STATE BAR of TEXAS

IMMIGRATION BULLETIN

Immigration & Nationality Law Section

Fall 2020 • Volume 1 • No. 2

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Message from the Chair

Matthew Myers

As Chair of the State Bar of Texas's Immigration & Nationality Law Section, I am happy to introduce myself and our Section's Fall 2020 Immigration Bulletin. Our Section strives to provide resources to our members to help navigate the ever-changing U.S. immigration climate and identify trends that impact our clients. With members in private practice, academia, and government, our goal is to curate information that will help make us all more informed advocates for our clients. As a result of the COVID-19 pandemic, we have shifted our focus to written publications such as this Immigration Bulletin, collaboration with other Sections and local bar associations and organizations to produce immigration CLEs, updating our Section website to provide resources to membership, and other developments which will be announced as appropriate in email blasts to the Section. We spend each of our monthly meetings brainstorming and also welcome feedback from Section members about ways that our Council can provide resources to its members in these interesting times. Please do not hesitate to contact me or any Section Council member directly.

The Section's Immigration Bulletin is designed to provide membership with the latest trends in local field offices, immigration courts, ports of entry, and consular posts. Quarterly articles may cover the latest in practice pointers, trends, best practices, insights, opinion pieces and other personal stories from our members who practice immigration law in the areas of family, employment, humanitarian, and removal defense across Texas. The Bulletin also maintains a recurring column on the latest 5th Circuit Court and Supreme Court decisions which impact immigration law.

We are currently accepting articles for publication in the Section's Winter edition of its Immigration Bulletin, which is scheduled to be published in January 2021. We are living in extraordinary times, and we would love to hear from you. We are particularly interested in including articles related to immigration in the time of COVID-19, including what to expect at local field offices, deferred inspection or ports of entry, courts, and consulates, as the world struggles with reopening.

Please consider writing an article or asking your colleagues to give it consideration. The deadline for submission of articles for the Winter issue of the Immigration Bulletin is **February 15, 2021**. Articles submitted should meet the following criteria:

1. Be between 500 – 2,500 words, although longer may be considered;
2. Be submitted double-spaced in Microsoft Word format;
3. Acknowledge all sources, but keep endnote citations at a minimum;
4. Include your name, email address, firm/company affiliation and city. A profile photo will also be included with the article if submitted; and
5. Include a short "about the author" summary about you and your practice.

Please submit your article by email to: **Roy Petty**, Editor at: **roy@roypetty.com**.

We anticipate great things for the 2020-2021 year ahead, and we look forward to including you in our efforts.

Sincerely,

Matthew Myers
Chair, Immigration & Nationality Law Section
State Bar of Texas

Proposed Regulation Seeking to End "Duration of Status" Admissions and Its Impact on J-1 Physicians and U.S. Healthcare

By Viera Buzgova

Among the alphabet of non-immigrant visa categories, F academic students, J exchange visitors, and I representatives of foreign media are unique in the way their period of admission is calculated. While most other non-immigrant visas are admitted for a fixed period of time, F, J and I visa holders are admitted for the "duration of status," meaning they are allowed to remain in the United States for the length of time it takes them to complete their studies or programs.[1] A recently proposed regulation by U.S. Immigration and Customs Enforcement (ICE) seeks to change this admission period to a fixed period of time.[2] This change would significantly impact not only the students, the exchange visitors, and the foreign media representatives, but would have significant impacts on our schools, teaching hospitals, and community at large. This article focuses on one specific, but a very important group – the J-1 physicians.

Viera Buzgova is a co-owner and partner in Buzgova, Meneses & Wellington Smith, LLP immigration law firm in Austin. TX. Her practice centers on employment-based immigration with a specific emphasis on the healthcare industry. She works closely with hospitals and clinics, handling both non-immigrant and immigrant cases, including physician J-1 waivers, H-1B visas, National Interest Waivers, PERM labor certifications, I-140 immigrant visa and I-485 adjustment of status cases. She also represents clients in family immigration matters, citizenship, and other areas of immigration law.

Background on J-1 physicians

Under the U.S. Department of State J-1 exchange visitor program, foreign medical graduates (FMGs) who wish to pursue their medical training can come to the United States for the purpose of completing graduate medical education or training programs through various medical residency and fellowship programs.[3] As part of their training, J-1 physicians are also providing supervised patient care, ranging from primary care specialties (such as internal medicine, family medicine, pediatrics, etc.) to various sub-specialties (emergency medicine, immunology, cardiology, etc.).

The State Department designated the Educational Commission for Foreign Medical Graduates (ECFMG) as the sole sponsor of foreign physicians who wish to participate in the J-1 program.[4] ECFMG conducts rigorous review of every applicant and their designated program, before the physician is accepted into the training program.

Once the J-1 physician is approved for the program, they are issued form DS-2019 "Certificate of Eligibility for Exchange Visitor (J-1) Status" by ECFMG. The physician uses Form DS-2019 to apply for a J-1 visa at the consulate or, if they are already in the United States, for change of status to a J-1 visa. Upon their entry or change of status approval, they are admitted for the Duration of Status (or "D/S"). The arrival and physician's progress throughout their training are validated through SEVIS (the Student and Exchange Visitor Information System) which is a joint Department of Homeland Security and Department of State database that tracks and monitors exchange visitors. ECFMG is required to update SEVIS program with any changes as to a physician's status. Thus the U.S. government has the ability to monitor the physician's progress as well as the end dates of their training programs.

It is important to note that Form DS-2019 for J-1 physicians is issued in 12-month increments as the physicians progress through their training. The form documents the beginning and the end of the program. Since most of the programs last several years, J-1 physicians must obtain a new DS-2019 form every year in order to extend and maintain their status and these extensions must be reported in the SEVIS database. In order to get an extension, ECFMG requires physicians to submit an annual

[1] *See* 8 C.F.R. §214.2(f)(5)(i), 214.2(j)(1)(ii), and 214.2(i)

[2] *See* 85 FR 60526; available at: https://www.federalregister.gov/documents/2020/09/25/2020-20845/establishing-a-fixed-time-period-of-admission-and-an-extension-of-stay-procedure-for-nonimmigrant#footnote-5-p60527

[3] *See* https://j1visa.state.gov/programs/physician/

[4] 22 C.F.R. 62.27(b)

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Proposed Regulation Seeking to End "Duration of Status" Admissions and Its Impact on J-1 Physicians and U.S. Healthcare

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application and ECFMG conducts a thorough review of the physician's progress and continued eligibility for the J-1 program. Once a new DS-2019 form is issued, the physician is allowed to continue their training.

New proposed regulation and the effect on J-1 physicians, training institutions and U.S. communities

On September 25, 2020, ICE published a proposal to change the rules on admission of F, J, and I nonimmigrants, titled "Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representative of Foreign Information Media." The new ICE regulation proposes to end the ability of these visa holders to be admitted for the "duration of status" and instead would require an admission for a fixed period.[5] While this is not the first time the current administration has attempted to end or reinterpret the "D/S" designation[6], this proposed regulation would have significant impact on the continuity of J-1 physicians' training as well as on the continuity of medical care for the populations these physicians serve.

