxpayer's dependent.

In short, the dependency rules produce unintuitive results authorizing exemptions to be claimed for residents of Canada or Mexico who have never set foot in the United States, so long as they maintained a certain relationship with a taxpayer, make under the established income ceiling, and receive a majority of their support from the taxpayer. Residents of other countries may also be properly claimed as dependents for exemption purposes if they meet the requirements to be considered "resident aliens" of the United States under the code. As a result, determining the propriety of a claimed exemption on behalf of a noncitizen requires particularized analysis.

Tax Credits: "Undocumented immigrants cannot claim tax credits"

Tax law provides for various credits which can serve to reduce the amount of tax owed (in the case of non-refundable credits) or can even result in the receipt of a payment (in the case of refundable credits). While there are numerous credits, including for retirement savings contributions, education expenses, and even child care expenses, each with their own set of requirements, some credits raise particular issues for noncitizens and warrant further discussion.

Child Tax Credit. The Child Tax Credit is a nonrefundable credit intended to reduce the amount of tax owed by taxpayers with qualifying children.[43] Any taxpayer with a qualifying child may claim the Child Tax Credit regardless of the taxpayer's own immigration status. A child that qualifies a taxpayer to claim this credit must, however, be a U.S. citizen or national, or a "resident alien" of the United States.[44] Thus a child who resides in Mexico who was properly claimed as a dependent cannot be claimed as a qualifying child for the purpose of the Child Tax Credit. But a child without lawful immigration status who lives in the United States and meets the definition of a "resident alien" under the code may qualify the taxpayer for the Child Tax Credit. Beyond the residency status, eligibility for the Child Tax Credit also depends on the age of the child, her relationship to the taxpayer, whether she was claimed as a dependent, residency with the taxpayer, and whether the child provided more than half of her own support.[45] Accordingly, determining whether a particular noncitizen can be claimed for the purposes of the Child Tax Credit requires consideration of all of these factors. The fact that the child met the requirements to be considered a dependent for the purposes of an exemption is only one part of the analysis.

Earned Income Credit. The Earned Income Credit is a refundable tax credit for working taxpayers, which has even greater benefit for taxpayers with children. In order

to be eligible for the Earned Income Credit, the taxpayer and all qualifying children must have valid Social Security numbers that authorize employment.[46] This means that ITINs or Social Security numbers that expressly do not authorize employment are insufficient for eligibility for the Earned Income Credit. Accordingly, noncitizens who do not have an Employment Authorization Document or other authorization to work cannot claim the Earned Income Credit. The requirement for a valid Social Security number authorizing employment applies to the taxpayer, the taxpayer's spouse (if married), and all children who are claimed for the Earned Income Credit. A taxpayer cannot avoid her spouse's lack of employment authorization by filing as "married filing separately" in order to claim the Earned Income Credit as taxpayers who file as "married filing separately" are categorically ineligible for the Earned Income Credit.[47]

If a noncitizen has a Social Security number which is valid for employment, then he may claim the Earned Income Credit if he meets the requirements for a "resident alien" for the entire tax year. Under this rule, a noncitizen with immigration status that allows for employment would remain eligible for the Earned Income Credit. If he is married and his spouse is a "nonresident alien," the taxpayer will remain eligible only if he is filing his return under the "married filing jointly" tax status. Thus eligibility for the Earned Income Credit also depends on residency and filing status. Before concluding that a particular noncitizen is eligible or ineligible for the Earned Income Credit, a careful analysis according to these nuanced standards should be undertaken. ◆

Conclusion

This article provides only an introduction to some of the most common and confusing tax issues that arise with noncitizens. Regardless of their immigration status, most taxpayers are advised by a professional or certified preparer on the extent of their tax obligations. However, even those familiar with tax law may be unaware of some of its specific applications to noncitizens, sometimes resulting in incorrect advice as to tax obligations and processes. Even when they are correctly prepared, misconceptions about the taxation of noncitizens may lead to misinterpretations of the absence of a return or the contents of a tax form. Careful immigration lawyers can play an important role in assisting noncitizens to comply with tax laws and ensuring that their compliance is properly appreciated.

Kavita Kapur is an attorney advisor with the Executive Office for Immigration Review (EOIR) at the Arlington Immigration Court. Any views expressed herein are those of the author and do not represent the positions of the EOIR, the Department of Justice, the Attorney General, or any other entity of the United States government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual *and/or the* Board of Immigration Appeals Practice Manual.

