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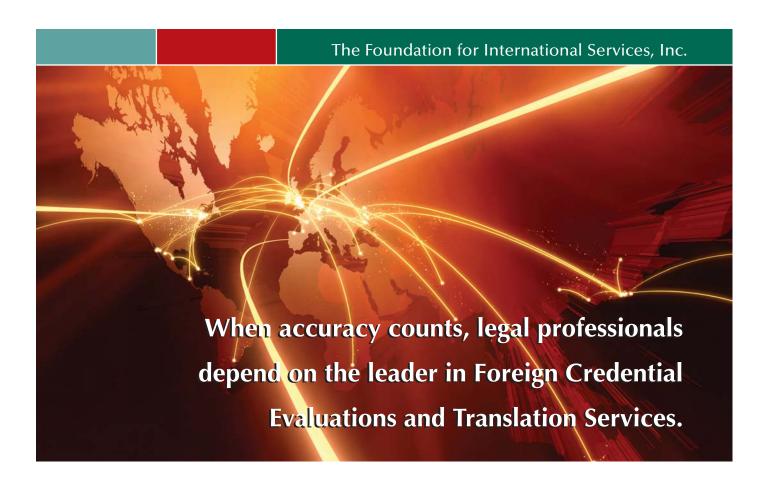


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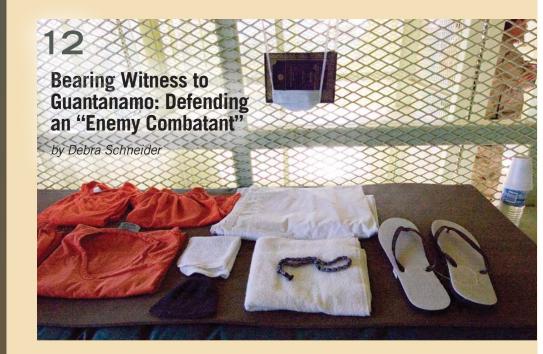
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ON THE COVER: A shackled detainee is escorted inside the detention center at Guantanamo Bay U.S. Naval Base, Cuba. AP PHOTO/ BRENNAN LINSLEY

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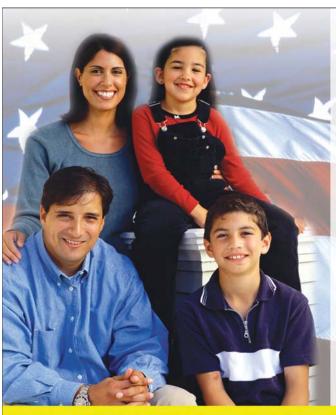
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president's PAGE / by Carlina Tapia-Ruano



Proposed Filing Fee Increases: Are They Reasonable?

.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) proposed a filing fee increase that would more than double some of its current fees. The agency's fee proposal places on the backs of immigrants its operations fees, overhead expenses, and costs of law enforcement activities such as investigations and security checks. This is not what Congress or the U.S. General Accountability Office (GAO) intended by having USCIS review its fee schedule.

The proposed increases are so outrageous that incoming chairs of the House and Senate judiciary committees and the immigration subcommittees asked USCIS not to finalize the proposed rule without first giving Congress the opportunity to analyze the assumptions and methodology used by the agency to arrive at the estimates.² Congressional members were concerned about the scope and scale of the fee increase.

In response to congressional concern, USCIS Director Dr. Emilio Gonzalez testified before the House Judiciary Committee on February 14, 2007, to provide an explanation for the astounding fee increase.³ During his testimony, Gonzalez principally blamed the fee increase on the need to comply with GAO recommendations and insufficient USCIS funds. Furthermore, Gonzalez stated that the proposed fee structure would—among other things—improve the integrity of the immigration system, improve performance, and reduce processing times by an average of 20 percent by 2009.

Fees to Increase by 86 Percent

The explanation provided for the proposed rule is as astounding as the proposed increases. USCIS has proposed a fee increase that is "an average weighted increase for applications and petition fees of approximately 86 percent." Yet, by its own calculations, this anticipated influx of millions of dollars would only produce a 20 percent average reduction in the processing of applications, which would not materialize for another

The American Immigration
Lawyers Association (AILA)
cannot support any fee proposal
where our newest residents and
citizens of the United States
are made to shoulder the entire
cost of operating a federal
government agency in which
they have no voice.

two years! How is this an improvement?

Gonzalez acknowledged that the proposed fee structure would increase the costs of benefits for many who will seek residency. For example, each applicant for adjustment of status currently pays \$325. The agency proposes to increase that to \$905, which is almost triple the current cost. Gonzalez justified this unbelievable hike by claiming that the new fee would include the costs of advance parole and employment authorization documents (EAD). However, this reasoning is flawed because many of the poorer applicants for adjustment of status will never receive the benefits of advance parole or an EAD. There are so many applicants for adjustment of status already paying a \$1,000 penalty fee for the benefits of Immigration and Nationality Act §245(i) because they have remained in the United States without authorization and are, therefore, not entitled to the benefits of advance parole. Furthermore, if all applications for residency are processed in a timely fashion as anticipated with the reduced processing times—most applicants will not receive an EAD prior to a decision on the application for residency. In the end, the new fees will force applicants to pay for benefits they are not even entitled to receive.

Chilling Effect on Legal Residents

The proposed fees are certain to have a chilling effect on legal permanent residents as well—including senior citizens—who are interested in becoming U.S. citizens. These folks will need to round up almost \$700 to file for naturalization. Furthermore, they will have to pay close to \$400 to replace lost or misplaced permanent resident cards, and naturalized citizens will have to pay \$400 to replace a Certificate of Naturalization. It is difficult to comprehend how the cost of simply reproducing a certificate or card—with all of USCIS's latest technology—requires a \$400 fee.