While the proposed regulation would allow admission for up to 4 years, the actual admission end date is tied to the DS-2019 form.[7] For example, if the DS-2019 is valid only for one year, the maximum admission period allowed would also be only for one year, corresponding to the end date on the form. In order to extend the J-1 status under the proposed rule, the applicant would be required to file an Extension of Status application on form I-539 and then wait for the U.S. Citizenship and Immigration Services (USCIS) to issue an approval before they could continue in their program.[8]

The fixed-time admission is especially problematic for J-1 physicians, whose DS-2019 forms can only be issued in 12-month increments. The rule would impose an additional requirement on the physicians to also apply for extension of status on form I-539 with the USCIS every year, in addition to going through already strict requirements of renewing their DS-2019 with ECFMG. In order to apply for the extension with USCIS, the physicians would have to have new DS-2019 forms in hand. Because the majority of residency and fellowship program contracts are issued 3 to 5 months prior to the next training year (which typically starts on July 1st for most institutions), ECFMG can only issue a new DS-2019 form close to the time the next training year starts. In preparing to write this article, the author reviewed roughly a hundred DS-2019 physician forms issued in the past few years and most of those were issued in a period of 1 to 3 months before the next training year started. This would mean that J-1 physicians may only have 1 to 3 months to apply for extension of status with the USCIS and get it approved in order to continue their training. With USCIS processing times for extension of status applications currently ranging from 4.5 to 19 months[9], it is a near certainty that there will be a period of time where the J-1 physicians will have to stop their training and wait for their extension of status to be adjudicated. Alternatively, the physicians could travel abroad and apply for a new visa at a U.S. consulate abroad; however, international travel combined with some consular processing times being fairly lengthy as well, would also cause interruption in the training (not to mention current travel bans in place and dangers of traveling internationally during a pandemic). These "inactive" periods could last several months, interrupting physicians' training, disrupting the training programs at teaching hospitals and institutions, and severely impacting health care of the patients that these physicians serve.

There are about 12,000 foreign physicians under the J-1 program[10] currently training and providing critical medical care to patients in the locations where they train. If there is one thing that we have learned from the recent COVID-19 pandemic experience, it is that our healthcare system is overburdened and there are shortages of health care providers. If the proposed rule had been in place this year, there would have been about 12,000 physicians who would have had to stop working on July 1st in

[5] *See* 85 FR 60526

[6] *See* August 9, 2018 Policy Memorandum, PM-601-1060.1, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants"; this Memo was later declared invalid by U.S. District Court for the Middle District of North Carolina in *Guilford College v. Wolf*, 02/06/2020.

[7] *See* 85 FR 60526

[8] *Id.*

[9] *See* https://egov.uscis.gov/processing-times/. Last visited Oct. 24, 2020.

[10] *See* https://www.ecfmg.org/protect-ds-for-J1s

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Proposed Regulation Seeking to End "Duration of Status" Admissions and Its Impact on J-1 Physicians and U.S. Healthcare

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order to wait for their extensions to be approved. And many would have been unable to treat patients for several months this summer and fall while waiting for their extensions, right when our nation was in dire need of medical professionals. Fortunately for many patients, with the current rules in place (which already thoroughly track and monitor these physicians through SEVIS and ECFMG systems, making the new regulation unnecessary), J-1 physicians were able to be on the front lines this year during the COVID-19 pandemic, working tirelessly to save human lives.

The impact of the new rule would have very serious and devastating consequences on multiple facets of our society. The physicians' training would suffer from annual interruptions due to the additional burden of having to apply for extension of status with USCIS and the USCIS's processing time delays. The teaching institution and their training programs would also be impacted by losing their medical residents and fellows for weeks to months every year. And most importantly, the continuity of health care that these physicians provide to their patients would be interrupted as well, having catastrophic effects on the health of the American society.

> Note: The Public Comment period for this proposed rule ended on October 26, 2020. More than 32,000 public comments were submitted (an impressive number!). Notably, many of these comments are opposing the new rule specifically because of the disruption to the J-1 physician program.

Third-Country Transit Ban Litigation

by Manoj Govindaiah

On July 16, 2019, the U.S. Departments of Justice and Homeland Security jointly promulgated an initial final rule entitled "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33829 (July 16, 2019) ("Asylum Transit Ban" or "Ban"). As an initial final rule, the Asylum Transit Ban went into effect immediately, without public input (typically through a notice and comment period). The Ban modified existing regulations to limit eligibility for asylum; apart from some very limited exceptions, if a person transited through other countries en route to the United States and failed to apply for asylum in one of those transit countries, the asylum seeker would be categorically barred from establishing eligibility for asylum in the United States.

Manoj Govindaiah is the Director of Policy and Government Affairs at the Refugee and Immigrant Center for Education and Legal Services (RAICES) in San Antonio, Texas, where he has worked since 2014. In his current role, he oversees all of RAICES' federal, state, and local policy and legislative work. Prior to this role, Manoj served as RAICES' litigation director. Manoj has previously worked at the Immigration Project in Granite City, Illinois, the National Immigrant Justice Center in Chicago, and at the Southern Poverty Law Center in Miami, Florida. Manoj is a 2006 graduate of the University of Illinois College of Law. He was counsel of record in *CAIR Coalition, et al v. Barr, et al.*

Litigation quickly followed. Those who regularly work with immigrant communities are surely familiar with the Ban's severe impact on asylum seekers. On July 16, 2019, the same day the Ban went into effect, two nonprofit organizations, RAICES, in San Antonio, TX, and CAIR Coalition, in Washington, DC, working with pro bono counsel from Hogan Lovells U.S. LLP, filed suit in the District Court for the District of Columbia, *CAIR Coalition, et al v. Trump, et al*, No. 2:19-cv-02117-TJK (D. D.C. July 16, 2019). The plaintiffs challenged the Ban for violating due process and a variety of statutory provisions—including the INA, the Administrative Procedure Act, and the Trafficking Victims Protection Reauthorization Act. The same day a separate lawsuit was filed by several nonprofit organizations in the Northern District of California, *East Bay Sanctuary Covenant, et al v. Barr, et al*, No. 3:19-cv-04073 (N.D. Cal. July 16, 2019). An additional case was filed about one month later, *I.A., et al v. Barr*, *et al*, No. 2:19-cv-02530 (D. D.C. Aug. 21, 2019), and joined with *CAIR Coalition*.

The initial results of the litigation were not favorable. On July 24, 2019, Judge Kelly denied an emergency TRO in *CAIR Coalition*, however later that same day, Judge Tigar granted a preliminary injunction in *East Bay* thus preventing the rule from going into effect. The government quickly appealed and *East Bay* ping ponged throughout the court system; eventually, the U.S. Supreme Court let the Ban go into effect nationwide in September 2019.

On June 30, 2020, however, Judge Kelly granted the plaintiffs' motion for summary judgment in *CAIR Coalition* and declared the Asylum Transit Ban unlawful nationwide. Judge Kelly determined that the issue at stake did not constitute an "emergency" and thus the Trump Administration violated the APA by not permitting a notice and comment period. A few days later, on July 6, 2020, the Ninth Circuit in East Bay similarly determined that the Ban was unlawful, nationwide. Almost as if attempting to ensure neither decision would be vacated, the Ninth Circuit ruled on the remaining grounds—the statutory and constitutional violations—and did not address the notice and comment claim.