Endnotes

[1]This article deals with principles of federal tax law and not with the tax systems of the various states. Some of the issues discussed here will overlap with state taxation systems, but lawyers dealing with state tax returns should familiarize themselves with state-specific requirements and definitions.

[2]*See Castro-O'Ryan v. U.S. Dep't of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988).

[3]*See IRS Publication 519, U.S. Tax Guide for Aliens* (2012).

[4]*IRS Publication 17, Your Federal Income Tax* (2012), Table 1-1.

[5]*Id*.

[6]*See id.*

[7]*See id*.

[8]*See Publication 17* at 5.

[9]*See id*.

[10]Self-employed taxpayers often face additional challenges to tax filing arising out of their lack of formal payment records. Particularly where no contractual agreement is in place with the entity issuing payments, taxpayers who receive payments by cash or check are responsible for maintaining their own records as to the amount of income that they earned. In these situations, it is advisable for self-employed taxpayers to keep written accounts of the amounts they were paid organized by the date that payment was received, as well as to note any expenses directly associated with their work.

[11]Under 26 U.S.C. § 6109, if a person is required to file a return, statement, or other document with the IRS, the person must include an identifying number.

[12]Like Social Security numbers, ITINs are nine digit numbers but are distinguishable insofar as all ITINS begin with the number nine and have a range of 70 to 99 in the fourth and fifth digits.

[13]*See IRS Publication 1915, Understanding your IRS Individual Tax Payer Identification Number* (2012).

[14]*See id*.

[15]*See id*.

[16]*See id*.

[17]*See id*.

[18]*See* IRS, Individual Taxpayer Identification Number (ITIN) Reminders for Tax Professionals, *available at http://www.irs.gov/Individuals/Individual-Taxpayer-Identification-Number-%28ITIN%29-Reminders-for-Tax-Professionals*.

[19]*See* Publication 519.

[20] *See id*.

[21]*See id*.

[22]For an extensive discussion of residency status and its implications on taxation, see *IRS, Publication 519, U.S. Tax Guide for Aliens*.

[23]*See id*.

[24]Under some circumstances, a noncitizen may be considered both a resident alien and a nonresident alien during a tax year and would thus be deemed "dual status." In this case, both a resident and a nonresident tax return should be filed.

[25]*See id*.

[26]*Publication 17* at 19-24.

[27]*See id.*

[28]*See id.*

[29]Generally if a taxpayer is legally married, but has lived apart from his spouse for the last six months of the year, and has a qualifying dependent, he may file as head of household. *See id.* at 22.

[30]*See id.*

[31]*See id.*

[32]*Id.* at 22.

[33]*See id.*

[34]*Id.*

[35]*See Publication 17* at 25.

[36]*Id.*

[37]*See id.*

[38]*See id.*

[39]*Publication 17*, Table 3-1.

[40]For 2012, a dependent must have had less than $3,800 in taxable income.

[41]Relatives who do not have to live with the taxpayer to be claimed as dependents include: son, daughter, step-child, foster child, or a descent of any of them; brother, sister, half-brother, half-sister, or a son or daughter of any of them; father, mother, or an ancestor or sibling of either of them; stepbrother, stepsister, stepfather, stepmother, son-in-law, daughter-in-law, father-in-law, brother-in-law, or sister-in-law.

[42]Publication 17, Table 3-1.

[43]The Internal Revenue Code also provides for an Additional Child Tax Credit which is refundable. Eligibility for this credit depends on the amount of taxable earned income or the number of children. Because eligibility for the Additional Child Tax Credit is premised on qualification for the Child Tax Credit, only those children who qualify under the Child Tax Credit will qualify for the purposes of the Additional Child Tax Credit.

[44]*See IRS Publication 972, Child Tax Credit* (2012).

[45]*Id.*

[46]*See IRS Publication 596, Earned Income Credit* (2012).

[47]*See id.*

Section News

Juan Osuna, director of the Executive Office of Immigration Review, spoke at the new Immigration Monthly Luncheon Series. Prakash Khatri of the D.C. Chapter did a fantastic job of setting up this first of, what we hope will be, a continuing series. The Series meets on the third Wednesday of each month, at Tony Cheng's restaurant, 619 H. Street NW, Washington, DC 20001. The next session will be on May 15, and feature the CIS Ombudsman as speaker. Lunch plus the program is a mere $15 for Section members. For information, contact fbadcchapter@gmail.com.◆

Director Osuna speaks.

Board member Mark Shmueli reflects.

Law student Leila Higgins makes a good point.

Section Chair Ray Fasano sums up.