USCIS has not been hesitant in disclosing its philosophy of having immigrants bear the full costs of services provided. The American Immigration Lawyers Association (AILA) cannot support any fee proposal where our newest residents and citizens of the United States are made to shoulder the entire cost of operating a federal government agency in which they have no voice. The proposed fee structure is as unsound as it is unfair. We need to propose rules that will be related to the services being provided at a cost that is both reasonable and realistic.

AILA President **Carlina Tapia-Ruano** is a partner in the firm of Tapia-Ruano & Gunn P.C. in Chicago.

Notes

- ¹ Department of Homeland Security, USCIS Publishes Proposed Rule to Dramatically Hike Fees (Feb. 1, 2007), AILA InfoNet at Doc. No. 07020160.
- ² The Pulse, AILA's Capitol Beat, "Letter from House and Senate Judiciary Committee Leaders" (Jan. 22, 2007), AILA InfoNet at Doc. No. 07021462.
- ³ USCIS Memorandum, "Gonzalez Testifies on Proposed Fee Increases" (Feb. 14, 2007), AILA InfoNet at Doc. No. 07021562.



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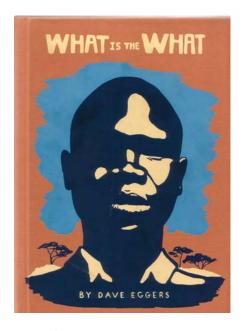


reader's CORNER / by Dan H. Berger and Eliza Camire

Home at Last! Chronicling the Lost Boys of Sudan

YOUNG BOY COMES TO THE UNITED STATES after years of battling poverty, deprivation, war, and life in refugee camps. Through a church group and generous sponsor families, he gets a job, takes college courses, and lives in a cozy apartment with all the modern amenities and electronics. Two autobiographical books tell this classic "American Dream" in different ways; each one a moving, insightful, and inspirational story of survival.

The books chronicle the "lost boys," a group of children displaced during the bloody Sudanese civil war that spans over a decade from the mid-1980s to the mid-1990s—a predecessor of strife to the current Darfur bloodbath. Various groups of lost boys met and banded together along the perilous journey to the refugee camps in Ethiopia and Kenya. What is the What (McSweeney's; \$26, hardcover) is the story of Valentino Achak Deng, who survived almost 15 years of civil war and refugee camp exile before coming to the United States in 2001. While Deng does exist, this book that purports to be his autobiography is actually a fictional recreation by its author, Dave Eggers. Some of the book's characters are composites, some episodes are invented, and much of the storyline has been reordered and reshaped for narrative effect. But since the author spent countless hours of conversation with Deng, all these factors blend perfectly to exude a kind of authenticity that is lacking in other nonfiction memoirs. In contrast, God Grew Tired of Us (National Geographic Books; \$26, hardcover) is the actual memoir of John Bul Dau, who went through a similar ordeal as a lost boy before coming to America in 2001. The book embodies the true spirit of hope, survival, and one man's unshakeable faith in God. National Geographic and NewMarket Films recently released the movie version of Dau's inspirational journey in selected theaters. For more information, see http:// godgrewtiredofus.com.



Becoming Lost Boys

In 1983, Sudan consisted broadly of a technologically advanced and economically advantaged Muslim country to the north and a pastoral, predominantly Christian and animist country to the south. At that time, the northern government initiated a policy of rotating military units between the south and the north. This action caused revolt among southern soldiers who were unwilling to leave their families behind. The south's Sudan People's Liberation Army (SPLA) started its initiative to topple the Muslim government in the north. The northern army eventually seized control of the government in 1985,

deposed then-President Gaafar Muhammad Numeiry, and instituted a new state of emergency. This series of events led to a long and bloody civil war that left death and destruction in its wake and displaced thousands of children, many of whom are simply remembered as the lost boys.

Idyllic Childhood

Far from the unrest in the north, the early childhood described by Deng and Dau was that of a peaceful and happy existence in a Dinka tribal community. It was a simple life without electricity, radio, television, written language, bureaucracy, or regular connections with other villages. The Dinka tribe was famous for its rich, oral tradition of stories that explained nature, tight family bonds and respect for elders, and an economy that uses cattle as a form of currency. Both men fondly recalled the days when the challenges were simple—wild animals, floods, drought, and cattle disease-compared to the tragedy that no Dinka story could foretell or explain.

Casualties of War

Deng and Dau were just boys when the national government in the north encouraged bands of marauding Arab horsemen to attack southern Dinka villages and destroy potential opposition. The horsemen came in the night with guns, burning huts while people slept inside, killing people in sight, kidnapping women and girls, and sending any lucky survivors into the wilderness. In just one night, both boys lost everyone they loved, the stability of their home, and their only way of life.

Perilous Journey

The boys were separated from their families. They were not sure if their villages still existed, but they gradually found other

[T]here were castes within the displaced. And we occupied the lowest rung on the ladder. We were utterly dispensable to all.

-Valentino Achak Deng, one of the lost boys

lost boys and coalesced in a plan to walk to Ethiopia. The journey showed the importance of adaptability in order to survive. The boys quickly learned what to eat, how to find water, how to hide from the enemy, and how to improvise for what they did not have—using tent cloth for shoes and twigs as splints for broken bones. The journey was brutal and unimaginable even for adults. Lions attacked, vultures circled over dying children, disease struck, and the boys ate and drank whatever they could find, whenever they could find it.