Although the overruling of the ban is overwhelmingly positive news for asylum seekers and those in the immigrant rights community, there are two main uncertainties moving forward. First, the Administration has appealed the decision in *CAIR Coalition* and the appeal is currently pending with the D.C. Circuit Court of Appeals; however Judge Kelly's decision remains in effect nationwide. Although the Supreme Court has previously considered the Ban through *East Bay* and allowed it to take effect, there is cautious optimism that it would uphold Judge Kelly's decision if asked to weigh in. Judge Kelly was appointed by President Trump and issued a comprehensive but relatively narrow decision on one specific claim. His decision may, therefore, withstand scrutiny on appeal. Another area of uncertainty is whether Judge Kelly's decision applies retroactively, and if so, what happens to those individuals who were already removed from the United States as a result of the ban. The government has taken the position that Judge Kelly's decision is not retroactive, however, there is litigation currently underway on that exact question. As

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Third-Country Transit Ban Litigation

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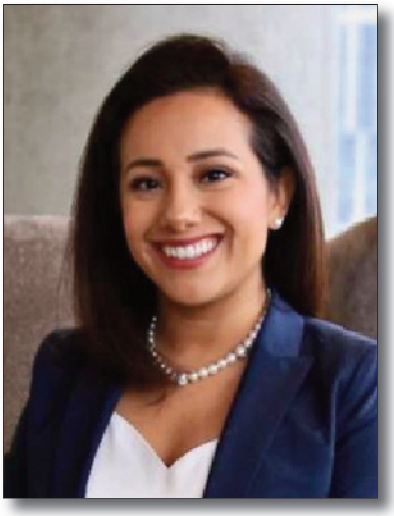
of now, those who were impacted by the ban before June 30 would need to pursue post-decision relief, such as reopening or reconsideration. Additionally, the Administration recently proposed regulations that would seek to codify the Asylum Transit Ban but in a different way: the new proposal would require an asylum seeker's failure to apply for asylum in a transit country to be considered a negative discretionary factor for asylum adjudication.

The Ban is simply one example of this Administration's attacks on asylum. Over the past four years, the Trump Administration has enacted two emergency final rules directly affecting asylum, and both were stopped by the courts. Despite these court losses, the Administration has continued to enact an unimaginable number of additional changes, many of which have gone into effect despite mighty efforts to stop or delay them. Additionally, and perhaps because Judge Kelly issued such a strong rebuttal against the Administration's attempt to sidestep the notice and comment requirement of the APA, over the past few months the Administration has been racing to propose new regulations affecting all aspects of the immigration system, including asylum, and, at least for appearance's sake, attempting to follow the APA as it does so. The impact of these changes to the asylum system, the U.S.' standing as a human rights defender, and the global refugee crisis will be felt for decades.



USCIS Filing Fee Changes

by Emma Ibarra-Martinez

October 2, 2020 was a date marked in most of my fellow immigration practitioner's calendars as the dreaded U.S. Citizenship and Immigration Services (USCIS) filing fees increased. On August 3, 2020, the Department of Homeland Security (DHS) published the final version of USCIS' revised fee schedule and announced the requirement of new versions of several forms.1 The rule specified: "Any application, petition, or request postmarked on or after this date must be accompanied with the fees established by this final rule." The fee increases and new versions of several forms were scheduled to go into effect on October 2, 2020.

In the weeks leading up to the filing fee increase deadline of October 2nd, practitioners and applicants rushed to get their applications filed with USCIS to avoid paying the increased filing fees. For many applicants, the increased fees would make it cost-prohibitive to apply for certain immigration benefits, like naturalization or adjustment of status. Even before October 2, 2020, USCIS began improperly rejecting applications citing the increased filing fees. In response, practitioners were creative and re-filed their client's applications with cover pages reminding USCIS to check their calendars in bolded letters and explained that the increased fees were not yet in effect.

Emma Ibarra-Martinez is a sole practitioner at Ibarra-Martinez Law, PLLC, located in Houston. Emma practices immigration law exclusively with a focus on family-based immigration, naturalization, consular processing, and removal defense. She received a B.A. from St. Edward's University in 2008 and a J.D. from South Texas College of Law in 2012. She currently serves as the American Immigration Lawyers Association (AILA) liaison to the USCIS Houston Field Office. She is also a member of the National Immigration Lawyers Guild, ASISTA, and has been a guest lecturer at the immigration clinics at the University of Houston Law Center and South Texas College of Law. To learn more about Emma's background and her practice, visit **www.imimmigrationlaw.com**.

A Temporary Sigh of Relief- The Preliminary Injunction

On September 29, 2020, four days before the fee increase was supposed to go into effect, the U.S. District Court for the Northern District of California in *ß*, 20-cv-05883-JWS granted a nationwide preliminary injunction2 enjoining DHS from implementing the final USCIS fee rule in its entirety. **While this injunction is in place, USCIS cannot require the new forms and the new fees associated with the new rule that were supposed to go into effect on October 2, 2020**. The case remains in litigation.

In his ruling granting the preliminary injunction, Judge Jeffrey White ruled that the plaintiffs in the case were likely to succeed on the merits, that the issuance of the rule violated the Administrative Procedure Act, and he also added that Acting Secretary of Homeland Security Chad Wolf and his predecessor had been improperly appointed to their posts and lacked the legal authority to issue the final fee increase rule. Judge White also noted that the nationwide injunction was in the public interest because the implementation of increased filing fees for USCIS applications would have a negative impact on low-income applicants for immigration benefits. Judge White noted that previously, "the United States did not charge a fee to apply for asylum".

USCIS Response to the Preliminary Injunction of Fee Rule

On September 30, 2020, USCIS issued the following statement in response to the nationwide preliminary injunction from the U.S. District Court for the Northern District of California.

> "This unfortunate decision leaves USCIS underfunded by millions of dollars each business day the fee rule is enjoined. Unlike most government agencies, USCIS is fee-funded. As required by federal law, USCIS conducted a comprehensive biennial fee review and determined that current fees do not recover the cost of

[1] U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 FR 46788 (August 3, 2020), https://www.federalregister.gov/d/2020-16389.

[2] *Immigrant Legal Resource Center et al. v. Chad F. Wolf, et al.*, Case No. 3:20-cv-05883 (Northern District of California District Court), https://www.nafsa.org/sites/default/files/media/document/preliminjonfeerule2020.pdf.

