The Green Card

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

H. RAYMOND FASANO, SECTION CHAIR

Quote of the Month

"The whole aim of practical politics is to keep the populace alarmed – and thus clamorous to be led to safety – by menacing it with an endless series of hobgoblins, all of them imaginary."
— H. L. Mencken

Section News

Washington, DC – ***Jan M.Pederson***, a distinguished member of the Section Board, has joined the immigration firm of Maggio & Kattar, effective December 1, 2013.

Recognized by the Washington Post as one of "seven leading lawyers" in Washington, D.C., Ms. Pederson has been dedicated to the practice of immigration and nationality law for over three decades. Known for her tenacity and creativity in problem-solving, her impressive list of clients in-cludes Fortune 500 companies, J-1 physicians, health care providers, television networks, international media, entertainers, IT professionals and more.

Jan is a leading advocate for the rights of J-1 Physicians in the United States and has been key to the passage of legislation and obtaining changes in DHS and other agency rules to benefit them. She is also renowned world-wide as an expert in consular processing as well as EB-5 investor visas.

Jan's advocacy skills and experience in representing physicians, hospitals and those with complex consular processing issues, combine to make Jan one of the most effective immigration advocates amongst today's Immigration Bar.

Washington DC – The successful ***Immigration Leadership Monthly Luncheon Series*** continues. In December 2013, Immigration Judge (and Section member) Paul W. Schmidt spoke on the use of tax returns in immigration court [the text of his speech is included in this newsletter]. On February 12, 2014 we heard from Dave Horton, Director, International Individual

NEWS *continued on page 2*

In This Issue

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Compliance, IRS. Next up will be Michael Falcone, Chief, Homeland Security Investigations Law Division, on March 12. Other scheduled dates will be April 9, May 14, and June 11, 2014. Speakers will be announced later. The lunches are held at La Tasca Spanish Tapas Restaurant, 722 Seventh Street NW, Washington DC. The lunches are generally sold out, so make your reservations early. Contact Governing Board member Prakash Khatri at prakash@khatrilaw.com.

Memphis, TN – The annual ***Immigration Law Seminar***, May 16-17, 2014, our Section's flagship event, is being finalized by Section CLE coordinator Barry Frager. Check the FBA/ILS website for the e-brochure. It will as good as ever, and the food will be better than last year (if you can imagine that!). Make your reservations early at the Sheraton Hotel Downtown [the same Marriott Hotel that we used last year; it is a Sheraton now]; be sure to specify the special FBA rate of $159 per night [901-527-7300]. Take advantage of the unique FBA benefit—socializing with top practitioners, Government attorneys, and judges (both Immigration and Federal) – by planning to attend the social events. As always, we will have a group dinner on Thursday night, May 15, and enjoy a Mississippi Riverboat Dinner Cruise on Friday (or a night at the International BBQ Festival if you prefer). Special this year: stay over Saturday night for a FREE reception at the fabulous Belz Museum of Chinese art. Belz has the finest collection of Chinese jade and ivory carvings anywhere this side of the Pacific. Reserve these events when you register for the seminar. Contact Barry at bfrager@fragerlawfirm.com if you have any questions that are not answered by the brochure.

Memphis, TN – ***Memphis Immigration Advocates, Inc.*** continues to grow. MIA has now obtained a live website, located at http://memphisimmigrationadvocates.org. The website was provided by a grant of in-kind services from 'GiveCamp Memphis', an annual, weekend-long event where software developers, designers, and database administrators donate their time to create custom software for non-profit organizations. ILS board member Alicia Triche blogs about the experience here: http://memphisimmigrationadvocates.org/blog/into-the-blogosphere/. ■

ILS Governing Board member Dr. Alicia Triche with some of the 'techies' at GiveCamp Memphis

SECTION LEADERSHIP

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

Out of the Labyrinth

BY HON. PAUL WICKHAM SCHMIDT (PERSONAL CAPACITY)
IMMIGRATION JUDGE, ARLINGTON, VA.

Speech given to the FBA Immigration Leadership Luncheon, Washington DC, December 11, 2013.

Good afternoon and thanks for inviting me to speak about tax and immigration. I actually *know* something about the *latter* topic.

Before we get started, please listen very carefully to the following important message. I appear today *solely* in my *personal* capacity. Please keep in mind that the views I express during this presentation and the following question and answer session are *mine* and do *not* represent the official position of the Attorney General, the Executive Office for Immigration Review, the Office of the Chief Immigration Judge, 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.

I will introduce my topic today with one of my favorite quotations from the late Chief Judge Irving R. Kaufman of the Second Circuit Court of Appeals in a 1977 case from one of my past lives, *Lok v. INS*[1]. Chief Judge Kaufman stated:

> We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.[2]

In memory of Chief Judge Kaufman, I call this speech "Out of the Labyrinth." In it, I will attempt to at least get you headed in the right direction in the labyrinth by making nine fairly practical observations about the intersection of immigration and tax practice.

First, tax crimes generally are "bad news" in immigration law. Tax evasion under federal and state law is usually a so-called "crime involving moral turpitude" because it involves an element of fraud or deceit.[3] An individual who commits such a crime thereby becomes both inadmissible to and removable from the United States. Additionally, such an individual would be ineligible to immigrate or regularize status in the United States unless qualified for one of a very limited number of waivers.

Individuals who falsify Social Security cards or numbers or who misuse a number assigned to another also face severe immigration problems. As you probably know better than I do, 42 U.S.C. §408 punishes an array of crimes involving misuse of Social Security numbers. To the extent that these crimes involve elements of fraud or deceit, they will be considered crimes involving moral turpitude.[4] Additionally, making a false representation of U.S. citizenship in connection with any Federal or state benefits is a ground of inadmissibility that cannot be waived.[5] Consequently, non-citizens who purchase or otherwise assume the identity of a U.S. citizen to get work will face major impediments to regularizing immigration status.

Perhaps even more seriously, tax evasion under section 7201 of the Internal Revenue Code where the revenue loss to the Government exceeds $10,000 is specifically listed as a so-called "aggravated felony" under immigration law.[6] Moreover, the Supreme Court in *Kawashima v. Holder*[7] recently held that willfully making and subscribing a false tax return under section 7206(1) of the Internal Revenue Code and aiding and assisting in the preparation of a false tax return in violation of section 7206(2) where the loss was more than $10,000 were both "aggravated felonies" under the general fraud section of the aggravated felony definition.[8]

"Aggravated felons" are subject to removal from the United States, *regardless of length of residence*, and have few viable avenues for relief. For example, Mr. and Mrs. Kawashima, the unfortunate subjects of the Supreme Court's decision, had resided lawfully in the United States for more than 25 years and had pleaded guilty to making and subscribing a false tax return as part of a plea bargain. Nevertheless, they were entirely without recourse in Immigration Court and were ordered removed.

At that, the Kawashimas might have fared better than most "aggravated felons" in at least one respect: there is no indication that they were being held in detention pending the completion of the lengthy judicial process in their cases. By contrast, almost all "aggravated felons" who appear in Immigration Court these days are subject to statutory "mandatory detention" under the immigration laws.[9] That means that they will be held without bond at a Department of Homeland Security ("DHS") detention facility pending trial, appeal, and any

available judicial review of their cases. This can be a period of many months, or even years if appeals are filed.