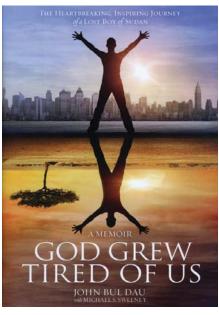
Along the way, Arab horsemen attacked their groups, and SPLA troops—the very force that they dreamed would save them—forced them away from a village where they had taken shelter. Although resilient throughout his journey, it was around this time that Deng experienced an anger "born of the realization that there were castes within the displaced. And we occupied the lowest rung on the ladder. We were utterly dispensable to all."

Boys died during the arduous journey from one refugee camp to another, and group leaders took care to avoid contact with the dead and dying, lest disease spread. Many of the boys simply grew tired and succumbed to death, usually while sitting under a tree. In one particularly vivid scene, Deng ignored the leaders and almost lost track of the group while burying a boyhood friend. Near exhaustion, Deng had to bend the boy's postmortem legs to fit the body in the small hole that served as his friend's grave.

Camp Life

Once in Ethiopia, the boys settled into the first of a series of refugee camps that would serve as their homes for more than a decade. Local tribes resented the Dinka refugees for taking their land, resources, and jobs. The lost boys were eventually moved to a longer-term camp in Kenya called Kakuma. They traveled mostly by foot to get there, and many died along the way due to heat exhaustion, starvation, and attacks by local tribes.

The boys spent most of their adolescent years in Kakuma. There, they were safe, but



they felt that their spiritual life was left barren. They experienced the transition from childhood to adolescence in a place that retained nothing of their Dinka upbringing. Yet, against the backdrop of Kakuma, these lost boys remarkably and poignantly grew into leaders and teachers at the camp. They continued to exist in this makeshift village while it took years for most of the world to notice or care. Sudanese opposition groups were divided in their struggle against the Khartoum government, and according to the story, "the infighting, the brutality involved, allowed the world to turn an indifferent eye to the decimation of Sudan: the civil war became, to the world at large, too confusing to decipher, a mess of tribal conflicts with no clear heroes or villains."

One day, Deng and Dau each found their names on the list of people chosen for refugee resettlement in the United States. Unlike the boys' past journeys, this time they could plan, prepare, and practice for their new life in America. The lost boys were bombarded with advice from all angles. The elders, eager to warn them of their susceptibility to laziness in America, reminded the boys of their obligations to the Dinka tribe. United Nation (U.N.) representatives also taught classes to help with the transition. Dau re-

called feeling awe and disbelief when a U.N. representative explained winter by passing around a block of ice to show that in some parts of America, water can become as hard as rock. The boys had never seen or touched ice before this incident, so winter was well beyond their wildest imaginations.

Home at Last?

Dau arrived in Syracuse, NY, in 2001. A hard-working and intelligent young man, he successfully pursued a college education. Unfortunately, Deng had more difficulty. He was unsure when to ask for help, had a harder time crossing the cultural divide, and always wondered if he was misunderstanding American words and gestures. In both cases, Dau and Deng received 90 days of direct refugee assistance. But this timetable was not long enough to transition from life in a refugee camp to independent living in the hustle and bustle of America. Numerous good Samaritans and private nonprofit groups filled some of the void, but there were times when they both needed money for health insurance and school despite working full-time. There were no parents to offer love, support, or much-needed guidance on how to approach life's many challenges.

Same Story, Different Perspective

Although both books chronicle a lost boy's journey-from his Dinka village, to life in a refugee camp, and, finally, resettlement in the United States—each is presented in drastically different ways that invoke varying emotions from its readers. What is the What is woven together more like a novel, highlighting the complexities of Deng's life; while God Grew Tired of Us reads more like an extended inspirational magazine article. What is the What alternates Deng's life story with an extended vignette of a dramatic robbery and assault in Atlanta after he was resettled. At one point during the robbery, as during his flight through Africa, Deng struggles to understand why bad things happen. Tied up and alone on the floor of his apartment, he flails about like a fish out of water, hoping that someone will hear him. This is not

[Dau] and his friends were not truly lost as long as they had each other.

the American Dream he had hoped for. In each part of the book, the prospect of a better life is never quite what Deng had expected.

On the other hand, Dau's memoir in *God Grew Tired of Us* ripples with faith and hope. The book is filled with vibrant photographs, maps, historical introductions to each chapter, extensive lists of resources on Sudan, and information regarding the organizations assisting the refugees. In Syracuse, Dau was blessed with having met other Sudanese refugees on whom he could lean. He and his friends were not truly lost as long as they had each other. Several people have commented that Dau's book probably will be more popular or more palatable to Americans because it is a victorious story of a realized American Dream. However, *What is the What* should

not be overlooked, for it also is a poignant book of a very complex story narrated by a larger-than-life lost boy without the aid of historical background, photos, or maps.

Dau, Deng, and Eggers have set up foundations to support the lost boys and other displaced Sudanese, and some of the proceeds from the books go to their respective foundations. For more information on how to help, see www. valentinoachakdeng.com, www.acsudanfoundation.org, and www.mcsweeneys. net/authorpages/eggers/eggers.html.

Author's Note: Eliza Camire, co-author of this review, met and studied a group of lost boys in Burlington, VT, as part of an anthropology course at St. Michael's College. She found both books moving and the

stories completely consistent with the experiences chronicled by her study group. She remembers the boys as eager to share their life stories, strongly connected to each other and to those still in the refugee camps, and focused on their mission to gain an education to help themselves and, eventually, their country.

Dan Berger is chair of the American Immigration Lawyers Association's Publications Committee and a named partner at Curran & Berger in Northampton, MA, where Eliza Camire works as office manager. The authors wish to thank Donna Nelson of Norwich, VT, for her insights on this review.