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USCIS Filing Fee Changes

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providing adjudication and naturalization services. This is nothing new or abnormal. In fact, the fee rule is two years behind schedule, and is a smaller percentage increase than the previous. In a fee-funded agency such as USCIS, this increase is necessary to continue operations in any long-term, meaningful way to ensure cost recovery. This decision barring USCIS from enacting its mandatory fee increase is unprecedented and harmful to the American people."[3]

Quick-Reference Chart of USCIS Filing Fees Under the New Fee Rule for Commonly Used Applications

Form #	Form Title	Current Fee	New Fee
I-129	Petition for a Nonimmigrant worker	$460	1. **H-1** $555 2. **O** $705 3. **E & TN** $695 4. **MISC (H-3, P, Q or R)** $695 5. **L** $805
I-130	Petition for Alien Relative	$535	$560
I-131	Application for Travel Document (including advance parole)	$575	$590
I-212	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	$930	$1,050
I-290B	Notice of Appeal or Motion	$675	$700
I-485	Application to Register Permanent Residence or Adjust Status	$1,140	$1,130* *The new fee will NOT include the fee for Form I-765 (employment authorization) or Form I-131 (advance parole). Adjustment applicants who wish to file for these benefits will have to pay the filing fees associated with those applications at the time of filing and yearly to renew while their I-485 application is pending. The filing fee with the I-765 and I-131 will be $2,270

[3] U.S. Citizenship and Immigration Services, USCIS Response to Preliminary Injunction of Fee Rule (September 30, 2020), https://www.uscis.gov/news/news-releases/uscis-response-to-preliminary-injunction-of-fee-rule.

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Form #	Form Title	Current Fee	New Fee
I-526	Immigrant Petition by Alien Investor	$3,675	$4,010
I-589	Application for Asylum and for Withholding of Removal	$0	$50
I-601	Application for Waiver of Ground of Excludability	$930	$1,010
I-601A	Provisional Unlawful Present Waiver	$630	$960
I-751	Petition to Remove Conditions on Residence	$595	$760
I-765	Application for Employment Authorization	$410	$550* *DACA renewals will remain $410
I-881	Application for Suspension of Deportation or Special Rule Cancellation of Removal	$285	$1,810
I-929	Petition for Qualifying Family Member of a U-1 Nonimmigrant	$230	$1,485
N-400	Application for Naturalization	$640	$1,170

To view a complete list of the changes to forms, see the Federal Register notice.

Fee Waiver Changes

Before the fee rule change, USCIS would allow low-income applicants to submit requests for fee waivers for several applications; citizenship, adjustment of status for certain groups of immigrants, self-petitions (for victims of domestic violence) [4], U and T visas (for victims of certain violent crimes and victims of trafficking) [5], and employment authorization (except for DACA recipients). **As of the date of this article, none of the changes to fee waiver standards nor to the fee waiver form are in effect.**

The (enjoined) fee rule change limits fee waivers for immigrants submitting applications related to VAWA self-petitions, T and U visas, battered spouses of nonimmigrant A, G, E-3 or H visa holders and special immigrant juveniles *who are placed in out-of-home care under the supervision of a juvenile court or a state child welfare agency at the time of filing*[6] (emphasis added) and Temporary Protected Status (protection for immigrants from certain countries that are in crisis).

[4] INA § 204(a)(1)(A) and (B)

[5] INA 101(a)(15)(U) and INA § 101 (a)(15)(T)

[6] The italicized language is a new restriction and it is still unclear how USCIS will interpret this language.

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USCIS Filing Fee Changes

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Additional Changes

DHS' rule also incorporated the following changes which were supposed to be effective October 2, 2020; however, the implementation of these changes is stayed while the injunction remains in place.

1. The fees for applications submitted online will generally be $10 less than paper filings.
2. Biometric services fees- DHS eliminated the 85 biometrics service fee for many applications and instead incorporated the cost of biometrics services in the filing fee. A separate $30 biometrics fee will be required for some applications. Practitioners should check the filing fee instructions to determine if the biometrics service fee applies.
3. Changes to premium processing from 15 calendar days to 15 **business days** (emphasis added).
4. Authorizes USCIS to use the USPS' Signature Confirmation Restricted Delivery as a method of delivery of secure documents (such as green cards, EADs, and advance parole authorizations).
5. Eliminates the $30 fee for dishonored payments. USCIS may reject a check dated more than 365 days before the receipt date.

Increase in Premium Processing Fees- Effective October 19, 2020

On October 16, 2020, USCIS announced a Premium Processing Fee Increase Effective Oct. 19, 2020[7]. The USCIS premium processing service allows petitioners to pay an additional filing fee to expedite the adjudication of certain forms, generally within 15 days.

Pub. L. No. 116-159 increases the fee for Premium Processing as reflected in the chart below.

Form #	Form Title	Current Fee	New Fee Effective 10/19/2020
I-907	Request for Premium Processing for all filings **except** those from petitioners filing Form I-129 requesting H-2B or R-1 nonimmigrant status	$1,440	**$2,500**
I-907	Request for Premium Processing for petitioners filing Form I-129 requesting H-2B or R-1 nonimmigrant status	$1,440	**$1,500**

Per USCIS' announcement, "any Form I-907 postmarked on or after Oct. 19 must include the new fee amount. If USCIS receives a Form I-907 postmarked on or after Oct. 19 with the incorrect filing fee, we will reject the Form I-907 and return the filing fee. For filings sent by commercial courier (such as UPS, FedEx and DHL), the postmark date is the date reflected on the courier receipt."

[7] USCIS, Premium Processing Fee Increase Effective Oct. 19, 2020 (October 16, 2020), https://www.uscis.gov/news/premium-processing-fee-increase-effective-oct-19-2020.

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USCIS Filing Fee Changes

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Tips for Practitioners

- Do not assume that the USCIS officers will know about the filing fee injunction.
- Print out the applicable USCIS filing fee alert[8] and include in all filings, except requests for Premium Processing.
- Include a cover letter in colored paper, with text clearly indicating that the fee rule does not apply while the injunction is in place. I include a red cover sheet with the following text: "-**DO NOT REJECT**-. This application is being filed during the national injunction from the *U.S. District Court for the Northern District of California in Immigration Legal Resource Center et al., v. Wolf, et al.*, 20-cv-05883-JWS. USCIS must accept the current editions and current fees."
- Include the filing instructions for the application that you are filing and highlight the applicable filing fee and filing edition. I will write on that page "Please verify that we are submitting the correct form edition and correct filing fees".
- Subscribe to receive USCIS email alerts.[9]

[8] USCIS, Filing Fees (September 29, 2020), https://www.uscis.gov/forms/filing-fees.

[9] USCIS, Alerts, https://www.uscis.gov/news/alerts.

Employment-Based Immigration: Tips for a Tough Practice Area

by Lisa Sotelo

The last several years have come with significant events in the immigration arena. While there is still much uncertainty regarding what changes will come next, there have been several shifts in policy within the United States Citizenship and Immigration Services (USCIS) that have affected legal immigration based on employer sponsorship.

Some of the most notable changes in policy have come as a result to President Trump's April 18, 2017 Executive Order ("EO") No. 13788, "Buy American and Hire American." Through that EO, the administration aimed to create higher wages and employment rates for U.S. workers, and it directed the Secretaries of State, Labor, and Homeland Security, as well as the Attorney General, to issue new rules geared to protect the interests of U.S. workers. The EO highlighted the H-1B visa program and directed the agencies to ensure that H-1B visas are issued to the most skilled and highest paid workers. As of October 2020, we have two additional changes to the H1B program, which if permitted to stand, will certainly impact employers' ability to utilize this critical work visa status.