For all of the foregoing reasons, I reiterate my first and most important point that "tax crimes are bad news" in immigration proceedings.

My second observation is that payment of taxes for any year in which a foreign national worked in the United States, regardless of status, can be relevant to issues of good moral character and discretion in applications for immigration relief. These include adjustment to lawful permanent resident status, cancellation of removal, certain waivers, and so-called "NACARA special rule cancellation of removal" which is available to certain nationals of El Salvador and Guatemala. The Board of Immigration Appeals ("BIA"), our precedent-setting tribunal, has held that fraudulently understating income for the purpose of "avoiding payment of a substantial sum in U.S. income taxes" shows bad moral character.[10] A prudent practitioner therefore will want to provide evidence of tax compliance for all years during which an applicant for immigration benefits has worked in the United States.

Third, demonstrated tax compliance can be a very positive factor for a foreign national in meeting his or her burden of proof for immigration benefits in the United States.[11] For example, some forms of immigration relief, such as cancellation of removal and NACARA benefits, require a showing of a certain period of "continuous physical presence" in the United States. Contemporaneous tax returns for the years in question are an excellent way of proving that physical presence.

Additionally, contemporaneous tax returns can be highly probative in cases where the DHS is claiming that a lawful permanent resident alien, that is, a so-called "green card" holder, has abandoned residence by virtue of prolonged absences from the United States. Complying with resident tax laws can help show a specific intent to continue residing in the United States.

Finally, as I mentioned above, tax compliance casts a favorable light on a foreign national seeking a discretionary U.S. immigration benefit. This could well become a factor, or even a requirement, in any type of future legalization which might be instituted as part of so-called "comprehensive immigration reform" now under discussion in Congress.

Fourth, when available, official tax transcripts issued by the IRS normally are the best evidence of tax compliance. By contrast, mere photocopies of tax returns are problematic because they often are unsigned, prepared by someone else, and do not facially demonstrate actual filing or payment of taxes.

Fifth, immigration counsel should actually review and understand all tax filing information submitted by a client in an immigration case. Ideally, there will be some coordination between tax preparers and immigration counsel. Otherwise, tax forms might actually raise new problems or undermine the claim in an immigration case.

For example, a number of immigration applications require the applicant to demonstrate a particular degree of hardship to a close relative who is a U.S. citizen or a lawful permanent resident alien.[12] Often, applicants claim that hardship exists because they are the "sole support" of a qualifying relative. However, a tax return showing that the applicant reported only minimal income can effectively negate such a claim. Likewise, tax filings showing that the applicant is claiming dependent deductions for unrelated individuals or for relatives residing in a foreign country or earned income credits can open up lines of questioning that anyone but the tax preparer will be ill-equipped to answer.

A sixth way in which tax forms might become relevant is where an applicant for lawful permanent resident status asserts an immigration preference based on specific job skills for which a so-called "labor certification" from the U.S. Department of Labor has been obtained. Particularly where the U.S. employer is a sole proprietor or a very small business, such as a restaurant or a landscaping company, the employer's tax returns might be necessary to show the employer's current ability to pay the proffered wage.

A seventh, and somewhat related, area of relevance is where a prospective immigrant is attempting to show that he or she is not subject to the ground of inadmissibility applying to someone who is "likely to become a public charge."[13] That ground of inadmissibility may be overcome by filing a so-called "Affidavit of Support" from a sponsor demonstrating that sponsor's ability "to maintain an annual income equal to at least 125 percent of the Federal poverty line."[14] In such cases, the sponsor must provide, at a minimum, a complete copy of his or her Federal tax return for the most recent tax year.[15]

Eighth, in cases where tax liabilities have not been satisfied, counsel generally should provide evidence that the applicant has entered into a formal agreement with the IRS for payment of back taxes and has established a history of making payments under such an agreement. Some Immigration Judges might choose to recess a case for a reasonable period of time to give the applicant a chance to establish such a record of payment, although there is no requirement that such a recess or continuance be granted. Wherever possible, the most prudent course is to have such evidence in hand before submitting the application to the Immigration Court.

Ninth, and finally, in the area of tax compliance in Immigration Court, much depends on the policies and attitude of the local DHS Chief Counsel. Consequently, a wise and pru-

MUSE *continued on page 16*

Thanksgiving: The Anti-Immigration Holiday

BY JASON A. DZUBOW
www.Asylumist.com

Many people believe that Thanksgiving is the quintessential refugee holiday. I didn't want to say anything negative about Thanksgiving before the holiday, as that would be a bit of a humbug. But enough time has passed that the leftover Turkey is gone, and now I want to write about the more challenging side of the holiday for immigration advocates. Of course, I speak about the fact that the immigrants in the Thanksgiving scenario (the Europeans) essentially eradicated the original inhabitants of their new country (the Native Americans).

It has always surprised me that more anti-immigration folks don't use Thanksgiving as an example of what happens when immigration runs amok. Fifty years after the first Thanksgiving, most of the Wampanoag tribe (the Native Americans who dined with the Pilgrims in 1621) were either dead or sold into slavery. From an estimated population of 6,600 in 1610, the Wampanoag were reduced to only about 400 individuals by 1677 (they have since recovered somewhat – in 2000, the estimated population was 2,336). In short, while the first Thanksgiving was lovey-dovey, things didn't end too well for the native peoples who received the new immigrants. But this is something we rarely hear about from immigration restrictionists.

I suppose one reason that Thanksgiving is not used by immigration opponents is that it's not easy to be anti-Thanksgiving. Thanksgiving is probably the most popular non-religious holiday in the U.S., and to oppose Thanksgiving might seem un-American (in fact, to oppose Thanksgiving is un-American). Since immigration opponents always seem to be uber patriots, I guess they do not want to be seen opposing the holiday.

Another reason that the holiday is not used against immigrants is that the analogy between European settlers/colonialists and modern-day immigrants really does not stand up. The settlers of old were not trying to integrate into the indigenous culture; they were trying to conquer it. Even if–as some restrictionists might argue–modern day immigrants do not integrate into mainstream society, they are clearly not in the same position to conquer our country as the settlers who conquered the New World. We are much larger and more unified than the pre-Colombian indigenous peoples. The number of immigrants coming to the U.S. these days is much smaller proportionately than the number of Europeans coming here in the colonial period. Finally, most Native Americans died from diseases, and–Lou Dobbs notwithstanding–that is not a real threat to us today (at least not because of immigration). So even if restrictionists wanted to use Thanksgiving as a cautionary tale about too much immigration, the analogy is weak.

Thanksgiving is frequently cited by pro-immigration types (and pro-asylum types like me). I do think the holiday could be used to raise questions about immigration: How much immigration is good for our country, whether immigrants appropriately integrate into our society, how best to handle people who are here illegally. But for restrictionists, maybe it is safer and more effective to raise those issues separately from the Thanksgiving holiday. That's fine with me, as I am a fan of Thanksgiving. Now if you'll excuse me, thinking about Thanksgiving has put me in the mood for a turkey sandwich with cranberry sauce… ■

Why Are Immigration Lawyers So Happy?

