STATE BAR of TEXAS

IMMIGRATION BULLETIN

Immigration & Nationality Law Section

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FEATURED ARTICLE

The Supreme Court heard oral arguments last year in the *Department of Homeland Security v. Regents of the University of California* on the future of DACA; and a decision was issued on June 18, 2020. The featured article of this inaugural issue of the *Immigration Bulletin* is authored by the State Bar's very own Diego Cervantes. Diego is a Texas attorney and one of many Texas residents who stands to lose his lawful status in the United States should the current administration terminate the DACA program.

IN THIS ISSUE:

Message from the Chair

Lisa Sotelo

As outgoing chair of the State Bar of Texas's Immigration & Nationality Law Section, I am proud to introduce our section's newest resource: The *Immigration Bulletin*. As a section, we strive to provide resources to our members to help navigate changing currents and identify trends that affect our immigration 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.

The section's *Immigration Bulletin* is designed to provide section members with the latest trends in local field offices, immigration courts, and ports of entry. Quarterly articles will cover the latest in best practices in both family-based and employment-based immigration; it will cover trends in asylum and removal cases; it will cover court best practices, immigration judge practice pointers, and other insights regarding litigation; it will include opinion pieces and other personal stories from our members across the state. *The Bulletin* will also keep a recurring column on the latest 5th circuit court and notable supreme Court decisions.

As I close out my time as section chair during these particularly challenging times for immigration practitioners, I am heartened by our allied communities' persistence to pursue fair and humane immigration policies and outcomes. Together we can and do affect change every day. And each day, we have more members joining and working collaboratively to make a positive difference in the lives of our clients.

We are currently accepting articles for publication in the section's fall issue of its *Immigration Bulletin*, which is scheduled to be published in October 2020. We are living in extraordinary times and we would like to hear from you. We are particularly interested in including articles related to immigration in the time of COVID-19 - 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 fall edition of the *Immigration Bulletin* are due on September 1, 2020. Articles submitted should meet the following criteria:

1. Be between 500 – 2,500 words, although longer copy may be considered;
2. Be submitted in MS Word format and double spaced;
3. Acknowledge all sources, but keep endnotes to 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;
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 those efforts.

Stay well, friends.

Lisa Sotelo
Outgoing Chair, Immigration & Nationality Section
State Bar of Texas

Reflections of a DREAMer and Texas Young Lawyer

By Diego Cervantes

As our friends and neighbors scramble around us to protect themselves and their families from COVID-19, I have in mind my clients who left their countries decades ago to protect their families and do what was best for their children. The Trump Administration has left the lives of millions in limbo as people who benefit from the DACA and Temporary Protected Status (TPS) programs have their legal statuses jeopardized—and their legal statuses likely will be terminated in the near future – even with the Supreme Court's recent decision.

DACA is a program that allows children who came to the U.S. as children to obtain temporary legal status that allows them to work in the U.S. TPS is a program that allows people from certain countries to apply for temporary legal status because conditions in their home countries are too dangerous for them to return. As an immigration attorney, I represent many individuals from Central America who fled natural disasters nearly 20 years ago and have maintained legal status through the TPS program in the US ever since. I also represent people who benefit from the DACA status who came to the country as many as three decades ago.

While there are plenty of articles that discuss the financial, community, and international ramifications of potentially sending millions of our neighbors to their home countries or into hiding in the United States, I want to focus on the individuals in this piece. Particularly, in empathizing with the folks in our communities who saw a crisis developing around them and did everything in their power to leave.

Just as we stock up on supplies, work from home to avoid spreading disease, and avoid crowds, so too did many individuals take action when they saw their families in a state of danger. It is easy to say, "they broke the law, they crossed illegally or overstayed their visa, they need to face the consequences." Perhaps now that we are taking steps to ensure our loved ones stay safe, it is time to consider the humanity in those decisions. Immigration violations, after all, are civil in nature for the most part. If we were in a situation where we could not feed or protect our children, few of us would hesitate to do what is possible to help. Some of us have traveled to distant grocery stores or risked our health to stand in long lines to find supplies. If we were told of a city that was completely clear of coronavirus and fully stocked with vaccines and treatment, how quickly would we all travel there?

Today, people who have legal status from TPS and DACA are all around us. They are teachers, custodians, business owners, members of their children's PTA organizations, members of our churches, traders on Wall Street, restaurant workers and owners, and even members of our State Bar. I have been a member of the Texas State Bar since I got my license in November 2018 and have been a beneficiary of the DACA program since 2012. The program came into existence during my final year of undergrad, saving me from a plan of working unpaid internships until immigration reform came along. The program was subsequently terminated at the start of my 3L year at the University of Texas. A temporary injunction has made it possible for me to keep legal status under DACA, and, thus, made it possible for me to sit for the bar exam, get licensed, and practice. When DACA goes away, so does my ability to work in the U.S. I will be left at the mercy of legislators in Washington D.C., who have not passed any significant immigration bills since 1996.

The same is true for many people in our communities. The impending termination of TPS will leave many parents in our communities in a vulnerable state. Their children, who are mostly US citizens, will suffer as a consequence. People who benefit from the DACA program will leave many students and young professionals out of work and facing the prospect of returning to a country they left as infants or babies.

I call on my fellow attorneys to consider the human side of the equation. Conversations about the rule of law, opening the floodgates, holding people accountable, etc. have their merits, but we must also keep in mind what we would do to protect our families. Because now, members of our community are at risk.

Diego Cervantes practices immigration law at the Law Office of Karen Crawford. He graduated from the University of Texas School of Law in 2018 and joined the Texas bar later that year. Mr. Cervantes is one of a handful of members of the SBOT who has DACA. His parents brought him from Mexico when he was three years old. In 2013, he received a bachelor's degree, with honors, from the University of Houston.