Although the administration has not been able to affect actual rule changes through legislative action, the EO and regulatory changes have already made a significant impact on how cases are adjudicated. In its effort to comply with the Order, the agencies involved have revised prior adjudication practices or policies. Accordingly, practitioners and employers alike have been left scrambling to adjust to the heightened scrutiny, increased initial evidentiary requirements, and inconsistent decision trends in the context of employment-based immigration.

Lisa Sotelo was admitted to practice law in Texas in November 2004 and is Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. She focuses her practice on Corporate Immigration. She counsels corporations, educational institutions, and individuals on a variety of business immigration issues. Her clients span across a wide variety of industries, including construction, education, energy, finance, health care, hospitality, insurance, manufacturing and sales, staffing, technology, telecommunications, athletics, celebrity personalities, investment, among others. She also has a breadth of experience in family immigration matters, removal defense litigation, federal litigation and international adoption.

Some of the more burdensome shifts include:

- Increased issuance of Requests for Evidence (RFE).
- Rescission of USCIS guidance of deferring to prior approvals when adjudicating extension requests involving the same parties and underlying facts as the initial determination.
- Revisions to the Foreign Affairs Manual to include reference to the Buy American and Hire American EO with respect to providing guidance to consular officers regarding the issuance of nonimmigrant H (9 FAM 402.10-2), L (9 FAM 402.12-2), O (9 FAM 402.13-2), P (9 FAM 402.14-2), and E (9 FAM 402.9-2) visas.
- Interim Final Rule titled *Strengthening the H-1B Nonimmigrant Visa Classification Program*, published by DHS on October 8, 2020 and effective December 7, 2020 revises definitions of and standards for "specialty occupation" and "employer-employee relationship;" limits petition validity for third-party placements; as well as other changes that will make the H1B category much more challenging if not unattainable for many employers.[1]
- Proposed regulation to be published on November 2, 2020 and open for 30 day comment period seeks to replace the H-1B visa lottery with a wage-based selection process prioritizing higher salaries.[2]

[1] https://www.nafsa.org/regulatory-information/h-1b-interim-final-rule-strengthening-h-1b-nonimmigrant-visa-classification

[2] https://www.dhs.gov/sites/default/files/publications/20_1028_uscis_h-1b-registration-selection-by-wage-levels-nprm-508.pdf

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What the government cannot change through Congress, it has done through the methods listed above. For example, in an effort to comply with the current administration's directive to ensure that the H-1B visas go to the most skilled, highest paid worker, the agency has promoted that policy through an RFE campaign insisting, for example, that entry level wage job offers do not qualify, that professional jobs are not "specialty occupations," or that employer-employee relationships have not been satisfactorily established. While these issues have been raised in RFEs for years, the frequency with which they are now raised – even on solid occupational descriptions – is enough to rattle even a seasoned practitioner and discourage a hopeful employer seeking to fulfill its destiny of expansion by supplementing or supporting its workforce with foreign talent. That is precisely what we saw happen in 2017, 2018, and through 2019. USCIS data shows that the denial rate for H-1B petitions has quadrupled over the past few years, increasing from 6% in FY2015 to 24% in FY2018. National Foundation for American Policy, *H-1B Denial Rates: Analysis of H-1B Data for First Three Quarters of 2019* at 1 (Oct. 2019).[3]

Similarly, as the changes to the Foreign Affairs Manual (FAM) indicate, consular officers have been instructed to adjudicate the applications for H, L, O, P and E visas with the spirit of the Buy American and Hire American Executive Order in mind. Over the course of the last three years, practitioners and employers have reported a heightened level of scrutiny at the consular level, to include inquiries, administrative processing delays, and recommendations for visa revocation as a result of unsatisfactory responses to requests for information or questions aimed at advancing the priorities set forth in the Executive Order. Discretionary denials of visas have risen; consular posts have shirked away from their already slack responsiveness; and applicants – and their employers – have begun to grow weary of the uncertainty. So, how did we get here?

The Buy American and Hire American Executive Order (BAHA) did not exist when Congress created the H, L, E, O or P visa provisions in the Immigration and Nationality Act. According to the legislative history for the 1970 Act, the L-1 visa was intended to "help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization." H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.). The statute at INA 101(a)(15)(L) makes no reference to a priority geared at creating higher wages and employment rates for U.S. workers and to protect their economic interests – priorities now enshrined by the BAHA Executive Order.

Congress has spoken to those interests in other contexts. For example, in the context of H-2B workers, the statute at INA 101(a)(15)(H)(ii)(b) requires an H-2B worker to perform temporary services or labor only "if unemployed persons capable of performing such service or labor cannot be found in this country." Even with respect to H-1B visas, Congress specifically required employers to make attestations to the Department of Labor relating to wages and work conditions, but they were not required to conduct recruitment of U.S. workers unless certain conditions exist in the context of H-1B dependency. Thus, if Congress had envisioned the priorities set forth in the Executive Order for the L, the H-1B (at least for non-dependent employers who do not have exempt employees), E, O or P visa, as it did for the H-2B visa, it would have said so.

Further, despite the lack of America First principles in the statute and regulations, the Foreign Affairs Manual (FAM) has been amended to incorporate them into other temporary visa programs that do not require payment of US source wages. For example, the remuneration of an intracompany transferee on an L-1 visa can come from a U.S. or a foreign source. *See Matter of Pozzoli*, 14 I&N Dec. 569 (RC 1974). Nor does the L visa require a certain wage rate or a test of the U.S. labor market. Similarly, E visa treaty traders or investors do not need to be paid wages or conduct a labor market test. Still, under the new EO, this may be viewed as suspect if it does not create higher wages and employment rates for U.S. workers.

In January 2018, USCIS updated its website to include its agenda for the coming year. In it, USCIS announced that it is actively working on a combination of rulemaking, policy memoranda, and operational changes to implement the BAHA Executive Order "to protect the economic interests of U.S. workers and prevent fraud and abuse within the immigration system."[4]

If government agencies seek to reinterpret INA provisions in light of the BAHA EO that result in denials of visa petitions, those decisions might be successfully challenged as contrary to the plain meaning of the statute as well as the underlying congressional

[3] https://nfap.com/wp-content.

[4] https://www.uscis.gov/laws/buy-american-hire-american-putting-american-workers-first.

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intent. A presidential executive order cannot supersede a law previously passed by Congress. In *Chamber of Commerce v. Reich*, 74 F.3d 1322 (1996) the court held that a 1995 executive order of President Clinton violated a provision of the National Labor Relations Act when it declared that federal agencies shall not contract with employers that permanently replace lawfully striking employees. Similarly, one could argue that visa petition denials based on the current administration's interpretation of statutory provisions based on the BAHA EO, may be in violation of the INA and that the president's interpretation of a statutory provision, unlike a government agency's, is not entitled to *Chevron* deference.