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BEARING WITNESS TO GUANTANAMO

"Enemy Combatant"

by Debra Schneider

AT 7:00 AM, A WHITE VAN PICKED US UP FROM OUR QUARTERS

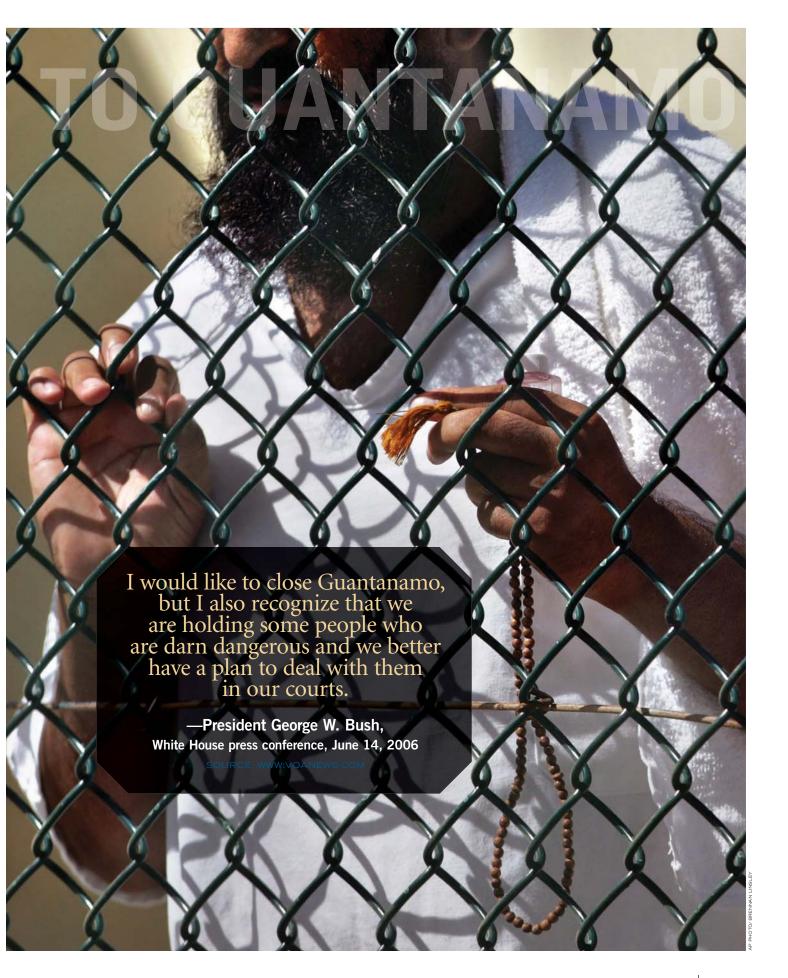
on the leeward side of the U.S. Naval base in Guantanamo, Cuba, and took us to the ferry deck where we would catch a boat across Guantanamo Bay to the windward side of the base. There, we were to meet our client who was being held as an "enemy combatant." By 9:00 am, we were still waiting. The Navy had just taken over control of the prison operation from the U.S. Army, and it was not prepared for our arrival. We lost over an hour just getting our photo badges. Finally, we were brought to the web of chain-link fences covered in green mesh, with coils of barbed wire lining the top. The gates opened, and we were led into the prison. Odd, Zen-like rock paths led to the center control booth operated by prison guards. We were in Camp Echo. As we stood outside waiting for our client to be brought to his interrogation cell, sheets of rain poured down. I was told before I left for Cuba that Guantanamo was notoriously dry, so I was not prepared for the rain. But I quickly learned to expect the unexpected.

Camp Echo was built for detainees who were being charged and tried by military commissions. The maze of interrogation quarters looked like a city of tool sheds. The guards led us to one of these sheds and explained how the system worked. They would be back at 12:00 pm to take us to lunch and we had to leave by 5:00 pm. When the door opened, I got my first look at my client, Ahcene Zemiri. He sat at a folding table. He wore an orange jump suit—which, in the prison's color-coded system, indicated an uncooperative prisoner. His feet were shackled and chained to a bolt in the floor. Three plastic chairs faced the table assigned to us. A buzzer hung on the wall, and we could use it to call the guards in the control booth outside.

I looked at the prison cell located inside the shed. It looked like a museum display of artifacts used by the inhabitants: a four-inch thick mattress, a toothbrush, a surgical mask tied between the cage mesh to create a safe spot to store the Quran, and a rubber pen. Beside the cell was a shower that provided privacy only from the waist down. We took our seats and smiled at Ahcene. He had a full beard, dark

eyes, and crooked teeth that gave him a disarming smile. Although we had sent a letter informing him of our arrival, he was never told that he would have lawyers visit that day. He was just told that he had a "reservation," which is the term used for interrogation sessions by the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the U.S. military, and foreign representatives. Fortunately, Ahcene's wife had written to tell him about our arrival. He was allowed to review the petitions, briefs, and orders filed on his behalf. We hoped he believed we were really his lawyers and not the CIA in disguise. At his first meeting with members of our defense team, he sat defiantly, arms crossed as if ready for another interrogation. Gaining trust from a client who had been held for three years without charge or trial presented a considerable challenge. He had been interrogated repeatedly, given limited news of the outside world, endured beatings, and placed in a cage-like cell. Given this background, we were total strangers who had to gain his trust and earn his respect.

We had two days to talk to, listen to, and advise



Our country's reputation as a defender of human rights is stained and diminished when juxtaposed against the reality of Guantanamo.

Ahcene. Our conversations were in French. We were fortunate to have a French-speaking lawyer on our team. Her day was twice as hard as that of the rest of us, translating for six straight hours while we took notes to be turned over for declassification. We had little time to get to know Ahcene, and him to know us. He asked how his wife and son were doing—his wife was pregnant with their first child the last time he saw her. At the end of our meetings, he always mentioned his son. His letters to his wife and family always expressed his yearnings to be with his child.