Adjustment of Status for TPS Registrants with Removal Orders

by Aaron Prabhu

Since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act("IIRIRA") of 1996, foreign nationals who have Temporary Protected Status ("TPS")—a status that is given to someone from a country designated by the Attorney General that have had armed conflicts or natural disasters—have been able to travel abroad with permission[1] from the United States Department of Homeland Security ("DHS"), return to the United States lawfully, and apply for adjustment of status to become lawful permanent residents ("LPRs"). When the current administration came into office, however, that all changed and the U.S. Citizenship and Immigration Services ("USCIS") instituted a new policy to temporarily close, or even deny, applications for adjustment of status to those TPS recipients. In those decisions, USCIS has adopted the position that it lacks jurisdiction to adjudicate the TPS recipient's adjustment of status application because the individual has an order of deportation or removal, and so, the only way for those individuals to get their residence is through the Immigration Court. That position, however, is not supported by the applicable law and regulations, which state that the USCIS has sole jurisdiction over those individuals' applications.[2] Accordingly, those individuals are left with no recourse, and must file complaints against the DHS in Federal District Court under the Administrative Procedure Act("APA") in an attempt to compel the USCIS to adjudicate their applications on the merits.

Aaron Prabhu is the head of Gonzalez Olivieri's appellate department. He handles a wide range of immigration issues. He prepares briefs and motions for the Immigration Court and the Board of Immigration Appeals, petitions for review for Fifth Circuit Court of Appeals, and petitions for writ of certiorari for the U.S. Supreme Court. He also is in charge of Federal litigation for the U.S. District Court for the Southern District of Texas, a Court in which he has prepared briefs and motions and attended multiple hearing on behalf of clients. Mr. Prabhu applies his keen understanding of immigration issues to devise top quality immigration litigation strategies for the firm's clients. Mr. Prabhu has filed and argued numerous cases in front of Federal District Court Judges, notably in front of Judge Lynn Hughes, and recently has done the rebuttal argument for a case in the Fifth Circuit Court of Appeals in Louisiana. Mr. Prabhu also enjoys working closely with Gonzalez Olivieri's clients because he understands their situations, as he was born in Mumbai, India and spent most of his life growing up in Toronto, Ontario, Canada. Accordingly, Mr. Prabhu has a firsthand understanding of the complexities of emigrating from one country to another. He therefore works zealously and is deeply committed to his work.

Litigation in Federal District Court has been difficult to win on the issue of whether USCIS or the Immigration Court has jurisdiction over adjustment of status applications filed by the type of individuals described in this article. In every case filed so far, the defendants have filed motions to dismiss, arguing that the District Court lacks subject-matter jurisdiction to consider plaintiffs' complaints because they are indirectly challenging their orders of removal, or alternatively, have failed to state a claim upon which relief can be granted. We have responded that the plaintiffs in our cases are in no way challenging their removal orders because their removal orders were executed when they traveled with advance parole and so they do not have removal orders any longer to even challenge.[3] Alternatively, we have argued that even if the removal orders were not executed, plaintiffs are in no way challenging their removal orders because an order of the District Court would not, in any way, nullify their removal orders since the plaintiffs would still have to go to the Immigration Court, file to reopen their cases, and request an Immigration Judge to terminate them.

With respect to the failure to state a claim for relief argument, plaintiffs are, by virtue of their travel on advance parole considered to be "arriving aliens," who can adjust their status to that of lawful permanent residents only with the USCIS.[4] Regrettably, the Southern District of Texas, in every case that has been filed by our firm so far, agrees with the DHS's position that by bringing suit, plaintiffs in these cases are effectively challenging their removal orders, and so, the District Court lacks jurisdiction to consider plaintiffs' claims.[5] This has forced us to appeal the cases to the Court of Appeals for the Fifth Circuit.

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1 The document that allows a TPS holder to travel is known as an advance parole document.

2 *See* 8 C.F.R. §§ 245.2, 1245.2; Matter of Yauri, 25 I&N Dec. 103, 106-07 (BIA 2009).

3 *See* 8 U.S.C. § 1101(g); 8 C.F.R. § 1241.7; Matter of Bulnes-Nolasco, 25 I&N Dec. 57, 58 (BIA 2009); *Stone v. INS*, 514 U.S. 386, 398 (noting that deportation orders are "self-executing").

4 *See* 8 C.F.R. § 1.2; 8 U.S.C § 1101(a)(13)(B); Matter of Oseiwusu, 22 I&N Dec. 19 (BIA 1998).

5 *See* 8 U.S.C. §§ 1252(a)(5), (b)(9), & (g).

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Adjustment of Status for TPS Registrants with Removal Orders

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Currently, our firm has a consolidated case pending at the Fifth Circuit, *Duarte, et al. v. Wolf, et al.* (Case No. 18-20784). Oral arguments were heard on that case on February 6, 2020.[6] The issues presented in that case are: (1) whether the District Court has subject-matter jurisdiction over plaintiffs' claims; and (2) whether plaintiffs' APA claims can succeed on the merits. A decision has not been made on the case yet, but it is expected to come down shortly, and we eagerly await it because if the case comes out in our favor, it will benefit hundreds of thousands of TPS recipients around the United States, who erroneously have been denied the ability to become residents of this country.

[6] For anyone who is interested, the link for the oral arguments can be found at: www.ca5.uscourts.gov/OralArgRecordings/18/18-20784_2-6-2020.mp3.

Special Immigrant Juvenile Classification in Texas

by Alma Benavides

Congress created the special immigrant juvenile (SIJ) classification when it enacted the Immigration Act of 1990 (IMMACT90).[1] The SIJ classification is available to certain children[2] in the United States who have been subject to state juvenile court proceedings.

In order to apply for SIJ classification, a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) must be filed on behalf of the eligible child.[3] To qualify for SIJ classification, a state juvenile court order must be submitted with the application. The court order must make certain judicial determinations on dependency or custody, parental reunification, and the best interests of the child, in addition to satisfying all other eligibility requirements under the statute.[4] Other eligibility requirements include a showing that the child must have suffered abuse, neglect, abandonment, or a similar basis under state law and cannot be reunified with one or both parents in their home country.