Indeed, practitioners are donning their sparring gear to defend from the staggering agency pushback and the results are interesting. In a recent study published by Hun Lee and Stephen Yale-Loehr, a review of over fifty federal court cases brought against USCIS in the last two years concerning H-1B denials led the authors to conclude that practitioners should prepare to litigate their denied H-1B petitions, and they may reasonably expect to win. *Challenging H-1B Denials in Federal Courts: Trends and Strategies*, by Hun Lee and Stephen Yale-Loehr, AILA Doc. No. 19120500 (posted 12/5/19).

With that background in mind, going forward in today's employment-based immigration climate will require careful strategy to ensure that the petition and arguments set forth within it meet the heightened scrutiny now imposed at the adjudications level. It will serve one well to carefully review the law and regulations, and then read them again. The following best practices are fundamental in practicing immigration law today, particularly employment-based immigration:

Standard of Proof

As a matter of first concern, advocating in the employment-based immigration context requires a clear understanding of the standard of proof required for the visa type you seek. Understanding the statute and regulations that pertain to each visa type is essential. Often, USCIS gets the standard of proof wrong and will issue an RFE with a conflated presentation of what you must establish. For example, USCIS has issued RFEs that insist a petitioner meet a specialized knowledge standard for an H-1B where that standard is only applicable in an L-1B context. In other instances, USCIS may insist that a petitioner satisfy more criteria than is required or produce evidence that is not relevant.

Best practice requires a review of the applicable standard of proof often. Additionally, that standard of proof should be referenced in the initial filing support letter along with argument and assertions related to how each required element is satisfied by the evidence presented. Specific references to the evidence and how it satisfies each element of the standard is also required. Gone are the days where you could reasonably expect a positive outcome on a case with basic evidentiary proof. Adjudication officers will not do the work for you nor will they review evidence and make reasonable conclusions as to how or why the evidence provided applies to the request. More specifically, in today's climate, adjudicators are not reviewing petitions to confirm that the eligibility criteria have been met; rather, they are reviewing petitions with a careful eye to identify – and in some cases, misidentify – grounds by which they can deny a petition. The shift in the adjudicator's perspective is the new trend and it has resulted in an incorrect application of the standard of proof in some cases, and an incorrect application of the burden of proof in many cases. Reminding the agency what the standard of proof is always a best practice to ensure that the decision aligns with the facts of the case.

Burden of Proof

In addition to presenting the correct standard of proof, understanding, and asserting the correct burden of proof is also critical. It should be stated in your initial presentation of the case and asserted again in a response to an RFE. Specifically, nonimmigrant visa petitions and visa applications must satisfy a "preponderance of the evidence" standard. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (precedent decision), noting that preponderance of the evidence is the standard of proof in administrative immigration proceedings unless a different standard is specified by law. *See also*, USCIS Adjudicator's Field Manual (AFM), ch. 11.1(c).

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To satisfy the preponderance of the evidence standard, the Petitioner must show that it is "more likely than not" a claim is true based on "relevant, probative and credible evidence." *Id.* The preponderance of the evidence standard requires that the evidence demonstrate that the petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each case. *See Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, the court in *Matter of E-M-* also found that "truth is to be determined not by the quantity of evidence alone but by its quality." *Id.* In other words, the preponderance of the evidence standard requires the adjudicator to examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence in determining whether the fact to be proven is probably true. Moreover, even if the adjudicator has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads to the conclusion that a fact is "probably true" or "more likely than not," then the petitioner has satisfied the burden of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987). Reminding the adjudicator how the petitioner has satisfied its burden with references to the specific evidence provided is the extra step that many practitioners fail to complete.

Expert Testimony

Further, in addition to understanding the standard and burden of proof, it is critical to understand and assert the proper weight to be accorded to the evidence submitted. All evidence submitted, including expert opinion letters, must be considered. To reject expert testimony, or to give less weight to the testimony, requires USCIS to identify how the proffered evidence is not in accord with other information in the record or specify how the evidence is in any way questionable. *See Matter of Skirball Cultural Center,* Interim Decision 3752, 25 I&N Dec. 299 (AAO 2012).

Despite the case law guidance on expert testimony, the agency has altered its interpretation of what constitutes acceptable expert testimony through its decisions and RFEs. Generally, practitioners or employers could commission an expert opinion letter from a qualified professor in the relevant field of study or industry. The most common expert letters commissioned are from college or university professors with a seasoned background in the specific specialty, who is experienced and authorized to review and evaluate academic and experience qualifications, and who has offered opinions and analyses of the academic and professional credentials of candidates as they relate to university admissions requirements or employment positions. However, over the course of the last couple of years, adjudication officers have issued decisions in which expert testimony was summarily discounted on the grounds that the expert did not adequately describe his background and authority to issue an opinion on the subject matter; or that the expert did not visit the worksite or observe the beneficiary's performance of the job in question; or that the testimony was merely a restatement of the position requirements described in the employer's letter; or that the expert was disqualified as irrelevant because they were a professor rather than a practicing industry consultant.

Expert testimony is compelling, and it should be given the proper weight in the adjudication process. However, to ensure that proper weight is accorded, practitioners must go one step further in asserting why the testimony is relevant and qualified. Selecting industry experts, independent consultants, experts within the petitioning organization, or testimony from a seasoned recruiter in the field have been given greater deference than testimony from professors in some cases. Also, assisting in shaping the narrative presented through the testimony is important. You do not always get what you pay for when it comes to expert testimony. Some letters are templated, repetitive, lack references to outside sources cited, or lack substantive detail. Best practice requires that you read the letter before it is submitted to the agency, participate in the editing of the letter, and collaborate with the expert to develop a strong presentation of the argument. Often, telephone interviews between the petition beneficiary's hiring manager and the expert writer are instrumental in lending weight to the expert letter.

Presentation of Evidence

Use of organizational charts, employee rosters, flowcharts, task-level job descriptions with time spend percentages, and sample work product has also become a new standard in the initial filing stage of any employment-based petition. Describing the context within which the beneficiary will perform the work offered is now essential. Illustrating the business context through photographs, employer marketing materials, or sample work product is also important in relaying to the adjudicator what, where, and how the beneficiary will be performing the proposed work.

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Use of demonstrative evidence is particularly important in cases where the petitioner must establish managerial, executive, or specialized knowledge roles in the L or E context. Global organizational charts that include dotted line reports representing outside vendors or contractors managed, or indirect reports comprised of teams or personnel from affiliated organizations is also key in adequately describing the scope of the work to be performed, the function managed, or the department overseen. Corroborating evidence requests to support assertions and organizational charts is also recently trending in USCIS RFEs. For example, it may not be enough to state in an employer support letter that an L-1A manager supervises a team of ten, illustrated with an organizational chart. Instead, USCIS is beginning to request payroll records, resumes, and performance reviews conducted by the L1A manager to prove that those reports actually exist on company payroll and that the company is sufficiently staffed to support such a manager.