Road to Guantanamo

The Center for Constitutional Rights spearheaded the litigation on behalf of Guantanamo detainees and recruited volunteer lawyers to represent the hundreds of detainees it had been able to identify. In Rasul v. Bush, 42 U.S. 466 (2004), the U.S. Supreme Court ruled 6–3 that detainees had the right to file for habeas corpus relief, and left it up to the district courts to determine whether detainees had standing to seek habeas relief. Since then, hundreds of lawyers have stepped forward to challenge the detainees' detention. I am part of a team of attorneys at Fredrikson & Byron, P.A. in Minneapolis that has represented Ahcene since 2003. Our team includes a seasoned commercial litigator, an experienced criminal attorney, a fluent French-speaking litigator, and an immigration attorney. The combination of specialties speaks to the complexity of the litigation involved: elements of due process, criminal law, international law, and constitutional law combined with diplomatic and public relations advocacy efforts.

Before we could meet with our client or even read information about him, we had to obtain security clearances that involved personal background checks. The FBI spoke to each attorney personally, to our employer, past employers, friends, and relatives. My favorite question during my background check was whether I associated with any foreign nationals. "You do know that I am an immigration attorney, right?" I replied. It took more than two months to receive clearance. Once cleared, we scheduled a meeting with Ahcene. First, we filed a request through the Department of Defense (DOD) to receive approval of the dates we had asked for to meet with our client. We went to see him in November 2004, June 2005, and February 2006.

To get to Guantanamo, travelers have a choice of either Air Sunshine or Lynx Air, both flying out of Ft. Lauderdale via prop plane around Cuba since it is against U.S. regulation to enter Cuban airspace. Everything brought into Guantanamo is searched by the military. Anything presented to Ahcene must first be cleared. Attorney notes made at client meetings must be handed over and declassified. Anything that remains classified can be read only in a secure facility in Crystal City, VA. Penmanship counts—messy handwriting can earn you a flight out to Virginia to type up notes for declassification.

Ahcene's Journey to Cuba

Ahcene and approximately 400 other detainees still held in Guantanamo have been declared "enemy combatants"—defined by President George W. Bush as an "individual who was part of or was supporting the Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Because of this declaration, Ahcene can be held indefinitely without charge or trial.

A citizen of Algeria, Ahcene left his homeland with one of his brothers to find work in Europe, where he lived in Italy, France, and Spain. He eventually made his way to Canada where he met his wife. He tried to become a legal resident in Canada and filed for asylum. His wife also filed a marriage petition on his behalf,



A uniform and other supplies that are given to detainees lay on a bed in a cell at Camp Delta at Guantanamo Bay Naval Base in Cuba.

What Others are Saying **About Guantanamo**

[The U.S. Court of Appeals for the District of Columbia Circuit's decision to uphold a central component of the Military Commissions Act] allows the president to basically do what he wants to prisoners without any legal limitation as long as he does it offshore.

—Shayana Kadidal, Center for Constitutional Rights Attorney SOURCE: WASHINGTON POST, FEB. 21, 2007, AT A01

A deputy assistant secretary of defense says corporate leaders should pressure law firms to stop representing Guantanamo detainees. The Pentagon says the views do not reflect policy, but legal experts are aghast.

-Nina Totenberg, National Public Radio Reporter SOURCE: WWW.NPR.ORG/TEMPLATES/STORY/STORY.PHP?STORYID=6849592

I believe [the guards are] doing a difficult job in a dangerous place, and they're doing it with honor and integrity.

-Navy Rear Adm. Harry Harris Jr., Joint Task Force Guantanamo Bay Commander SOURCE: WWW.DEFENSELINK.MIL/NEWS/NEWSARTICLE.ASPX?ID=2665

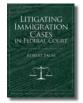
but neither application was approved. Due to the moratorium on Algerian deportations, Ahcene was able to continue living in Canada where he made friends with other Algerians in Montreal. He befriended Ahmed Ressam, who was arrested in 1999 and charged with planning an attack at the Los Angeles airport. Ahcene was never arrested or charged in connection with the Ressam plot. He continued to reside in Canada after Ressam's arrest and had spoken with Canadian authorities. Recently, Ressam wrote a letter to the judge who presided over his trial and sentencing, stating that Ahcene "is innocent" and "did not know anything" about the operation Ressam carried out.2

About 18 months after Ressam's arrest, Ahcene and his wife decided to leave Canada. The media had discussed deporting Algerians and they worried they would be separated from each other. They moved to Afghanistan in June 2001 to raise a family in a developing Islamic society. In October 2001, violence increased in Afghanistan. As the Northern Alliance began taking over cities, the Zemiris felt it was no longer safe for them to remain in Afghanistan. Ahcene and his wife split up, believing it was safer for her to travel with other women. She made it back to Canada, where she gave birth to their son in June 2002. Ahcene did not make it out of Afghanistan. After being injured, he was turned over to Afghan authorities by Afghan villagers for a bounty.

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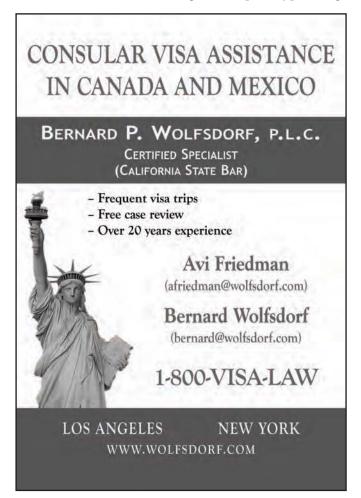
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In late December 2001, he was placed in U.S. custody. He was held in U.S. prisons in Kabul and Kandahar and sent to Guantanamo in late spring 2002. He has been there ever since.