Alma R. Benavides is a sole practitioner at the Law Office of Alma R. Benavides, PLLC, located in Plano, Texas. Alma graduated from Texas Tech School of Law in May 2001 and is Board Certified by the Texas Board of Legal Specialization in two areas of specialty: Family Law (2011) and Child Welfare Law (2018).

She is fluent in Spanish and provides legal services in Collin County, Dallas County, Tarrant County, Denton County and the immediate surrounding counties. Alma previously served as Chair of the Dallas Bar Association Family Law Section, President of the Family Law Section of the Collin County Bar Association, was recognized by Thomson Reuters as a Rising Star and holds an AV Preeminent Rating as listed by Martindale Hubbell.

The child who is seeking to be the beneficiary of SIJ classification must have been a juvenile when a court order was issued. The court order must be issued from a court that has the authority to act as a juvenile court.[5]

When applying for SIJ classification, the applicant may submit simultaneous with the Form I-360, Form I-485, Application to Register Permanent Residence or Adjust Status, and Form I-765, Application for Employment Authorization.[6] The U.S. Citizenship and Immigration Services (USCIS) has sole discretion to adjudicate Form I-360 and approve or deny SIJ classification.

Pleadings and Court Orders [Juvenile Court Orders]

The best interest of the child always shall be the primary consideration of the court in determining issues of conservatorship and possession of and access to the child.[7] Requesting the proper relief in the pleading filed with the court is imperative and should provide background information to support the allegations of abuse, neglect, abandonment or a similar basis under state law. The pleading should further support the basis as to why it is not in the best interest of the child to be reunified with one or both parents in their home country. As a result of the child being abused, neglected or abandoned, the person seeking conservatorship of the child should request to be appointed as the sole managing conservator.[8] The sole managing conservator should have all the rights and duties of a person appointed in such capacity.[9]

Complete statutory references to the applicable sections of the Texas Family Code should be included in the petition and the court order.[10] The person seeking conservatorship of the child should present sufficient evidence to ask the court to find that

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1 See Pub. L.101-649, 104 Stat. 4978 (Nov. 29, 1990).

2 For purposes of this definition, this paper is referring to "alien" children which means any person not a citizen or national of the United States.

3 Special Immigrant Juvenile Status is a classification under federal law that allows a child to seek a "green card," i.e., adjustment of status to lawful permanent residence.

4 See 8 U.S.C. § 1101(a)(27)(J).

5 Section 23.001 of the Tex. Gov't Code establishes each district court, county court, and statutory county court exercising any of the constitutional jurisdiction of either a county court or a district court, has jurisdiction over juvenile matters and may be designated a juvenile court. Under Tex. Gov't Code § 24.601, a family district court has the jurisdiction and power provided for district courts by the constitution and laws of this state. Its jurisdiction is concurrent with that of other district courts in the county in which it is located. A family district court has primary responsibility for cases involving family law matters.

6 Having work authorization does not necessarily mean you are in the United States lawfully or that you have legal permanent resident status, however, even though a child may not be old enough to apply for employment, the work authorization is a valid form of U.S. identification.

7 *See* Tex. Fam. Code § 153.002.

8 *Id.* at § 153.005. The Texas Family Code further supports the appointment of a non-parent as a conservator of the child. *See* Subchapter G, Appointment of Non-Parent as Conservator.

9 *Id.* at § 153.132.

10 *See* Tex. Fam. Code Chapter 152, Chapter 161, and Chapter 261.

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Special Immigrant Juvenile Classification in Texas

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the parent(s) who abused, neglected or abandoned the child, not be appointed as a joint managing conservator or possessory conservator because the appointment is not in the best interest of the child. Further, evidence should be presented to support that parental possession or access would endanger the physical or emotional welfare of the child.[11]

Finally, the evidence presented to the court should be sufficient to support why the court should find the child has been abused, neglected or abandoned, or a similar basis under state law, that the child cannot be reunified with one or both parents in their home country, and that it would not be in the best interest of the child to return the child to his or her native country.

It should be noted that the court order obtained on behalf of a child in Texas can have a variety of titles, but the most common title is an *Order in Suit Affecting the Parent Child Relationship*. In certain circumstances, a Decree of Divorce may include certain judicial determinations of dependency or custody, parental reunification, and the best interests of the child along with the other eligibility requirements under the statute.

Conclusion

The process of applying for SIJ classification and receiving a response from USCIS will take time. Many applications are not approved immediately. In some instances, after submitting the Form I-360, USCIS may send a letter known as a Request for Evidence (RFE) before making a final decision. The RFE likely will require further documentation to be submitted by the petitioner by a date certain. All evidence requested should be submitted by the deadline at the same time. Missing the deadline likely will result in the petition being denied.

In rare circumstances, a court order may need to be corrected or modified. Unfortunately, not all court orders may be modified or corrected. Practitioners should exercise care in preparing court orders to ensure no further legal action is required on behalf of the child. Individuals who have obtained a court order after reaching the age of 18 likely will not be granted SIJ classification despite the eligibility standards.[12]

Once a child is classified as a special immigrant juvenile, a child may be eligible to adjust status, if all eligibility requirements are met.[13] A SIJ classification allows the child to remain in the United States while waiting for adjustment of status. Importantly, the classification is not an affirmative defense to deportation. If a child has an Order of Deportation and is eligible for SIJ classification, one should still file a petition for SIJ after obtaining the family court order of dependency. While USCIS cannot adjust the status of a child who has an Order of Deportation, every effort should be made to set aside the Order of Deportation.