Careful use of prior recruitment efforts, industry job postings, and transcripts and course descriptions is also advised. However, it is essential that you clearly describe how each evidentiary offering is relative, credible, and probative to the issue at hand. Do not assume that the adjudicator will see what you see or understand what you do when you review a balance sheet, employee roster, or functional flow chart. Describing what those pieces of evidence mean should be in the support letter and detailed in the index of exhibits. Presentation matters: use color, headers, sub-titles, and detailed descriptions of evidence and provide an explanation of what the evidence proves; do not fill your page with text that an adjudicator is unlikely to read. Your index of exhibits should track the eligibility requirements and reference the relevant regulations. For example, one such header might look something like:

> **Evidence that the Beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding his admission to the U.S. per 8 CFR §214.2(l)(3)Iiii), (iv):**
>
> Exhibit 12: Beneficiary's pay slips from August 2016 through August 2017 issued by Company X, the foreign employer. NOTE: also included are attested English translations of the foreign language documents.
>
> Exhibit 13: Beneficiary's I-94, L-1A visa stamps, Forms I-797A approval notices; and travel history from Customs and Border Patrol (CBP)

Prepare the Record for Litigation

Our immigration landscape is a treacherous one and navigating through it can be challenging. One of the more valuable insights that has proven true through experience is that you do not have to be the loudest, meanest, or most aggressive advocate to be the victor. What you need is to be the most prepared. Organizing your evidence, knowing the case law, understanding the regulatory and statutory history and intent, and clearly presenting the facts are what you need to be successful in the current immigration climate. While times have changed, the victories have not. Successful cases are by design. If you prepare your case as if you were going to litigate it in the future, you will have a better shot of prevailing at the initial filing. Once you are forced to play defense by responding to an RFE or denial, the universe of judicial review begins to shrink because it is limited to the record of proceedings. Best practice requires a thorough presentation of the facts and development of the record up front.

It is important to note that for the most part, the law has not changed. But the secrets in employment-based immigration are the tricks that make the average practitioner seem like a wizard. The extra review and practice of the standard and burden of proof; the careful crafting of expert testimony; the slight adjustments to the presentation of evidence; and the willingness/preparedness to litigate capricious and arbitrary USCIS decisions can turn something that might otherwise result in a boilerplate RFE or summary denial into an approval that earns you the praise of even the toughest, most sophisticated client.

Fifth Circuit Update

by Amanda Waterhouse

In *Nastase v. Barr*, No. 18-60264 (5th Cir. July 1, 2020), the Court held that Nastase did not acquire citizenship when his mother naturalized because his admission as a refugee was not sufficient to satisfy the "lawful admission for permanent residence" required under the statute. The Court also reviewed the decisions on Nastase's alternate relief of adjustment of status with a waiver under INA § 209(c), finding that the BIA did not apply an incorrect legal standard to Nastase's waiver and that they were without jurisdiction to consider the discretionary denial of the waiver.

United States v. Wallace, No. 17-40007 (5th Cir. July 6, 2020), was a sentencing case where the appellant argued that Texas' burglary statute did not describe generic burglary because one subsection of the statute, TPC §30.02(a)(3), had no specific requirement of intent to commit a crime but required only the commission or attempt to commit a crime. The Court rejected this argument, finding that the commission or attempt to commit a crime makes intent inherent in the statute and that the subsection was applicable to one who enters without intent to commit a crime and then subsequently forms that intent. The Court did, however, affirm their prior holdings that the Texas statute is indivisible.

In *Santos-Alvarado v. Barr*, No. 19-60432 (5th Cir. July 21, 2020), the Court upheld the denial of Santos-Alvarado's asylum, withholding of removal, and CAT claims based on an adverse credibility finding. The Court found that substantial evidence supported the IJ and BIA determinations that Santos-Alvarado's PTSD diagnosis was insufficient to explain the discrepancies between his testimony, the I-589 application, and the reports of his therapist. The Court further found that it was not a due process violation for the IJ to refuse to allow the therapist to testify telephonically or to deny a continuance to allow for a country conditions expert to be available for the hearing.

Gjetani v. Barr, No. 18-60827 (5th Cir. July 30, 2020), involved an Albanian asylum and withholding of removal claim based on political opinion. The Court found that the petitioner had not established past persecution after having been threatened with death three times and physically attacked once by socialist party supporters on account of his pro-democratic political opinion. The Court determined that the incidents of harm were isolated as opposed to being the systemic type of harm that is necessary for persecution and that the petitioner's past-persecution claim was undercut by him remaining in Albania for six months after the last threat without further incident. They further determined that a well-founded fear of future harm was not established because the petitioner's family members remained unharmed in spite of continuing to live in Albania. The Court discussed the standard of review at length and applied the substantial evidence standard—treating the persecution issue as fact finding rather than a legal question. The dis-

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Amanda Waterhouse graduated from Sam Houston State University, *cum laude*, with a Bachelor of Arts in political science and a minor in history. While there, she was inducted into the Alpha Lambda Delta Freshman Honor Society, Golden Key International Honor Society, Alpha Chi Honor Society, and the Pi Sigma Alpha Political Science Honor Society. Ms. Waterhouse received her Juris Doctor from the University of Houston Law Center in May of 2006. During law school, she was awarded a public interest fellowship and interned with the Southwest Regional Juvenile Defender Center. She also participated in the Law Center's clinical program as a student attorney in the Child Advocacy Clinics, representing victims of child abuse and defending juveniles charged with delinquency. In November of 2006, Ms. Waterhouse was admitted to the State Bar of Texas. She was an associate at Reina & Bates from February 2007 until October of 2018, rising to the position of senior associate prior to her departure. She joined Gonzalez Olivieri, LLC in October of 2018 and is a Supervising Attorney as well as Head of Litigation. Ms. Waterhouse is admitted to the US Court of Appeals for the Fifth circuit, the United States District Court for the Southern District of Texas, and the Supreme Court of the United States. She is also a member of the College of the State Bar of Texas and the American Immigration Lawyers Association. Ms. Waterhouse has represented clients in a variety of cases, including cases adjudicated by Citizenship and Immigration Services as well as deportation defense before immigration judges, the Board of Immigration Appeals, and the Fifth Circuit Court of Appeals. In removal proceedings, Ms. Waterhouse has successfully represented clients in applications for Cancellation of Removal, Cancellation of Removal for non-Permanent Residents, 212(c) waivers, 212(h) waivers, 237(a)(1)(H) waivers, adjustment of status, withholding of removal, and temporary protected status.

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sent argued that *Guerrero-Lasprilla*, 140 S.Ct. 1062 (2020), requires that the Court review the underlying decisions de novo but the majority wrote that SCOTUS had ruled only on jurisdiction in that case and that the existing circuit precedents remain undisturbed as applied to the standard of review for the "fact findings" in this case.

In *Garcia v. Barr*, No. 19-60097 (5th Cir. August 4, 2020), Jose Antonio Garcia was convicted of sexual assault of a child under Texas Penal Code §22.011(a)(2) and the Court found that he was properly removable under INA §237(a)(2)(E)(i) for having been convicted of a crime of child abuse. Garcia had challenged the BIA definition of child abuse as too broad and argued it was not entitled to deference but the Court upheld the BIA definition as a reasonable interpretation of the statute. The Court then applied the categorical approach to determine that Garcia's offense was categorically a crime of child abuse because the Texas statute requires that the offense be committed against a person under the age of 18, requires intentional or knowing conduct, and involves acts (direct sexual contact or sexual exploitation) that are *per se* abusive and harmful to the child victim.