BY CAREEN SHANNON AND ANGELO PAPARELLI

According to statistics provided to CNN by the Centers for Disease Control, among professionals in the United States lawyers rank fourth in suicides (exceeded in misery only by dentists, pharmacists and physicians). Lawyers are also nearly four times more likely to suffer from depression than non-lawyers.

Clearly, practicing law is never a 9-to-5 job. Being a lawyer is a high-stress, plummeting-prestige profession—the work is demanding, the economics of the profession are increasingly challenging, and in the views of some, the psychic or status rewards of working as a lawyer rank below nail technician. Far be it from us to suggest that immigration lawyers are immune to the effects of such stress. But among the countless lawyers we know in dozens of different specialties, we think it is fair to say that the immigration lawyers are the happiest. Why?

The stress in most lawyers' lives is caused primarily, we believe, by a few key factors. First, the American legal system is deliberately adversarial. Our adversarial system of law is meant to be fairer than the inquisitorial approach used in many civil law countries by allowing each side in a dispute to zealously defend its position before an impartial arbiter (judge or jury). But the pressures of such a system can take a toll on the advocates—the lawyers—who work within it. In fact, lawyers have been compared to soldiers in this regard: "Both lead physically tough lifestyles: long hours, separated from family life and both are sent to fight other people's conflicts, no questions asked." The qualities that can make for a good lawyer—intelligence, diligence, perfectionism, competitiveness, being hard-working and achievement-oriented—can also create the isolation, panic and anxiety that often lead to depression.

Second, contrary to how the life of a lawyer is depicted on television or in the movies, much of what lawyers actually do on a day-to-day basis can be mind-numbingly boring. Think document review, drafting boilerplate contracts, performing endless legal research, completing innumerable government forms (especially in fields like tax and immigration), and preparing for trial or finishing a brief late into too many nights. Not really anyone's idea of fun.

Of more immediate concern to members of the legal profession nowadays are the financial pressures presented by a changing economy, and the fear that lawyers will be replaced by non-lawyers and by the increasing use of technology. In tough economic times, corporate and individual clients alike are seeking more for less—more and speedier legal services for less money. A related pressure flows from what Professor Richard Susskind argues in his book, ***Tomorrow's Lawyers: An Introduction to Your Future***, is the inevitable liberalization of legal services, whereby non-lawyers are permitted to provide services traditionally considered to constitute the practice of law. This is already the case in many other countries, and in the United States is institutionalized in immigration law practice, where certain non-lawyers accredited by the federal Board of Immigration Appeals are allowed to represent immigrants in removal proceedings or in administrative matters before the Department of Homeland Security.

As discussed at length in a recent article in The Economist (accessible at http://econ.st/1k9yB7K), whereas automation in the world's advanced economies in the 20th century served mostly to replace workers with machines in the manufacturing sector, technology in the 21st century is automating "brain-work," including some of the work typically performed by white-collar professionals such as accountants and lawyers. This type of disruptive economic growth will inevitably have a significant impact on the practice of law. Indeed, Susskind's more sobering prediction is that the future of law will be "a world of virtual courts, Internet-based global legal businesses, online document production, commoditized service, legal process outsourcing, and web-based simulated practice." That's enough to drive any lawyer to drink.

So why do we think immigration lawyers are different? Notwithstanding the innovative use of technology to simplify and automate many of the more mundane aspects of law practice, including gathering information, tracking deadlines and completing forms (of which our firms, Fragomen and Seyfarth Shaw, are leading examples in the world of immigration law), immigration practice fundamentally revolves around people. Whether you're helping a Fortune 500 company manage its global mobility program, defending an individual against removal (deportation) in Immigration Court, or helping a U.S. citizen's foreign spouse apply for permanent residence, as an immigration lawyer you are ultimately assisting people through a major personal transition that will profoundly transform their lives and the lives of their families.

Economic pressures and technological development are moving us inevitably toward a more data-driven, data-input system of immigration benefits procurement, and the trend

toward reliance on technology carries with it the threat of dehumanizing both the practice of law as a profession and the truly intimate odyssey for the immigrants we represent. But while the CDC has not provided statistics about the mental health of immigration lawyers in particular, it is clear to us that immigration lawyers labor in the finest tradition of law as a "helping profession."

This ability to help others, without a true adversary such as a litigation opponent staying up all night devising ways to destroy opposing counsel—not just a government lawyer with an impossible case load who often has too little time for assertive advocacy—distinguishes immigration lawyers from the suicide-prone attorneys described in the CNN article (accessible at http://cnn.it/1mZngXw). To be sure, we've seen immigration lawyers react poorly to the stress of the practice, especially those of the people-pleaser sort who have a hard time communicating bad news to clients, and just want always to say yes. But they are by far a speck in the immigration-lawyer universe.

As immigration lawyers, we have expertise in a complicated area of law that we apply in the service of our clients. For those of us who work in the private sector, we have skills that are also uniquely valuable to an underserved population of indigent immigrants for whom there is a severe shortage of qualified non-profit and pro bono legal counsel. Attorneys who do not specialize in immigration law also have skills that are easily transferable to representing immigrants facing deportation or applying for asylum or seeking various types of lawful immigration status.

In one of Careen's first pro bono cases as a young lawyer—an asylum matter in Immigration Court—the case concluded with Respondent's counsel, the client and the judge choking back tears. Angelo's pro bono cases have also included life-changing experiences, for Angelo and his clients.

So, feeling stressed out or depressed? Take a sip of the helping-profession elixir that brought many of us into law in the first place, and take on a pro bono immigration case. Whether you are already an immigration lawyer, or a lawyer in another specialty looking for meaning amid the stress and frustrations of law practice, we promise you that in addition to helping a person in need and fulfilling the highest ethical calling of the legal profession, the experience will leave you feeling fulfilled beyond all expectations. And it is far superior to talk therapy and antidepressants.

Careen Shannon *is Of Counsel at Fragomen, Del Rey, Bernsen & Loewy, LLP, the world's largest immigration law firm. A frequent speaker, writer and blogger on immigration law issues, she is also the co-author, with Austin Fragomen and Daniel Montalvo, of a well-regarded series of immigration handbooks and treatises published by Thomson Reuters/West. Ms. Shannon is also an Adjunct Professor of Law at Yeshiva University's Benjamin N. Cardozo School of Law, where she directs the Immigration Law Field Clinic and teaches an associated seminar.*

Angelo A. Paparelli, *a partner in the 800-lawyer firm Seyfarth Shaw LLP, practices immigration law in Los Angeles and New York. His full-service practice emphasizes business immigration and the EB-5 visa category. He founded the Alliance of Business Immigration Lawyers, a worldwide alliance of leading immigration lawyers. A Calif.-Certified Immigration & Nationality Law Specialist, he has been rated three times as the World's Leading Immigration Lawyer by the International Who'sWho of Corporate Lawyers, and a Star Individual by Chambers in several annual rankings. A recipient of AILA's Edith Lowenstein Award, he blogs on our dysfunctional immigration system at www.nationofimmigrators.com < http://www.nationofimmigrators.com/ > and co-authors the Immigration Column for the New York Law Journal.* ■

Article

Labor/Employment Update: Employment Verification

BY EILEEN M.G. SCOFIELD

Employers participating in E-Verify must execute a Memorandum of Understanding (MOU) in order to participate in the program. Many employers signed–up in 2009, in light of numerous federal contract rules and state laws. Subsequent MOU's have been issued by DHS, and possible unbeknownst to some, the new MOU terms were incorporated into the initially executed MOU. Due process issues aside, this newest MOU, dated June 1, 2013, effective January 8, 2014, provides a bit more clarity, and confusion, but most importantly, now includes a few key substantive points on an employer's duty to self-report and DHS's termination of an employer's use of E-verify. Knowledge of these key points is required for the successful use of and participation in E-Verify, yet known to few E-verify user. These January 2014 terms were effective immediately, regardless of the date of execution and/or version of the MOU.