If a child is the beneficiary of an approved SIJ petition, USCIS still may revoke that petition for good and sufficient cause.[14] First, USCIS must issue a Notice of Intent to Revoke (NOIR) and will provide the child an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approved petition.[15] If the petition is denied, the child (or petitioner who filed on behalf of the child) is notified of the right to appeal the decision.[16]

Note to practitioners: USCIS currently is adjusting status of applications filed three years ago for children of certain countries (Guatemala, Honduras, El Salvador). Children from other countries may not have to wait as long to be approved for adjustment of status (Mexico, Colombia).

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[11] *Id*. at § 153.191.

[12] *Budhathoki v. Nielsen*, 898 F.3d 504 (5th Cir. 2018). Plaintiffs, who were each over the age of 18, had filed Suits Affecting Parent-Child Relationship (SAPCR). In the SAPCR suits, the state courts awarded child support and made certain findings. The Fifth Circuit affirmed and held that USCIS properly determined that the state court orders for child support were not the equivalent of the necessary "care and custody" rulings required for SIJ status.

[13] *See* USCIS Policy Manual, Part F – Special Immigrant-Based (EB-4) Adjustment (Chapter 7). *See also* 8 C.F.R. § 204.11. If a child has an order of deportation but is eligible for SIJ classification, one should still file a petition for SIJ after obtaining the family court order of dependency despite the immigration court order.

[14] *See* 8 U.S.C. § 1155.

[15] USCIS automatically revokes an approved SIJ petition, as of the date of approval, if any one of the following circumstances occurs before a decision on the adjustment of status application is issued: (1) Marriage of the petitioner; (2) Reunification of the petitioner with one or both parents by virtue of a court order where a juvenile court previously deemed reunification with that parent, or both parents, not viable due to abuse, neglect, abandonment or a similar basis under state law; or (3) Reversal by the juvenile court of the determination that it would not be in the petitioner's best interest to be returned (to a placement) to the petitioner's or his or her parent's country of national or last habitual residence.

[16] An appeal may be made to the Associate Commissioner, Examinations. *See* 8 C.F.R. § 204.11(e).

Fifth Circuit Update

by Amanda Waterhouse

In *Flores-Abarca v. Barr*, 937 F.3d 473 (5th Cir. 2019), the Court held that an Oklahoma offense for transporting a loaded firearm in a motor vehicle did not qualify as a firearms offense under INA §237(a)(2)(C)/8 USC §1227(A)(2)(C) and did not render Flores-Abarca ineligible to seek cancellation of removal. The Court rejected the BIA interpretation of the statute and refused to give deference as the statute is unambiguous.

Gonzales-Veliz v. Barr, 938 F.3d 219 (5th Cir. 2019), involved a withholding of removal and CAT claim. Gonzales-Veliz put forth a particular social group formulation of "Honduran women unable to leave their relationship". The Court upheld the BIA conclusion that group membership was not the basis for the harm suffered and, regarding the CAT claim, substantial evidence supported the finding that authorities would not acquiesce to her torture. Gonzales-Veliz also filed a motion to reconsider with the BIA and a second petition for review after it was denied. The Court addressed the denial and found that while *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), did not create a blanket ban on social groups based on domestic violence, the BIA applied it correctly to Gonzales-Veliz's case.

In *Cruz v. Barr*, 929 F.3d 304 (5th Cir. 2019), the Court upheld the denial of Cruz's asylum, withholding of removal, and CAT claims on the basis that the threats he received from gang members did not amount to persecution, family members still living in his home country had suffered no harm, and Cruz never attempted to relocate within his home country.

Pena Oseguera v. Barr, 936 F.3d 249 (5th Cir. 2019), involved an asylum and withholding of removal claim based on family membership. While the case was pending, the Attorney General issued *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019), finding that families might qualify as social groups, but a case-by-case analysis is required. The judge in the initial proceedings had improperly conflated Pena Oseguera's claim with his mother's and the Court found that the factual findings of the judge were therefore suspect. The Court remanded to allow for additional factfinding. The Court also noted that while *L-E-A-* is at odds with precedent in several circuits it is not at odds with any precedent in the Fifth.

In *Padilla v. Barr*, 938 F.3d 658 (5th Cir. 2019), Ubaldo Olguin Padilla was found removable based on his 2011 Texas conviction for possession of methamphetamine with intent to deliver, which the BIA concluded was a violation of a state law "relating to a controlled substance". Padilla argued the conviction did not "relate to" a federally controlled substance because the statute includes an offer to sell counterfeit drugs. The Court disagreed, finding the relevant factor is whether the seller *purports* to be offering a real controlled substance.

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Amanda Waterhouse graduated from Sam Houston State University, *cum laude*, with a B.A 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 a J.D. from the University of Houston Law Center in May 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 also is 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.

Recent Notable Fifth Circuit Decisions

Continued from page 8.

Lavery v. Barr, No. 18-60244 (5th Cir. November 22, 2019), involved a visa waiver program ("VWP") entrant who was served with an administrative notice of removal. VWP entrants waive all rights to contest removal except through an asylum application. Lavery attempted to reopen the administrative order by filing form I-290B, arguing that he had not knowingly waived his rights. The I-290B was rejected and Lavery appealed, but the Court found that they couldn't review the rejected motion because there was no right to file the motion.

In *Chavez Mercado v. Barr*, No. 17-60212 (5th Cir. January 6, 2020), the Court found that although *res judicata* does apply in removal proceedings, it did not bar DHS from seeking to remove Chavez a second time for a conviction that was not charged in the first proceeding "because the convictions…underlying his removal proceedings were not based on the same nucleus of operative facts...".

Ali v. Barr, No. 17-60604 (5th Cir. February 24, 2020), involved an argument that Ali was simultaneously an asylee and an LPR and could not be removed unless his asylee status was terminated. The Court found adjustment to LPR status ended Ali's asylee status and he was subject to removal.

In *Mejia v. Barr*, No. 17-60580 (5th Cir. February 28, 2020), the Court found a ten-year delay in filing a motion to reopen was inexcusable and Mejia's motion was time-barred.