Flores-Moreno v. Barr, No. 19-60017 (5th Cir. August 24, 2020), involved the denial of a motion to reopen. Flores-Moreno had been granted cancellation of removal by the IJ and the BIA later overturned the grant and ordered him removed. Counsel at the time advised him that nothing could be done. Three years later, a second attorney also advised that nothing could be done. Seven years after the original removal order, Flores-Moreno consulted with a third attorney who helped him file an MTR based on ineffective assistance of counsel. The BIA found the motion to be untimely and not entitled to equitable tolling due to a lack of reasonable diligence in the time period between consulting with the second attorney and the third attorney. Moreover, the Board found Flores-Moreno did not demonstrate prejudice arising from the ineffective assistance of trial counsel. The Court affirmed the decision of the BIA in regard to equitable tolling but, in order to affirm the BIA, the Court first had to find that they had jurisdiction to review the equitable tolling question. Relying on *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020), and their own unpublished decision in that case following a Supreme Court remand, the Court found that a determination of "due diligence" is a question of law over which they have jurisdiction.

In *Du v. Barr*, No. 18-60792 (5th Cir. September 14, 2020), the Court declined to review the IJ's adverse credibility finding or the failure to present corroborative evidence as those issues were not reached by the BIA. Focusing solely on whether there was a nexus between the harm suffered and Du's anti-corruption political opinion, the Court found that a reasonable factfinder would not have been *compelled* to conclude that Du was persecuted on account of his opposition to corruption because although he filed a complaint against corrupt police officers he had initially cooperated with some of their demands. The Court also found that the motivations of the persecutors were not certain as they could have harmed him in order to preserve their criminal scheme rather than on account of his anti-corruption beliefs. Ultimately, Du was found to have not met his burden to show that the evidence compelled a different outcome.

Nolasco v. Crockett, No. 19-30646 (5th Cir. October 23, 2020), involved an APA challenge to the denial of adjustment of status. The district court dismissed the suit after finding that it lacked jurisdiction because adjustment of status is a discretionary benefit and the application had to be renewed in removal proceedings. The Court issued a decision on May 6, 2020 ("*Nolasco I*") affirming the dismissal and reiterating that removal proceedings were the only venue to review the denial of adjustment of status. On rehearing, the Court reversed course and found that the district court did have jurisdiction to review the purely legal question of statutory eligibility for adjustment to LPR status. Unfortunately, the Court then went on to decide that Nolasco was not statutorily eligible for adjustment of status because his TPS admission did not cure his previous entry without inspection.

In *Londono-Gonzalez v. Barr*, No. 16-60766 (5th Cir. October 26, 2020), the Court addressed equitable tolling in the context of a motion to reopen. The Court first acknowledged that under *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020), they did have jurisdiction to review the equitable tolling issue in spite of Londono-Gonzalez's criminal convictions because the case presented a question of law. On the merits of the equitable tolling claim, the Court evaluated the following fact pattern: Londono-Gonzalez was removed from the US in 2000 on the basis of his federal drug trafficking convictions, later became eligible for 212(c) relief following changes in the case law as to eligibility for individuals who went to trial, and filed a motion to reopen four months before the Fifth Circuit decided in *Lugo-Resendez*, 831 F.3d 337 (5th Cir. 2016), that the deadline for a motion

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to reopen could be equitably tolled. The Court ruled against Londono-Gonzalez, finding that *Lugo-Resendez* did not present a change in the law but rather the resolution of an "open question" and equitable tolling was available and widely requested before that decision. Because his diligence should be measured from the time he became eligible for relief rather than the issuance of *Lugo-Resendez*, Londono-Gonzalez had not been diligent and equitable tolling of the motion to reopen deadline was not warranted.

Suate-Orellana v. Barr, No. 19-60729 (5th Cir. November 3, 2020), involved a challenge to an adverse credibility finding, the denial of withholding of removal and CAT relief, and the denial of a motion to remand for new evidence. Suate-Orellana was removed from the US in 2011. After her removal to Honduras, she began a relationship with a drug dealer who was later murdered. The suspected murderer was later killed by a gang leader who then attempted to recruit Suate-Orellana and threatened her when she refused. Finally, in 2013, Suate-Orellana was informed by a hitman that he had been hired to kill her and he would kill her if he saw her again. She then fled to the US and applied for withholding of removal and CAT relief. The IJ found her not credible based on inconsistencies in her testimony and declined to accept "memory fragmentation" as an explanation or justification for the inconsistencies. The Board affirmed and the Court declined to overturn the adverse credibility finding under the substantial evidence standard. The Court examined the withholding and CAT claims and found that Suate-Orellana's proposed social group of "Honduran woman who have been targeted for and resisted gang recruitment after the murder of a gang-associated partner" was not cognizable and that she had failed to demonstrate her membership in a second proposed social group. The denial of CAT was affirmed because substantial evidence supported the conclusion that there was no state action. Finally, the Court affirmed the denial of the motion to remand because they determined that the new evidence was similar to previously submitted evidence and was not sufficiently connected to the threats against Suate-Orellana to necessitate remand.

In *Bacilio-Sabastian, et al v. Barr*, No. 19-50168 (5th Cir. November 13, 2020), the Court considered a habeas claim brought by four Guatemalan men who were given written notices that they would be paroled from ICE custody but were never actually paroled. The petitioners filed suit in district court, seeking habeas relief, a writ of mandamus, and a declaratory judgment that they had a right to parole and the parole notices should be honored. After filing suit, the petitioners were released by ICE but, importantly, they were not released on parole. The government moved for dismissal on mootness grounds and petitioners argued the case was not mooted because they had not been paroled and thus could not file for work authorization. The district court dismissed. On appeal, the Court agreed that petitioners' release mooted the habeas action. The Court characterized the inability to apply for work authorization as a collateral consequence of being released rather than paroled. The Court went on to explain that even if collateral consequences were enough to maintain a habeas action in the immigration detention context, the collateral consequence presented here would be insufficient because the decision to grant or deny work authorization is discretionary. Judge Higginbotham dissented, noting that that the inability to apply for work authorization is specific, concrete, and flows directly from the decision to release rather than parole the petitioners. He would have held that the case was not moot and he disagreed with the majority's view on the limits of habeas relief.

DID YOU KNOW?

courtesy of Lisa Sotelo

USCIS will not accept filings unless delivered by a designated courier, i.e. FedEX, DHL, UPS, or USPS. Hand delivery or other courier services are not permitted. But, did you know that FedEx has same-day courier delivery in many of the larger metroplexes? This service can come in handy when trying to make a same day filing, particularly at a USCIS Lockbox. Check out FedEx same-day service at https://www.fedex.com/en-us/shipping/same-day.html. Your package will arrive at its destination within hours of pickup, delivered by a uniformed courier in a FedEx marked vehicle. The service is available for destinations within 45 miles of origin; it is pricey but comes with FedEx's tracking capabilities that allows for real time tracking. Store this little nugget in your back pocket in case you are ever in a pinch and you may be able to make a miracle happen! Happy filing!