Employers must allow contractors and other agents of DHS and SSA, after notice, the ability to review Forms I-9 and other employment records, and to interview the employer and its employees. This access is often via a Site visit. Site visits by the Monitoring and Compliance Branch of Verification have increased over the years and we expect hundreds of such this year. Monitoring and Compliance Branch of Verification has also expanded its review by tracking all the actions of an employer within E-verify, a look-see at the back side. These site visits and the tracking actions were arguable vague terms in prior MOU's. The clarity provided in the 2014 MOU is helpful. Additionally though, the 2014 MOU clearly states that "any inaccurate statement" provided to DHS may subject an employer, its subcontractors, employees, or representatives to **prosecution for false statements** under federal law, 18 U.S.C. § 1001. Naturally a site visit or any compliance related inquiry should be taken seriously, the responses truthful, and fully responsive, but the 18 U.S.C. § 1001 warning, even if not read by all users of E-verify, need be noted and share with its subcontractors, employees, or representatives of such.

Other KEY language should be noted and shared. Under both the original 2009 and 2013 MOU, certain actions can lead to termination from E-very. A "breach" can result in termination from the program. The 2013 MOU includes the definition of a certain breach, **a breach which now requires self-disclosure by an employer to E-verify.** This breach is related to "personal information" (assume an employees' personal information?). Per the MOU, "*The Employer agrees to notify DHS immediately in the event of a breach of personal information. Breaches are defined as loss of control or unauthorized access to E-Verify personal data. All suspected or confirmed breaches should be reported …".* Unfortunately little guidance beyond this language is provided, so we are looking to other sources for established sophisticated analysis of the same, included FDC, FTC and FAR regulations. Clearly any such "breach' should be followed by notification, corrective action to prevent future breaches, and a quality control check.

Also, possibly nothing, but the 2014 E-verify MOU now defines certain actions as "illegal" activity. Non-compliance with INA 1324b's discrimination provisions, the Civil Rights Act, and certain E-verify operational activity are **deemed "illegal" acts.** This new definition read in conjunction with the MOU termination provisions is a cause for concern. **Termination by DHS can be "deemed necessary because of the requirements of law"**, or a "failure on the part of the Employer to comply with established E-Verify procedures and/or legal requirements". Accordingly, one wonders if a U.S. Department of Justice Office of Special Counsel (DOJ OSC) INA 1324b query, phone intervention, investigation, etc. now evidences "illegal act" and is a termination trigger. Will an en employer's "settlement" with DOJ OSC be a termination trigger? Will any EEOC query constitute grounds for termination under the MOU? Clearly today's E-verify leadership do not appear to be trigger happy, but what of the future, especially when it is likely that E-verify will be mandatory for all U.S. employers. Also query, will any of the current dozen or more "behaviors" tracked by the Monitoring and Compliance Branch constitute a "breach" for purposes of termination.

Additionally, further dialogue is needed because the 2014 MOU clearly states that DHS may at its discretion, **with or without notice to an employer, terminate an employer's participation in E-verify**. For many employers, such a termination will result in the inability to operate in some states, the immediate loss of contracts, and a loss of livelihood—for employees and employers alike. One assumes that such a decision would not be made lightly, and that attempts to resolve issues will occur prior to termination, but now that the impetus for participation has shifted from volunteerism to mandatory, both the volume will increase and a greater number of less savvy (or supported) users will be on board.

EMPLOYMENT UPDATE *continued on page 16*

Article

We Need Immigration Courts That Work

BY RUSSELL WHEELER & LENNI BENSON

EOIR has 59 immigration courts, whose 260 judges adjudicate each year the cases of more than 300,000 people whom the Homeland Security Department wants to deport.

The courts are a mixed bag. Annual completions per judge average 1,495 but range from 521 in the Honolulu immigration court to almost 5,000 in a Houston court. The figure in 58 of the 59 courts exceeds the 538 terminations-per-judge figure in federal district courts.

The immigration courts are badly in need of help to achieve effective but fair enforcement of the nation's immigration laws. The bipartisan comprehensive bill that the Senate approved in June (and a similar bill introduced by House Democrats) paid immigration courts some much-needed attention, but so far none of the pending House bills with much chance of serious consideration contain parallel provisions.

The pervasiveness of delay

The administration has put people into removal proceedings at a record pace. Times from initiation to completion have increased accordingly. The Transactional Records Access Clearinghouse reports that immigration cases wait on average 562 days for resolution, up from 430 days in 2009. Demands for more enforcement mean more removal proceedings and more delay.

Excessive delay increases detention costs. The government spends slightly more than $200 million on immigration courts but almost ten times that amount to detain some respondents awaiting hearings. The House's 2014 Homeland Security appropriations bill would add over $150 million to that figure and continue to require DHS to detain at least 34,000 people per day.

Excessive delay degrades adjudication as memories fade. It prolongs the separation between immigrants who are eventually allowed to stay and their families. Worse, delay becomes a goal for some with no legitimate claim to legal status, because it lets them remain in the country for up to several years while their cases wait in the court queue.

The Senate immigration bill would reduce delay by authorizing 225 more immigration judges over three years, as well as additional staff -- one law clerk per judge rather than the three-to-one judge-clerk ratio in most courts now. In our survey of immigration judges, almost three-fourths said additional law clerks were one of the changes that would most improve their courts. The bill would also provide more continuing judicial education and better transcription and interpreting services -- all of this funded from the bill's fee-fed "Comprehensive Immigration Reform Trust Fund."

The paucity of legal representation

Intertwined with pervasive delay is the paucity of adequate legal representation for those in removal proceedings. Current law is clear: They may have lawyers but "at no cost to the government." One major cause of delay is that judges often grant postponements to let respondents search for affordable lawyers or seek representation from overtaxed pro bono providers. Those who go it alone must navigate complex immigration laws and court procedures.

The representation rate for those in immigration-court removal proceedings crept up to 56 percent last year but is much lower for detained respondents in those proceedings. In some detention centers fewer than 12 percent of detainees ever get any form of legal advice. Both figures mask the low competence levels of some immigration attorneys.

The dearth of competent counsel has several consequences. For one thing, some detainees (who cost the government about $160 a day) press their cases when a lawyer could tell them they have no grounds for a favorable court ruling. And unrepresented respondents make court proceedings more difficult and time-consuming for government prosecutors -- and for immigration judges, neutral arbiters who must also protect pro se respondents' basic due process rights. In our survey of immigration judges, 92 percent agreed that "when the respondent has a competent lawyer, I can conduct the adjudication more efficiently and quickly."