Yanez-Pena v. Barr, No. 19-60464 (5th Cir. February 28, 2020), was a challenge to the two-step process outlined in *Matter of Mendoza-Hernandez*, 27 I&N Dec. 520 (BIA 2019). The Court agreed that a defective Notice to Appear could be cured by a subsequent hearing notice and the subsequent notice would trigger the "stop-time" rule.

In *Vetcher v. Barr*, No. 18-60449 (5th Cir. March 19, 2020), the Court found that although the Texas controlled substance schedules are not a categorical match to the federal schedules, Vetcher had not met the realistic probability test. The Court further found that Vetcher's conviction was for a particularly serious crime and he was ineligible for withholding of removal.

Avelar-Oliva v. Barr, No. 18-60421 (5th Cir. April 3, 2020), involved a challenge to an adverse credibility finding. The Court found that the IJ and BIA did not err in basing the adverse credibility determination on inconsistencies between her CFI interview and testimony at trial, that Avelar-Oliva's challenge to the legal standard applied by the BIA was not exhausted as she failed to file a Motion to Reconsider, and that an IJ does not have to notify an applicant of the need for corroborating evidence before dismissing a claim.

In *Inestroza-Antonelli v. Barr*, No. 18-60236 (5th Cir. April 9, 2020), the Court granted the petition for review and remanded to the BIA after finding the Board had abused their discretion by not addressing uncontroverted evidence of changed country conditions. The Court found that the evidence of record actually compelled a conclusion that country conditions in Honduras had changed—specifically in regard to rates of violence against women and the systematic dismantling of protections for women following the 2009 coup.

Alexis v. Barr, No. 18-60748 (5th Cir. June 8, 2020), raised the issue of whether the Texas definition of cocaine is overbroad because Texas includes position isomers of cocaine and the federal definition does not. The Court agreed that there was not a categorical match between the two; however, the Court ruled against Alexis because he failed to satisfy the realistic probability test. The majority opinion and the concurrence recognized that satisfying the test was essentially impossible but the Court was bound by *Castillo-Rivera* to apply the test. The Court also affirmed the denial of asylum, withholding, and CAT on the basis that Alexis' PSG formulations were not cognizable and he had not shown he would be tortured by the government or with government acquiescence.

Updates to EB-5 Immigrant Investor Visa with Comparison to E-2 Treaty Investor Visa, A Potentially Better U.S. Investor Visa Strategy

by Matthew Myers

Certain foreign nationals can come or stay in the United States as a lawful permanent resident through the EB-5 investor immigrant program or temporarily with an E-2 treaty investor/trade nonimmigrant visa. Which approach is the best approach depends on many considerations, including timing, plans for the future, funds available for an investment, whether a treaty exists, and the foreign national's country of birth. Surprising for some, the better option may be to come to the United States as a nonimmigrant rather than an immigrant (lawful permanent resident).

Matthew Myers practices immigration law exclusively with a focus on employment and investor immigration to the U.S. and other countries through partnership with local counsel. He currently serves the State Bar of Texas as the Chair Elect of the Immigration & Nationality Law Section Council and on the planning committee for TexasBarCLE's annual Advanced Immigration Law conference. He also is a member of the American Immigration Lawyers Association on the Global Migration Section.

EB-5 Immigrant Investor Visa Update

In recent years the EB-5 Immigrant Investor visa category has become significantly backlogged for applicants born in China, India, and Vietnam, which has led to a substantial decrease in demand for this category.

At a time when demand had substantially decreased, the EB-5 Immigrant Investor Program Modernization Regulation took effect on November 21, 2019, with the following notable key changes:

- **Increased minimum investment amount** in a Targeted Employment Area (TEA) increased from $500,000 to $900,000 and in a Non-TEA from $1 million to $1.8 million;
- **Restricted TEA designation process** based on case-specific evidence submitted with each Form I-526 petition; and
- **Priority Date** of certain earlier-approved EB-5 immigrant petitions may be retained by filing a new I-526 petition.

New Office L-1A Multinational Manager/Executive or E-2 Treaty Investor Visa

Foreign investors may wish to consider alternate options, such as the new office L-1A or E-2 Treaty Investor visa, which may provide for greater flexibility, lower investment requirements, and be obtained in a much faster timeframe than an EB-5 or other immigration visa strategy.

The E-2 Treaty Investor visa and other U.S. nonimmigrant visa categories, such as a new office L-1A Multinational Executive/Manager visa, may actually prove more beneficial than an immigrant visa strategy such as EB-5. Although the new office L-1A nonimmigrant visa category or the EB-5 category do not require the applicant to be from a treaty country, citizens of only certain countries qualify for the E-2 visa. A successful E-2 strategy may first require securing citizenship by direct investment in a country with an E-2 Treaty, such as Grenada. Often this can be accomplished by similar types of direct investment one might make in the United States, and sometimes with less capital outlay for the combined citizenship application and U.S. E-2 strategy, compared to EB-5 or new office L-1A which receives a substantial amount of scrutiny by U.S. Citizenship and Immigration Services (USCIS) at this time.

The E-2 Treaty Investor visa is a nonimmigrant visa, which requires a "substantial" investment in the U.S. and provides for the principal investor, as well as executives, supervisors, and essential personnel who share the same nationality of the E-2 Treaty Country as the principal investor to work in the United States. The U.S. company must be at least 50% owned by a national of a country with which a qualifying Treaty of Friendship, Commerce, or Navigation or its equivalent exists with the United States.

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Updates to EB-5 Immigrant Investor Visa with Comparison to E-2 Treaty Investor Visa, A Potentially Better U.S. Investor Visa Strategy

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The EB-5 Immigrant Investor Program provides a path for permanent residency for persons who invest $1.8 million, or under certain circumstances $900,000, in a new commercial enterprise that will create ten (10) new jobs for U.S. citizens or lawful permanent residents full-time.