The Legal Challenge

Immigration attorneys have been drawn to Guantanamo-related litigation because they have experienced first-hand what happens when Congress strips judicial review of executive action against foreign nationals. There is a history of relying on international law to defend and protect foreign nationals, and attorneys have spent years challenging administrative regulations that do not comport with the U.S. Constitution. Over the past six years, I have represented many clients who have risked their lives to seek asylum in the United States. Representing someone who has been the subject of aggressive interrogation techniques—and hearing reports of others who claim to have been tortured by or at the acquiescence of the United States—has brought me to the frontlines of the "war on terrorism." Our country's reputation as a defender of human rights is stained and diminished when juxtaposed against the reality of Guantanamo.

The right to habeas corpus has, for many years, been defended and litigated by immigration practitioners on behalf of foreign nationals in the United States. Congress has repeatedly passed leg-



Annual World Day of Migrants and Refugees **Focuses on Family First**

he Institute for the Study of International Migration at Georgetown University in Washington, D.C., commemorated the 93rd Annual World Day of Migrants and Refugees on January 12, 2007. Ellen R. Sauerbrey, Assistant Sec-



Ellen R. Sauerbrey

retary of State for Population, Refugees and Migration, was the guest lecturer. Since this year's theme was the migrant family, Sauerbrey brought attention to the legal barriers in keeping refugee families together as they resettle in the United States. "Immigrants are to be welcomed, not to be feared," said Sauerbrey.

Sauerbrey explained that many deserving refugees have been barred from admission to the United States due to their tenuous associations with terrorist groups—one of the unintended consequences of tougher security measures brought about by the USA PATRIOT Act and the REAL ID Act. In particular, Sauerbrey noted that families are sometimes split up or effectively denied entry altogether when one member is disqualified after allegedly having provided "material support" to a terrorist organization. The Bureau of Population, Refugees and Migration is supporting efforts to amend Department of Homeland Security regulations and instructions in order to increase the availability of waivers for refugees—especially in instances when material support was given under duress.

Sauerbrey highlighted the efforts of some 360 refugee resettlement programs throughout the United States and underscored the positive contributions of refugees to the American society in terms of work ethic and entrepreneurship. "The integration of immigrants [into the United States] is key to our success as a nation," she noted. Sauerbrey concluded the lecture with a call to action—urging participation as a volunteer in local refugee resettlement programs.

Courtesy of Richard Link, Legal Editor with the American Immigration Lawyers Association.

islation attempting to strip habeas corpus review in the immigration arena, as we have seen in the Illegal Immigration Reform and Immigrant Responsibility Act, Antiterrorism and Effective Death Penalty Act, and the REAL ID Act. It comes as no surprise to see court-stripping provisions surface once again for foreign nationals under the Detainee Treatment Act and Military Commissions Act.4 Many times in the past, we have had to resort to the federal courts to ensure that constitutional protections apply equally to foreign nationals. We understand all too well how easy it is for an agency to require mandatory custody of certain foreign nationals, with the Supreme Court having to step in to provide limits on acceptable executive detention.

In Guantanamo-related litigation, the Supreme Court has opened the door for habeas suits, but not a single detainee has ever had a hearing on the merits of a habeas petition. Following *Rasul v. Bush*, the Department of Justice (DOJ) moved to dismiss our petition—along with every other case—on the grounds that the Combatant Status Review Tribunals (CSRT) and the Administrative Review Board (ARB) are constitutionally adequate, and while the detainees are allowed to file petitions under *Rasul*, they are not entitled to a decision on the merits. In separate cases with similar grounds—*Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. 2003) and *Boumediene v. Bush*, No. 05-5062 (DDC __)—Judge Joyce Hens Green ruled that detainees have the right to challenge their detention, yet Judge Richard Leon held that detainees do not have this right. Both cases have been appealed to the U.S. Court of Appeals for the Washington, D.C. Circuit.

Guilty Until Proven Innocent

In addition to challenging the legal sufficiency of the CSRT and the ARB process in the federal district court in Washington, D.C., we are attempting to use the CSRT/ARB process to obtain Ahcene's release. Although this process is not fair or consistent with due process, it

is the only process available until Congress or the courts provide adequate protections. CSRT inadequacies are glaring. Attorneys are not permitted to participate in CSRT hearings. Secret evidence is admissible. Classified evidence is also admissible and exempt from the detainee's review. The deputy secretary of DOD operates and oversees the process. The tribunal is composed of a panel of three commission officers—one of which is a judge advocate—instead of impartial decision-makers. Every detainee is presumed to be an "enemy combatant" with no right to review all the evidence against him or her. The detainee is afforded a nonattorney representative without attorney/client privilege, who must disclose to the tribunal anything he or she learns from the detainee. Not surprisingly, more than 90 percent of Guantanamo detainees have been found to be "enemy combatants." Navy Secretary Gordan England announced that as of March 2005, 558 CSRT hearings were conducted and only 38 detainees were found to no longer be enemy combatants. ⁵ These hearings are conducted with or without the participation of the detainees, and many have chosen not to participate in the CSRT.

If determined to still be an enemy combatant, a detainee will be afforded a periodic review by an ARB. As explained by DOD:

The ARBs are an administrative review process to annually —



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Immigration attorneys have been drawn to Guantanamo-related litigation because they have experienced first-hand what happens when Congress strips judicial review of executive action against foreign nationals.

assess whether there is reason to believe that an enemy combatant might pose a continuing threat to the United States or its allies in the ongoing conflict against al-Qaeda and its affiliates and supporters, and whether there are other factors warranting the enemy combatant's continued detention.⁶

Habeas counsel is permitted to provide evidence for the ARB to review on behalf of the detainee, but unlike the CSRT, the detainee is not permitted to attend or participate at the ARB hearing. In fact, attorneys are not even informed when an ARB hearing has or will occur. DOD confirmed it held 330 ARB hearings in 2006, and has released statistics that show 165 detainees will continue to be detained, 46 have been recommended for transfer, and 0 for release. The other 119 detainees are still awaiting a decision. The New York Times concluded that "[ARB] [has] often fallen short, not only as a source of due process for the hundreds of men held there, but also as a forum to resolve questions about what the detainees have done and the threats they may pose."