Long delays, meager representation, and other resource shortages may contribute to arbitrary disparities in outcomes -- there is empirical evidence of disparities in asylum cases. Such disparities mean that courts deport some people who are entitled to protection and spare others who, by law, should be removed. That is an unfair and inefficient administration of immigration laws.

Some object to any government-funded legal assistance for those in removal proceedings -- and under current law, unlike criminal defendants, federal and state civil litigants have no right to government-provided counsel. But while immigration-court proceedings are technically civil, they look a lot like

IMMIGRATION COURTS *continued on page 17*

Article

Let's Talk "TRIG": Litigation in the Federal Courts on the Terrorism-related Inadmissibility Grounds

BY PATRICIA ALLEN

Don't know much about geography
Don't know much trigonometry
Don't know much about algebra
Don't know what a slide rule is for

But I do know one and one is two
And if this one could be with you
What a wonderful world this would be
—Sam Cooke, Wonderful World

Thankfully, this article is not about trigonometry. Not even slide rules. Here, we are talking about a different sort of "TRIG," that is, the terrorism-related grounds for inadmissibility under section 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B). This article will provide an update on movements in the district courts and courts of appeal relating to TRIG since the last time we published on the topic in February of 2009. The first part of the article relates to district court treatment of TRIG issues as encountered by United States Citizenship and Immigration Services ("USCIS"), and the second part covers recent court of appeals treatment of TRIG issues affecting our own agency. While USCIS and the Executive Office for Immigration Review ("EOIR") act separately, they do intertwine in this area of inadmissibility, thus making true Sam Cooke's "one and one is two."

Brief Background on TRIG

Over the past 5 years, the Immigration Law Advisor has provided its readers with a number of excellent articles on the topic of terrorism-related inadmissibility grounds ("TRIG") and exemptions, particularly relating to material support.[1] These articles, listed in the endnotes, provide a thorough and comprehensive look at TRIG's history and scope. As a refresher, the following is a brief summary of the aspects of TRIG most relevant to the present theme.

Section 212(a)(3)(B) of the Act enumerates a number of terrorism-related grounds that render an individual inadmissible.[2] The ground discussed in this article applies where the alien "has engaged in terrorist activity" by "commit[ing] an act that the actor knows, or reasonably should know, affords material support" to a person engaged in terrorist activity or to a terrorist organization. Sections 212(a)(3)(B)(i)(I), (iv)(VI) of the Act.[3] However, an alien who has provided "material support" to an undesignated, or "Tier III," terrorist organization, as defined by section 212(a)(3)(B)(vi)(III) of the Act, may avoid inadmissibility if he or she can show by clear and convincing evidence that he or she "did not know, and should not reasonably have known, that the organization was a terrorist organization." Section 212(a)(3)(B)(iv)(VI)(dd) of the Act. This alien may also escape the application of the "material support bar" if he or she qualifies for an exemption issued by the Secretary of Homeland Security, which is the focus of this article.

As noted in Lisa Yu's article in this newsletter in 2008, the Secretary of Homeland Security has delegated to USCIS the authority to adjudicate exemptions for the certain grounds of inadmissibility under section 212(a)(3)(B) of the Act. See section 212(d)(3)(B)(i) of the Act (providing exemption authority). EOIR lacks jurisdiction to consider or adjudicate such exemptions.[4] Cases in which a final order of removal has been entered may be referred by Immigration and Customs Enforcement ("ICE") to USCIS for exemption consideration. However, only those cases where relief from removal was denied solely on the basis of a terrorism-related ground and for which an exemption is currently available are referred. This process underscores Ms. Yu's recommendation that "[a]s USCIS will only consider for an exemption cases in which the sole obstacle to a grant of relief is one of the section 212(a)(3)(B) grounds for which an exemption is currently available, it is very important that the record be developed fully."[5]

The following recent circuit and district court decisions also highlight the importance of a full record. However, the cases outlined below do not concern aliens denied relief in removal proceedings. Instead, they involve individuals who were actually granted asylum but encountered issues at the next stage where they were seeking to adjust status before USCIS. Under section 212(d)(3)(B)(i) of the Act, the Secretaries of State and Homeland Security, in consultation with the Attorney General and each other, may grant exemptions from the terrorism-related inadmissibility grounds. These exemptions may be applied to applications for immigration benefits, such as adjustment of status, submitted by individuals who currently possess lawful status in the United States (such as asylee status) and are not in removal proceedings or subject to a final order of removal. The following cases highlight issues raised during this exemption process.

Lets Talk TRIG *continued from page 10*

District Court Action

The "hot" issue in the district courts relating to TRIG at the moment relates to the process within USCIS when an applicant for adjustment of status seeks a waiver of inadmissibility for material support provided to terrorist activities, which would otherwise be grounds for denial of the application. An applicant's sole recourse in cases where he claims that he provided material support under duress is to seek a waiver from the Secretaries of State or Homeland Security. Through a waiver provision enacted by Congress in section 212(d)(3)(B)(i) of the Act, "sole unreviewable discretion" vests with the Secretary of State and the Secretary of Homeland Security to waive the material support bar, provided that the alien has not "voluntarily and knowingly" supported terrorist activities. It is the "sole unreviewable discretion" language in this statute that has been heating up the district courts.

For background, on March 26, 2008, USCIS issued an internal memorandum directing its adjudicators to withhold adjudication of adjustment of status applications where the applicant appears to be inadmissible for having provided material support to a Tier III terrorist organization "until further notice," because "new exemptions [to the terrorism-related ground of inadmissibility] may be issued by the Secretary in the future."[6] Following this directive, an applicant for adjustment of status awaiting a determination on his application might receive a notice from USCIS containing this language:

> Your case is on hold because you appear to be inadmissible under [§] 212(a)(3)(B) of the [Immigration and Nationality Act], and USCIS currently has no authority not to apply the inadmissibility ground(s) to which you appear to be subject. Rather than denying your application based on inadmissibility, we are holding adjudication in abeyance while the Department of Homeland Security considers additional exercises of the Secretary of Homeland Security[']s discretionary exemption authority. Such an exercise of the exemption authority might allow us to approve your case.

Geneme v. Holder, 935 F. Supp. 2d 184, 186 (D.D.C. 2013) (alterations in original) (quoting a Dec. 11, 2009, letter from USCIS to the petitioner).

Applicants have demanded that agency action be compelled under the Mandamus Act[7] and/or the Administrative Procedures Act.[8] These arguments are presented despite provisions contained in both Acts that prohibit judicial review of discretionary agency action. See 5 U.S.C. § 701(a)(1), (2); 28 U.S.C. § 1361. Judicial review of discretionary agency action is also prohibited under section 242(a)(2)(B)(ii) of the Act, 8 U.S.C. § 1252(a)(2)(B)(ii). District courts nationwide are split on whether claims that USCIS unreasonably delayed adjudicating applications for adjustment of status involving a waiver of terrorism-related inadmissibility grounds are subject to judicial review because USCIS inaction constitutes discretionary agency action. *See Al-Rifahe v. Mayorkas*, 776 F. Supp. 2d 927, 932, 938 (D. Minn. 2011) (explaining that district courts across the country are divided, but noting that the overwhelming majority have concluded that section 242(a)(2)(B)(ii) of the Act does not bar judicial review of claims alleging unreasonable delay in the disposition of applications of asylees associated with Tier III terrorist organizations).