Relative to the EB-5 Immigrant Investor visa, the E-2 Nonimmigrant Treaty Investor visa category provides the following benefits, requirements, and considerations:

EB-5 Immigrant Investor Visa	E-2 Nonimmigrant Treaty Investor Visa
Significant backlog for applicants born in China, India, Vietnam.	No backlog or quota for this visa category.
Physical presence and residency required to maintain permanent residency in the United States, otherwise may be abandoned and lost.	Investment, not physical presence, must be maintained in the United States.
Investment must create or maintain ten (10) full-time U.S. positions.	Investment must be "substantial" relative to the business and not "marginal".
Lengthy processing times with U.S. Citizenship and Immigration Services (USCIS) followed by application at a U.S. consulate abroad.	Application at U.S. consulate abroad, generally approved at the time of the appointment; or can apply to change status to E-2 if in the United States.

EB-5 Immigrant Visa Backlog? Consider Grenada Citizenship and the U.S. E-2 Visa

For those nationals of countries which do not have an E-2 Treaty with the United States, it is important to develop a tailored U.S. immigration strategy and approach in consideration of the immigrant visa backlog and plans of the entrepreneur or investor, which may include securing second or third citizenship as a prerequisite to securing U.S. nonimmigrant or immigrant status.

A handful of Caribbean countries provide for direct citizenship by investment without significant physical presence or residency required as a prerequisite to citizenship, specifically Antigua & Barbuda, Dominica, Grenada, St. Kitts & Nevis, and St. Lucia. These countries provide pathways for citizenship within **3-6 months** following an investment in real estate or a contribution to a government fund generally varying from US $100,000 – $350,000.

Of these countries, only Grenada has an E-2 Investor Treaty with the United States, which creates an additional visa category for nationals of Grenada that may otherwise not be available. As mentioned, the E-2 Treaty Investor visa is only available to nationals of a set list of countries with an E-2 treaty with the United States, which at this time does not include China, India, or Vietnam, all of which heavily utilize the EB-5 Immigrant Investor visa category creating a backlog in the EB-5 Visa issuance due to over-subscription and annual per-country quotas. Foreign nationals of countries with an E-2 Investor Treaty, however, may start in E-2 nonimmigrant status, and then transition at a later date to the EB-5 immigrant visa if and when their intent changes from wanting to be in the United States temporarily to permanently.

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Updates to EB-5 Immigrant Investor Visa with Comparison to E-2 Treaty Investor Visa, A Potentially Better U.S. Investor Visa Strategy

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It's important to develop a tailored U.S. immigration strategy and approach keeping in mind the immigrant visa backlog and plans of the entrepreneur or investor.

The Public Charge Rule Executive Summary

by Brandon Roché

Full disclosure: I was initially asked to write a short piece on the *proposed* Public Charge Rule. At the time, it was still enjoined, and we did not know the full implications of the new requirements. Fuller disclosure: the public charge rule went into effect on February 24, 2020; we still do not know the full ramifications of the new requirements but I know it's impractical to summarize in 750 words or less.[1] With that as a starting point, this article looks at what the rule says on its face, what factors will be considered, and what appear to be some of the more problematic evidentiary obstacles introduced by the public charge definitions and requirements.[2] Finally, the concept of the Public Charge Bond is introduced in order to bring this to practitioners' attention.

On its face, there is no change to the longstanding public charge language from the INA:

> *Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible[…] In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's-(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills . . . .* [3]

This determination is made at the point of Admission or Adjustment of Status (AOS)[4] (or Consular Processing). The new rule, and the accompanying USCIS Policy Manual updates, defines and expands on the terms laid out in the INA and provides a burden of proof in assessing whether an alien may be "more likely than not at any time in the future to become a public charge, as defined in 8 CFR 212.21(a), based on the totality of the alien's circumstances."[5]

In short, the primary changes are: 1) expanding the definition of what is a public charge; 2) adding new types of public assistance/benefits to be considered by immigration officials; and, 3) introducing a prospective totality of the circumstances test (and, in order to carry out this analysis, the I-944 Declaration of Self-Sufficiency).[6]

Before addressing each of the changes and their impact on the process, it is necessary for immigration practitioners to assess whether the intending immigrant is subject to the public charge rule in the first place. There are many types of admissions and applications for adjustment that are exempted from this test. There are 27 exemptions listed in the regulations in addition to military service members being separately excepted from having received public benefits while serving.[7] Some of the more common ones who will not have to submit an I-944 are: Refugees and Asylees, Aliens applying under the Cuban Adjustment Act, Special Immigrant Juveniles, VAWA self-petitioners, and U visa petitioners.

With that in mind, the analysis turns to how the new rules and requirements will affect those who are subject to them.

1) A new definition of Public Charge

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[1] The overall rule and requirements are far too complicated to properly dissect in this short article; I will be focusing on the broad strokes. For a more in-depth look at the new rule, I highly recommend: Kehrela M. Hodkinson, Jason C. Mills & David A. Guerrattaz, AILA Practice Advisory: 2020 Comprehensive Public Charge Update and Strategies (2020).

[2] *See* 8 C.F.R. § 212.20-23. For purposes of this article, I am focusing on the CFR and the corresponding USCIS policies and forms. The Department of State implemented a correlative version of the USCIS public charge rule on the same date and updated the Foreign Affairs Manual at 9 FAM 302.8.

[3] 8 U.S.C.A. § 1182(a)(4) (West)

[4] 8 C.F.R. § 212.20

[5] 8 C.F.R. § 212.21(c). See, USCIS Policy Manual, Vol. 8, Part G, Ch. 2(B). www.uscis.gov/policy-manual/volume-8-part-g-chapter-2.

[6] The DOS equivalent is the Form DS-5540.

[7] 8 C.F.R. § 212.23; 8 C.F.R. §212.21(b)(7).