The Freedom of Information Act lawsuit filed by the American Civil Liberties Union (ACLU) enabled us to review the CSRT transcripts and the first ARB nonclassified transcripts for our client's case (all ARB hearings are audiotaped). Without ACLU's help, we would not have known when Ahcene's hearing was held or what was even alleged against him. We have learned that his case has gone before the ARB a second time, but as of this writing, we do not know the board's recommendations. We also do not know whether Ahcene participated in the hearing and have no idea whether our submissions on his behalf will influence the outcome.

Inaction Leads to Injustice

We have all read the reports coming out of Guantanamo—hunger strikes, renditions, torture, and, painfully, the death of three detainees by suicide. World opinion has uniformly called for Guantanamo's closure. Hamdan v. Rumsfeld, 548 U.S. ____ (2006), recently affirmed the limitations of the executive branch and has renewed calls to create due process. Sadly, nearly three years after taking on Ahcene's case, little has changed.

I see a glimmer of progress in this process, albeit slow and incremental. Though it is easy to feel powerless working within the government's constraints, detainees' confinement is no longer a secret and some are being released. To remain silent or to take no action allows injustices to continue. Failure to challenge indefinite detention would leave a legacy of shame for future generations.

More importantly, failure to act endorses the illegal and inhumane treatment of 400 human beings at the hands of the world's model democracy. It jeopardizes our country's reputation as a refuge for asylum-seekers across the globe. It keeps potentially innocent men and women locked up and tears families apart. And in at least one case, it keeps a son from the arms of the father he has never met.

EDITOR'S NOTE: On February 20, 2007, in a 2–1 decision, the Washington, D.C. Circuit dismissed both Boumediene v. Bush and Al Odah v. U.S., holding that the writ of habeas corpus did not extend to prisoners in Guantanamo; these cases are being appealed to the Supreme Court.8 The author returned to Guantanamo on March 1, 2007, to meet with Ahcene, who is now held in solitary confinement for 22 hours a day in Camp 5—a maximum security facility with little or no natural light. His last ARB hearing did not change his situation, but he remains hopeful. Ahcene's last request before the author's departure was a DVD of his soon-to-be 5-year-old son.

Debra Schneider is an immigration attorney at Fredrikson & Byron, P.A. in Minneapolis.

Articles in ILT do not necessarily reflect the views of the American Immigration Lawyers Association.

- ¹ See www.defenselink.mil/news/Jul2004/d20040707review.pdf. See also In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 450 (DDC 2005) (citing July 7, 2004, Order of Deputy Defense Secretary Paul Wolfowitz).
- ² M. Carter, "Millennium bomber changes story about friend," Seattle Times, Jan. 4, 2007.
- ³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 310.
- ⁴ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat 2600.
- ⁵ See www.defenselink.mil/news/mar2005/20050330_368.html.
- 6 See www.dod.mil/pubs/foi/.
- ⁷ T. Golden, "For Guantanamo Review Boards, Limits Abound," The New York Times, Dec. 31, 2006.
- 8 J. White, "Guantanamo Detainees Lose Appeal: Habeas Corpus Case May Go to High Court," The Washington Post, Feb. 21, 2007, at A01.

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Having lived 100 years in a 20-year-old body,

He had come to my office beaten and battered.

Displaced in a war where he was forced to fight his brother,

With no family, I faced a man whose heart had truly shattered.

He told me his story of a man on the run,

A conscientious objector unwilling to take up a gun.

Caselaw ran through my head, it was forced military conscription he fled,

And I said to myself, "Why isn't this law dead?"

He asked me, "Sir, is my fear well-founded?"

I paused and thought, "I am truly confounded."

If I take this case, my fee must be cheap,

And if I take this case, I will surely lose sleep.

But if I take this case, I might end this man's strife,

And if I take this case, I might save this man's life.

But I think what of the precedent, this Act, these courts?

He thinks what of his family, to whom will he resort?

I'm young, I'm scared, I want out of this office,

Should I tell him his chances, the risk we won't profit?

And if I hide under my desk, can I elude his stare?

The government looms, they're after me, I can feel it.

We stared at each other, nervous, our hearts pounded,

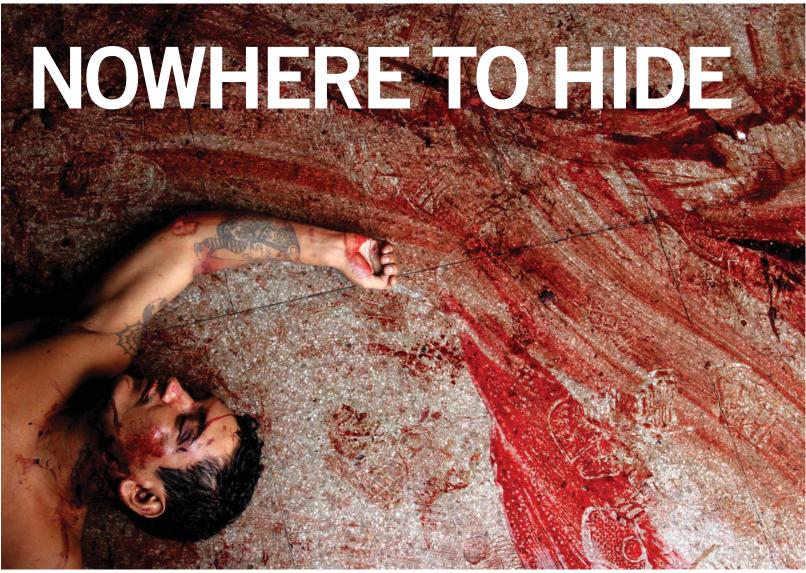
And I thought to myself, "Is my fear well-founded?"