The cases surveyed for this article reveal abeyances lasting more than 5 years. Since USCIS does not possess a timetable for these particular adjudications, an abeyance is, in effect, open-ended. However, USCIS has maintained that an applicant is not prejudiced by the delay because the delay "actually benefits him" and that the agency is "exercising every effort to address the delay." Singh v. Napolitano, 909 F. Supp. 2d 1164, 1172 (E.D. Cal. 2012). Indeed, as of May of 2012, the Secretary's exemption authority has proved to benefit 14,393 applicants. See Beyene v. Napolitano, No. C 12-01149 WHA, 2012 WL 2911838, at *6 (N.D. Cal. July 13, 2012). Additionally, from June 2010 to June 2012, USCIS released more than 3,500 cases from being held in abeyance. Id.

The following is an example of a case that reached the district court where the petitioner sought an order compelling USCIS to make a decision on an adjustment application and the district court found that it did have jurisdiction. Irshad v. Napolitano, No. 8:12CV173, 2012 WL 4593391 (D. Neb. Oct. 2, 2012). The petitioner, a native of Afghanistan, was granted asylum in 1998 and duly filed an application for adjustment of status in 1999. Nearly 9 years later, in February of 2008, the petitioner was notified by USCIS that his application was denied on the ground that "his transporting of supplies for the Mujahidin as a child constituted material support of an 'undesignated terrorist organization.'" Id. at *2. The petitioner timely appealed this denial with USCIS 1 month later and USCIS reopened his case sua sponte. After waiting close to another 4 years, the petitioner received a letter from USCIS, similar to that referred to above in Geneme, informing him that adjudication on his application was being held in abeyance. Four months after receiving this notice, the petitioner filed suit against USCIS in district court demanding a final ruling on his application. The district court found that section 242(a)(2)(B)(ii) of the Act "does not divest [it] of jurisdiction over a claim that USCIS has failed to adjudicate an application for adjustment of status within a reasonable time." Id. at *5. The court clarified that it saw "no indication that the USCIS has the discretion to refuse to resolve the applications placed before it, or to delay its decisions indefinitely" and that USCIS has "a nondiscretionary duty to act on an I-485 application."

Lets Talk TRIG *continued from page 11*

Id. at *5-6. After extensive analysis, the court then found that the delay in adjudication was reasonable and granted USCIS's motion for summary judgment. The petitioner appealed to the Eighth Circuit Court of Appeals.

Oral argument in Irshad was conducted on November 20, 2013. As of the date of publication of this newsletter, there has been no decision issued. Should the Circuit Court decide to address USCIS's delays through adjudication on the merits, it would be the first time a court at this level has done so. This would also be the first time a case in a circuit court specifically addressed an inadmissibility finding for material support of a Tier III organization as provided under section 212(a)(3)(B). Moreover, should the court address jurisdiction, although not argued by the Government, and affirm the district court's finding that section 242(a)(2)(B)(ii) of the Act did not have effect over adjudication times, the Government would look forward to additional difficulties defending the delays.

Circuit Court Action

In a relatively recent case, the United States Court of Appeals for the Fifth Circuit addressed a similar issue involving agency delay. Amrollah v. Napolitano, 710 F.3d 568 (5th Cir. 2013). As in Irshad, the petitioner in Amrollah was granted asylum but the adjudication of his adjustment application was held abeyance by USCIS, in his case for nearly 9 years. He also filed a complaint with the district court, seeking a writ of mandamus to compel USCIS to act on his application. Unfortunately for him, USCIS proceeded to deny his application based on his previous support of the mujahedeen movement, which he testified to during his removal proceedings. Then, through an amended complaint, the petitioner argued that USCIS had wrongly denied his application. The district court found that substantial evidence supported the denial of his application and, most interestingly here, that collateral estoppel did not bar USCIS from issuing the denial. The petitioner had argued that USCIS was collaterally estopped from denying his application because the Immigration Judge had already granted him asylum after hearing his testimony and "extensive" cross-examination covering his support of the mujahedeen movement at his removal proceedings. He presented this argument to the Fifth Circuit and saw a different result.

The court of appeals first recognized that a "final decision by an immigration judge has a preclusive effect on future litigation and agency decisions." Amrollah, 710 F.3d at 571. The court then applied the 3-prong test of issue preclusion: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision." Id. (quoting Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 290 (5th Cir. 2005) (en banc) (internal quotations marks omitted)). The court found that the second and third prongs were "easily satisfied," given the petitioner's testimony on his support of the mujahedeen movement, and that "the IJ's ruling that Amrollah was admissible necessarily included, under the structure of [section 212(a)(3)(B) of the Act], a finding that Amrollah did not provide support to an individual or organization that engaged in terrorist activities." Id. at 571-72.

The trickier question was the first prong, which requires that the issue previously adjudicated be identical to the issue at hand. To level the playing field, the court first examined whether there was a "demonstrable difference" between the definition of "engag[ing] in terrorist activity" under the 2010 version of the statute and that which was in place in 1999, to avoid collateral estoppel. Id. (alteration in original). USCIS argued that the petitioner was inadmissible under the expanded 2010 statute for providing material support to a Tier III terrorist organization, which is defined as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup that engages in" terrorist activity. Section 212(a)(3)(B)(vi)(III) of the Act. The court then set out to determine whether the Immigration Judge had found that the petitioner fell under this definition. The petitioner argued that the Immigration Judge, "[b]y granting [him] asylum . . . specifically rejected the government's contention that [he] provided material support to terrorists." Brief of Appellant, Amrollah v. Napolitano, 710 F.3d 568 (5th Cir. 2013) (No. 12-50357), 2012 WL 3066837, at *23. In support, the petitioner presented the Immigration Judge's finding, as stated in his decision:

> Although the Service attorney asserts, or hinted that Respondent's support of the Mujahedeen indicated violent activity which might disqualify the Respondent from being eligible for asylum, the Immigration Judge concludes that the Respondent's testimony showed that he did not commit any violent act and there is no evidence of that in the record.
>
> Id. at *23-24.

The court extrapolated from the Immigration Judge's finding (which is absent of any TRIG-related discussion) that by "finding Amrollah admissible to the United States in 1999, the immigration judge necessarily decided that Amrollah did not afford material support to any: (i) individual, (ii) organization, or (iii) government in conducting a terrorist activity at any time." Amrollah, 710 F.3d at 573. The court concluded that the Immigration Judge's finding "has a preclusive effect against a subsequent finding that Amrollah provided material support to 'a group of two or more individuals' engaged in

Lets Talk TRIG *continued from page 12*

terrorist activity." Id. Consequently, the court held that USCIS was collaterally estopped from denying the petitioner's application based on his provision of support to the mujahedeen movement.

The question remains, however, whether the court of appeals would have found that the issues were identical if the record of proceedings been more fully developed on the TRIG issues raised. We will never know. What if the Immigration Judge had made more specific TRIG-related findings on the petitioner's history of providing medical assistance as a pharmacist to members of the mujahedeen and monetary assistance for the printing of pamphlets? Would the court of appeals have found it more difficult to consider USCIS's findings to be "identical"? Possibly. Again, we will never know. What we do know is that a more developed record on TRIG-related issues that are raised in removal proceedings would help the inquiry later down the line.