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Previously, the definition was "an immigrant likely to become primarily dependent on the government for subsistence." The new definition is far more specific: "[A]n alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)."[8] This assessment will be made prospectively and the regulations acknowledge that current receipt, or certification for future receipt, of public benefits "suggest a likelihood of future receipt."[9] This first prong provides a specific metric for adjudicators to hold applicants to in their prospective analysis. Because receipt of more than one benefit at a time is fairly common for those who need these benefits – it stands to reason that counting receipt of multiple forms of benefits per month in the aggregate will add up quickly.

2) Additional Types of public assistance can be considered

This second change expands on the list of programs that will be considered in the first prong's calculation. Previously, the only programs that were considered in adjudicating someone's likelihood of becoming a public charge were: Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), General (Cash) Assistance/Relief programs, and Long-term institutionalization. Now, there are 5 new programs to be considered: Supplemental Nutrition Assistance Program (SNAP), Medicaid,[10] Section 8 Housing Vouchers, Section 8 project-based subsidies, and public housing.[11] Importantly, there are many benefits which are not explicitly considered. A non-exhaustive list includes: disaster relief aid, emergency medical assistance, WIC, and Pell grants and student loans. In reality, very few immigrants qualify for the enumerated benefits in the first place, so they are unlikely to have received them in the past. From a practical standpoint, the biggest obstacles to showing one will not be a public charge lie in the final prong.

3) Totality of the Circumstances

The totality of circumstances test being the final prong of this new rule is really burying the lede. This is a far-reaching and subjective test whereby the adjudicators will look at a set of factors to assess the applicant's likelihood of becoming a public charge in the future.[12] Some of these factors are problematic because of the weight accorded them, and some are problematic because of the evidence that is now required. The chart below notes the factors and what about them are weighted negatively or positively or will be accorded more weight than others ("heavily weighted" factors in bold).[13] The far right column on evidentiary issues includes notable USCIS guidance and this author's attempts to point out some problematic obstacles that may arise in preparing and documenting eligibility under the I-944 form and Totality of the Circumstances test.

[8] 8 C.F.R. § 212.21(a).

[9] 8 C.F.R. § 212.21(e).

[10] With exclusions for children under 21, pregnant women (during pregnancy and 60 days after) and benefits received for emergency medical conditions. 8 C.F.R. § 212.21(b)(5).

[11] 8 C.F.R. § 212.21(b).

[12] *See* 8 C.F.R. § 212.22(b).

[13] This chart is derived from the smaller charts found in the policy manual in the chapter for each respective factor. *USCIS Policy Manual*, Vol. 8, Part G, Ch. 6-14. The fourth column on evidentiary issues cites to portions of the respective chapter for those factors and the I-944 Instructions and is intended to highlight issues immigration practitioners should be aware of.

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FACTOR	POSITIVE WEIGHT **(Bold indicates "Heavily Weighted")**	NEGATIVE WEIGHT **(Bold indicates "Heavily Weighted")**	EVIDENTIARY ISSUES
Applicant's Age	Between 18-61	<18 or >61	Birth Certificates are acceptable evidence
Health	No Diagnosed Medical Issues	Form I-693 lists a Class A or B medical condition	• "The applicant may submit … any additional medical records, medical or mental health documentation, evaluations … regarding or related to the applicant's health and condition … [which] makes him or her more or less likely to become a public charge…." USCIS Policy Manual, Vol. 8, Part G, Ch. 7(C)(2) •"Officers must rely on the medical information, prepared by [a qualified medical professional] in making these determinations. Officers must not speculate as to the cost of medical conditions or future diagnoses." *Id.* at Ch. 7(A)
Family Status [Size]	Alien is able to support themselves and household members at or above 125 percent of the Federal Poverty Guidelines (FPG) (100 percent for active duty military)	Alien is not able to support themselves and household members at or above 125 percent of the FPG (100 percent for active duty military)	The "household" may include someone "who provides to the alien at least 50% of the alien's financial support" even if not living with the alien. *Id.* at Ch. 8(A)(1)

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Assets, Resources, and Financial Status	• **Total household income, assets, or resources, and support of at least 250 percent of the FPG** • **Private health insurance appropriate for the expected period of admission (without subsidies)** • "Good" Credit Report and Score (670 and above) • Current employment • Total household gross income at or above 125 percent of the FPG (100 percent for military) • Financial resources that would make the applicant ineligible to obtain means-tested public benefits • Total household assets and resources in the applicable equivalent amount	• **Receipt, certification of, or approval of public benefits for more than 12 months in any 36-month period starting before the application for adjustment of status, (calculated no earlier than February 24, 2020)** • **Medical condition and is uninsured and either lacks the prospect of obtaining private health insurance or lacks the financial resources to pay for reasonably foreseeable medical costs** • "Bad" Credit Report and Score (580 and below) • No or low income or applicable equivalent assets • Other liabilities such as mortgage and car loan and credit card debt are weighed negatively to varying degrees • Request, certification of, or receipt of public benefits • Any bankruptcy filings within the last 2 years • Request or receipt of a fee waiver for immigration benefits	• Note that many people may have no credit history or score – they must procure documentation they do not have a credit report or score AND may provide evidence of continued payment of bills if there is no report or score. See, USCIS I-944 Instructions at p. 7. • "The alien is only required to provide one credit report from any of the three main credit reporting agencies, Equifax, Experian, and TransUnion that [was] generated within the last 12 months. If there are any errors in the credit report, the person should provide information about the error and the report or notice from the credit agency." USCIS Policy Manual, Vol. 8, Part G, Ch. 9(C)(4)