When TRIG-related issues are raised in immigration proceedings, the development of the record, including clear findings of fact and conclusions of law, by EOIR's adjudicators may play an important role in future exemption consideration by USCIS and litigation before Federal courts. We hope the foregoing has been helpful in expanding your knowledge of TRIG as it is applied outside of EOIR and within our agency. ■

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ENDNOTES

1. Linda Alberty, *Affording Material Support to a Terrorist Organization – A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place*, Immigration Law Advisor, Vol. 2, No. 4 (Apr. 2008); Lisa Yu, *New Developments on the Terrorism-Related Inadmissibility Ground Exemptions, Immigration Law Advisor,* Vol. 2, No. 12 (Dec. 2008) [hereinafter Developments]; Lisa Yu, *Differentiating the Material Support and Persecutor Bars in Asylum Claims, Immigration Law Advisor,* Vol. 3, No. 2 (Feb. 2009).

2. 212(a)(3)(B) renders inadmissible an alien who, engaged in terrorist activity; is engaged in or is likely to engage in terrorist activity after entry; incited terrorist activity with intent to cause serious bodily harm or death; is a representative or current member of a terrorist organization, endorsed or espoused terrorist activity; received military-type training from or on behalf of a terrorist organization; or is the spouse or child of anyone who has engaged in terrorist activity within the last 5 years (with certain exceptions).

3. Linda Alberty provides an interesting outline of the different Tier designations in her article. *See* Alberty, *supra* note 1, at 2.

4. *Matter of S-K-*, 23 I&N Dec. 936, 941 (BIA 2008) ("Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals."); *see also* REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, §§ 103(b), 104, 119 Stat. 302, 307-09.

5. Yu, *Developments, supra* note 1, at 3.

6. Memorandum from Jonathan Scharfen, Deputy Dir., USCIS, to USCIS officials, at 2 (Mar. 26, 2008), available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2008/withholding_26mar08.pdf.

7. Under the Mandamus Act, a district court has the authority to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Mandamus is a "'drastic and extraordinary'' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)).

8. The Administrative Procedures Act ("APA") states that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). The APA further provides that Federal courts shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Asylum Victory by GW Law Student

BY JESSICA LEAL
Student Attorney in the George Washington University Immigration Clinic and 3L at George Washington Law School•

On November 26, 2013, my client, M-L-R-, won the opportunity to sleep at night. M-L-R- was granted asylum by Immigration Judge Paul W. Schmidt. She fled El Salvador after she was brutally raped and beaten by an MS-13 gang leader and was told that she would have to be subject to his sexual demands in the future. A mere twenty-two days after this horrific attack, M-L-R- left her husband, her family, and the only country that she had ever known, to journey to the United States. She believed that our country was the only one where she would be able to escape her persecutor's reach and establish a new life. Fortunately, she will now have the chance to petition for her husband and live in peace out of harm's way.

At the end of the hearing, Judge Schmidt encouraged M-L-R- to thank her lawyers. I could not have asked for a better client or better colleagues for my first Immigration Court hearing. I am a Student Attorney in the GW Immigration Clinic, and I represented M-L-R- under the supervision of Professor Alberto M. Benitez and Jonathan C. Bialosky, Esq. I started working on this case in July 2013, over a-year-and-a-half after the Clinic undertook my client's representation. I am the fourth Student Attorney to act on her behalf. M-L-R- was previously represented by Rachael Petterson (Associate Attorney at Benach Ragland LLP and former Interim Director of the Clinic), Jason Boyd, Denisse Velarde-Cubek, and Cleveland Fairchild. Each of these individuals helped to craft my client's affidavit, compile supporting evidence, and obtain her work authorization. In addition to their legal roles, they met with M-L-R- countless times and helped her to work through the traumatic events that she endured.

This semester, I was tasked with preparing the pre-trial filing (PTF) and representing M-L-R- in her individual hearing, which was originally scheduled to take place on October 1, 2013. When I met M-L-R- in July, I did not have very much experience meeting with clients or discussing persecution. My lack of experience was further compounded by the language barrier. M-L-R- is a Spanish-speaker and, although I am also a native Spanish-speaker, I found it incredibly difficult to converse with M-L-R- about the terrible details of her persecution. I had never had to discuss rape or abuse in Spanish. When I did not know how to translate a word, I would gesture and she would fill in the gaps. M-L-R- helped me to work through my own insecurities with the language as she worked through the details of her story. This was only one of the many surprising challenges that I encountered in representing a client in Immigration Court for the first time.

I have had several immigration-related internships throughout my law school career. Each of these internships introduced me to a different piece of the complex immigration system puzzle. Although I attended individual hearings before this semester and was exposed to asylum law, I could not imagine the stress of preparing for a hearing. Nor could I have anticipated the number of people and details that affect the outcome of an asylum claim. In this case, I had the good fortune of working with an experienced professor, a knowledgeable staff attorney, and an excellent group of Student Attorneys. I was able to rely on this support system in confronting and overcoming the many obstacles that led to my client's victory. I also benefitted from working with an extraordinarily helpful DHS trial attorney, Justin Leone. Mr. Leone patiently explained the intricacies of particular social group (PSG) claims and was prepared well in advance of the hearing to discuss the issues.

After I submitted the PTF two weeks before the original hearing date, I encountered yet another hurdle in the process of winning asylum. I checked EOIR's automated phone system to make sure of the hearing date and time. The system reflected that the next hearing was a master calendar hearing scheduled for March 20, 2014, not an individual hearing scheduled for October 1, 2013. I notified Professor Benitez and proceeded to contact the Arlington Immigration Court. A legal assistant attempted to figure out why the date had been changed, but she could not find an answer in the computer system. Judge Schmidt's legal assistant, Glenda Britt, was extraordinary helpful in resolving this problem. She checked with Judge Schmidt and found an open time slot on the Tuesday before Thanksgiving because the original time slot had already been filled. Judge Schmidt helped to find a date and time that would accommodate my academic schedule. This was a huge victory at the time and proved to be serendipitous as the federal government shutdown on October 1, 2013. There is no way of knowing how much longer M-L-R- would have had to wait for her day in court if the hearing had not been rescheduled.

In the days leading up to the rescheduled hearing, I felt overwhelmed by how little I knew about PSG case law. Objec-

tively speaking, there is almost no way of knowing every case in every jurisdiction that might affect the outcome of a claim; however, I could not help but feel insecure about my knowledge base. To that end, mooting was very useful. It helped me to realize that I could argue the law without specific case names and that, for this particular hearing, the case law was not as important as the facts. In addition to my insecurity about case law, I worried that I had not reviewed the record sufficient times and that I would forget essential details. To help combat my fears, I prepared several documents to take to the hearing, including: a list of themes to guide my questioning, a case chart with key facts, a timeline, and an outline of my closing statement. To further minimize the stress, I spent the weekend before the hearing unwinding with family. I also made sure that I arrived in Crystal City over an hour before the hearing and encouraged M-L-R- to do the same.

At the hearing, I tried to keep the amount of paper on the table at a minimum to avoid cluttering my space and relying too much on the documents. I kept my note-taking to a minimum to ensure that I maintained eye contact with M-L-R-. I also attempted to smile often, however that proved difficult because I tend to maintain a serious expression when I am focused. In lieu of smiling, I nodded as often as I could. My voice was shaky when I began the direct examination, but it steadied as I progressed. I felt most confident as I delivered my closing statement because it afforded me the opportunity to piece together my client's testimony.

In preparing for this hearing, I learned that winning an asylum case is just as much about the facts as it is about the people presenting them and the people adjudicating them. M-L-R- had particularly compelling facts; however, the gang element of her claim presented an obstacle. With the help of the Clinic, she was able to submit a thorough PTF articulating the nuances of her PSG. Judge Schmidt also carefully considered every detail of her claim and appreciated the fact that I was a Student Attorney. His flexibility and patience allowed me to get through my questioning and my closing statement without significant interruptions.

It was very helpful to be able to moot in anticipation of the hearing several times and to have an experienced attorney, Rachael Petterson, serve as the Immigration Judge. Mooting almost replicated the experience of appearing in court, but nothing came close to actually representing an individual in a high-stakes situation. Despite the four months of preparation, I felt anxious. When I walked through the gate in the courtroom, I did not know how I would react. I realized that I work well under pressure, but that I have nervous habits. As much as I tried, I could not stop leaning forward and I often clenched my hands. I also had to remind myself that this was a real hearing and that I could not jump up and down when Judge Schmidt announced his decision.

Preparing for this hearing was very time-consuming. In addition to compiling the PTF and mooting for the hearing, I had other academic and extracurricular commitments. As I got closer to the hearing date, I had to budget my time carefully to keep up with my obligations. I also had to forego taking on additional commitments to ensure that I devoted enough time to the hearing. Ultimately, the hearing itself was not as stressful as the months of preparation. I know that, when I become an attorney, I will not have the luxury of spending months on a case, but I am confident that my nerves will fade with time. This client, this hearing, and this victory reassured me that there is no other type of law that I would rather practice than Immigration. I am ecstatic to have been a part of the team that won M-L-R- the chance to sleep at night, and I would not trade the experience of preparing for her hearing for the world! ■

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[Editor's note: Prior to entering the GWU immigration clinic, Ms. Leal interned with the Arlington VA Immigration Court, and the DOJ Office of Immigration Litigation. She has developed a solid grounding in immigration law]

continued from page 4

dent practitioner will always attempt to contact the Assistant Chief Counsel who will handle the case, in advance of the merits hearing, to inquire as to what type and proof of tax compliance the Chief Counsel will be expecting.

In conclusion, I have offered you nine non-profound, yet practical, pointers about taxes in Immigration Court: 1) tax crimes are bad; 2) payment of taxes can be relevant to issues of character and discretion; 3) evidence of tax payment can be an important positive factor in meeting the burden of proof for immigration benefits; 4) official IRS tax transcripts normally are the best evidence; 5) immigration counsel should thoroughly review and understand tax filings that they submit in Immigration Court; 6) sponsoring employers might be required to submit tax records to show ability to pay a proffered wage; 7) other types of sponsors will also be required to submit tax forms to show evidence of ability to support; 8) IRS agreements for payment of back taxes can help in overcoming the adverse effects of past failure to pay; and 9) check with the local Chief Counsel's Office about that office's expectations in the area of tax compliance.

I hope that this information will help you escape the dreaded Minotaur and successfully wend your way through the labyrinth of tax and immigration law. I will, of course, be happy to take your questions during the question and answer period. ■

ENDNOTES

1. 548 F.2d 37 (2d Cir. 1977)
2. 548 F.2d at 38.
3. *See, e.g., Carty v. Ashcroft*, 395 F.3d 1081 9th Cir. 2005).
4. *See Matter of Adetiba*, 20 I&N Dec. 506, 507 (BIA 1992) (uncontested that having falsely represented a Social Security number is a crime involving moral turpitude).
5. INA §212(a)(6)(C)(ii), 8 U.S.C. §1182(a)(6)(C)(ii).
6. INA §101(a)(42)(M)(ii), 8 U.S.C. §1101(a)(42)M)(ii).
7. 132 S.Ct. 1166 (2012).
8. INA §101(a)(42)(M)(i), 8 U.S.C. §1101(a)(42)M)(i).
9. INA §236(c)(1)(B), 8 U.S.C. §1226(c0(1)(B).
10. *Matter of Locicero*, 11 I&N Dec. 805 (BIA 1966).
11. *See, e.g.*, INA §240A(b)(1)(A), 8 U.S.C. §1229b(b)(1)(A) (cancellation of removal for certain nonpermanent residents).
12. *See, e.g.*, INA §240A(b)(1)(A), 8 U.S.C. §1229b(b)(1)(C) ("exceptional and extremely unusual hardship" to USC or LPR spouse, parent, or child required for cancellation of removal for certain nonpermanent residents); INA §212(h)(1)(B), 8 U.S.C §1182(h) (1)(B) ("extreme hardship" to USC or LPR spouse, parent, son or daughter required for waiver of certain criminal ground of inadmissibility); INA §212(i)(1), 8 U.S.C §1182(i) (1)("extreme hardship" to USC or LPR spouse, son, or daughter required for a waiver of material misrepresentation).
13. INA §212(a)(4), 8 U.S.C. §1182(a).
14. INA §213A(f)(1)(E), 8 U.S.C. §1183a(f)(1)(E).
15. 8 C.F.R. §213a.2(c)(2)(i)(A).

Labor/Employment Update *continued from page 8*

Will these factors result in a shorter window to cure prior to termination? Each day the system gets new enhancements, more steps—will these create more monitoring and compliance behavior tests, which be more easily violated? And what are the behavior baselines? We know for instance that the "number of behavior hits" per a certain period of time can result is a compliance behavior report.

It continues to be important that E-verify users be trained on the entire employment verification process, and adequate, yet not overwhelming, support sources are available. Dialogue with DHS should continue in order to improve this system for employees and employers alike. DHS should state that but for a clear case of intentional purposeful wrongdoing by the employer, termination should not occur. Finally, DHS might consider sending this new 2014 MOU, and abstract, directly to every E-verify user so that adequate notice is provided. One need not panic, but solid knowledge is essential.

A copy of the 2014 MOU is available upon request. Please contact us with any related questions or concerns today or in the future. Eileen.scofield@alston.com ■

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Immigration Courts *continued from page 9*

criminal proceedings; they include government prosecutors, the incarceration of some pending and during trial, and potentially life-threatening outcomes, including removal to a hostile country.

The Senate immigration bill takes modest steps to ensure representation for children and some vulnerable populations. It would also give statutory recognition to a small office created several years ago that arranges for non-profit groups to brief some new detainees about immigration-court procedures and to explain why fighting a removal order may not be legally viable.

Others are trying to fill the representation void. For example, a coalition founded by Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit in New York, which (like the western-state Ninth Circuit Court of Appeals) hears a disproportionate number of immigration appeals, devised a pilot project that the New York City Council agreed to fund at a local detention center. The council determined that the project will directly benefit New York families who suffer the collateral damage created by immigration detention.

In short: there can be no effective and fair enforcement of our immigration laws if the immigration courts cannot keep up. ■

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