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Education and Skills	• **The alien is authorized to work and is currently employed with an annual income of at least 250 percent of the FPG for the alien's household size** • Attendance in elementary, middle, or high school • High School Diploma or GED or equivalent • Higher education such as Bachelor's Degree, Master's Degree, or Doctoral Degree • Skills and certifications relevant to employment • Basic English proficiency • Primary Caregiver • Other language skills in addition to English	• **The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment** • No high school diploma or GED or equivalent • No work experience • No occupational skills • Limited to no English language proficiency	• "Foreign education should include an evaluation of equivalency to education or degrees acquired … in the U.S." USCIS I-944 Instructions at p.11. • "Native English speakers … must provide documentation of language proficiency including language certifications." Id. • Being a primary caretaker is considered in the totality of the circumstances adjudication and may outweigh a negative factor related to the alien's education and skills because of lack of employment or lack of employment history. USCIS Policy Manual, Vol. 8, Part G, Ch. 11(A)(1)
Prospective Immigration Status and Expected Period of Admission	The applicant provides evidence of ineligibility for public benefits based on immigration status or expected period of stay.	Evidence that the alien will be in the United States for a long or indefinite period (such as when seeking LPR status) that in conjunction with the alien's insufficient income, assets, and resources may make the alien more likely than not to become a public charge and more likely than not to be eligible for public benefits at any time in the future.	• "Generally, the alien's prospective immigration status is established through his or her immigration benefit request or application for admission. As a result, there is no additional evidence relating to this factor that an alien must provide." USCIS Policy Manual, Vol. 8, Part G, Ch. 12(C) • "An adjustment of status applicant's prospective immigration status is that of a lawful permanent resident (LPR). The expected period of stay is permanent and is generally considered to be a negative factor." Id. Ch. 12(A)

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Additional Support Through Sponsorship (I-864)	• Sponsor's income and assets at or above 125 percent of the FPG (100 percent for military) • The applicant has a relationship with the sponsor	• Sponsor's receipt of public benefits in the United States • Sponsor has a previous bankruptcy • Sponsor received a fee waiver for immigration benefits • Sponsor is sponsoring multiple applicants	• "Aside from the requirements under INA § 212(a)(4) to have a sufficient I-864, USCIS also reviews the I-864 as a factor in the totality of the circumstances. A sufficient I-864 alone does not necessarily result in a finding that an alien is not likely at any time to become a public charge due to the statute's requirement to consider the mandatory factors." Id. Ch. 13(D)

Bonus Round: Public Charge Bonds for AOS applicants

If, after weighing the positive and negative factors above, an applicant for AOS is found inadmissible solely on the public charge ground, USCIS may offer the option of posting a public charge bond.[14] This is wholly discretionary and the regulations make clear that an applicant with even one heavily weighted negative factor generally will not be offered this option.[15] When the public charge bond is offered, the minimum bond possible under the regulation is $8,100.[16] There is a new USCIS form I-945 for Public Charge Bonds that must be filed once instructed to do so by an officer.[17] Once posted, this bond is cancelled (returned) when the alien becomes a U.S. citizen, permanently departs the U.S., dies, or after 5 years of LPR status.[18] The bond is considered breached if an alien receives public benefits for 12 of 36 months before the bond is cancelled.[19]

In closing, all these new procedures revolving around the public charge issue will take time to discern. How strictly they will be enforced and how much differentiation will be seen on the subjective and discretionary items will likely be a moving target, making it difficult to advise clients on what to expect. The best thing practitioners can do is to familiarize ourselves with the new procedures and communicate amongst our colleagues what we experience with their implementation.

[14] *See* 8 C.F.R. §213.1.

[15] *Id.* at § 213.1(b).

[16] *Id.* at § 213.1(c)(2).

[17] This form has a $25 filing fee and no, it is not eligible for a fee waiver.

[18] *Id.* at § 213.1(g).

[19] *Id.* at § 213.1(h)(2).

Ongoing Pro Bono Opportunities:

- American Gateways offers a number of volunteer opportunities and ways to get involved in the work that they do. For information on how to sign up to volunteer with American Gateways, please visit the webpage at: **americangateways.org/get-involved/**

- Houston Legal Service Collaborative has a number of ongoing opportunities for attorneys to get involved, including: Know Your Rights Presentations, Citizenship clinics, Pro Bono Asylum representation with one of their member non-profits, Pro Bono representation for Unaccompanied minors. For more information on how to get involved please visit the webpage at: **houstonimmigration.org/volunteer/**

- ABA Children's Immigration Law Academy – has numerous pro bono opportunities, many of which are in Texas, along with resources for pro bono attorneys: **cilacademy.org/pro-bono/**

- Tahirih Justice Center in Houston, TX is looking for volunteer attorneys to assist with helping clients obtain legal relief under our asylum, Special Immigrant Juvenile Status, U visa, T visa, and VAWA clients. For more details on becoming a volunteer attorney, attorneys can visit here: **tahirih.org/get-involved/our-pro-bono-network/**

- Cabrini Center at Catholic Charities Houston has ongoing opportunities for attorneys to represent and assist unaccompanied minors in custody of ORR in the greater Houston area. For more information on how to get involved, please visit the webpage at: **catholiccharities.org/what-you-can-do/volunteer/**

- RAICES has several volunteer opportunities. For more information on how to get involved please visit the webpage at: **raicestexas.org/volunteer/**

- The Human Rights Initiative of North Texas (in Dallas) is always looking individuals to get involved in their work. Opportunities include pro bono representation and other non-legal work designed to aid immigrants in need in North Texas. For information on how to get involved, please visit the webpage at: **hrionline.org/get-involved/william-o-holston-jr-pro-bono-fund/**

- ProBar – South Texas Representation Project has a number of volunteer opportunities that are both long and short term. More information on all of these opportunities can be found at the webpage at: **americanbar.org/groups/public_services/immigration/projects_initiatives/south_texas_pro_bono_asylum_representation_project_probar.html**

- Mosaic Family Services, in Dallas, TX has ongoing volunteer opportunities at their Mosaic House, in their offices, and in the community. For more information, please go to **mosaicservices.org/what-you-can-do/volunteer/**