Submitted by Furqan "Sunny" Azhar, a senior law clerk with Mathur Law Offices PC.

Casualties of Central America's Gang Warfare

BY BRITTNEY NYSTROM

ince the early 1990s, criminal street gangs, or maras, have been amassing power and spreading violence throughout Central America—forcing people in those countries to seek safety in the United States. These maras operate virtually unchecked in El Salvador, Guatemala, and Honduras. El Salvador is considered the incubating country for the violent U.S. street gang, MS-13, or Mara Salvatrucha, that first emerged in Los Angeles more than 20 years ago when Salvadoran immigrants "confronted well-entrenched Mexican-American gangs in the barrios where they landed" and created their own Salvadoran gangs on the streets of Los Angeles.1 After El Salvador's civil war ended in 1992, the United States began deporting criminal gang members back to El Salvador. These days, the El Salvadoran-based MS-13 and its rival, 18th Street Gang—also known as Mara 18—are involved in racketeering, drug trafficking, and kidnapping. As a result, waves of individuals and families from El Salvador, Guatemala, and Honduras are fleeing to the United States to seek protection from deadly and widespread gang violence.



AP PHOTO/ RODRIGO ABI

An Uphill Battle

Despite the notoriety gained by Central American gangs, grants of asylum in the United States based on gang violence are rare. The obstacles encountered in seeking asylum based on gang violence in Central America are numerous: (1) fear among adjudicators that a grant of relief in one case will trigger a deluge of similar claims; (2) bias toward applicants who may have participated in gang activity under duress or when very young; (3) a lack of precedent establishing a framework for protection premised on gang violence; and (4) the expansion of increasingly harsh anti-gang measures in Central American countries by law enforcement seeking to contain the gangs. Immigrant advocates must understand why adjudicators are uncomfortable granting protection to the victims of gang violence, and attempt to allay those concerns when handling a gang-based asylum claim.

Obstacles to a Grant of Asylum

Asylum-seekers must fit the definition of "refugee" as defined by the Immigration and Nationality Act (INA) \$101(a)(42) as:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion, or

(B) in such other circumstances as the President after appropriate consultation (as defined in section 207(e) of →

[T]he primary challenge in these cases is convincing asylum officers and IJs that our immigration laws were intended to protect, not keep out, those who risk persecution and even death when they resist the maras.

this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

However, satisfying this statutory definition may not be sufficient for an asylum applicant with a fear of persecution at the hands of the maras.

Lack of Favorable Precedent

The federal circuit courts and the Board of Immigration Appeals (BIA) have yet to articulate favorable precedent for granting protection from Central American gangs. In several cases that have reached the federal courts and the BIA, the applicants were found ineligible for relief for various reasons: Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004) (lacking nexus between persecution and applicant's family membership); Suazo-Umanzor v. Gonzales, 127 F. App'x 131 (5th Cir. 2005) (failure to challenge lack of nexus between persecution and statutory grounds); Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir. 2003) (finding "tattooed youth" did not meet statutory definition of a social group); Menjivar v. Gonzales, 416 F.3d 918 (8th Cir. 2005) (declining to recognize gang members' retaliatory persecution of a victim who aided police as persecution attributable to the government where police conducted investigation); Aquino v. Ashcroft, 89 F. App'x 71 (9th Cir. 2004) (lack of nexus between persecution and motive as required by the statute); Romero-Rodriguez v. Gonzalez, 131 F. App'x 203 (11th Cir. 2005) (attempted recruitment was not persecution on account of statutory grounds for asylum).

Some courts have cited the U.S. Supreme Court's ruling in INS v. Elias-Zacarias, 502 U.S. 478 (1999), to deny relief based on forced recruitment into a gang. Thus, asylum-seekers who fear being forced into the ranks of a gang must distinguish their situation from Elias-Zacarias by establishing that they were specifically targeted for recruitment not because of the gang's agenda, but because of a statutorily protected ground such as political opinion, religion, or membership in a particular social group.

Alternatively, several immigration judges (IJs) have granted asylum, withholding of removal under INA \$241(b)(3), or protection under the Convention Against Torture (CAT) to applicants who established a fear of persecution at the hands of Central American gangs.² For example, in an unpublished opinion titled *Matter of* D-V-, (Sept. 9, 2004) (San Antonio, TX), the IJ granted asylum to a young man who had resisted forced recruitment into the *maras*. In her opinion, the IJ found that refusal to join a gang was "the ultimate expression of a political opinion." Id. Because nearly all of the immigration court decisions are unpublished, they are of questionable precedential value before another adjudicator.

Fear of Opening Floodgates

Because gangs in Central America are widespread and virtually uncontrollable, adjudicators may fear that establishing favorable precedent for gang-based asylum claims would result in a rush of asylum-seekers fleeing to the United States. Asylum claims based on membership in a particular social group are most vulnerable to this fear.

In *Lopez-Soto v. Ashcroft*, the fear of future immigration floods appears to have played a central role for the appellate court. Here, the IJ had found that the applicant was at risk of persecution not because the murder of his brother and two cousins indicated a vendetta against the family by the Mara 18 gang, but because he belonged to a larger social group of teenage males living in a part of Guatemala where the police had ceded control to the gangs. Unfortunately, the Fourth Circuit determined that there was not sufficient evidence to uphold the IJ's decision, even though it read the evidence as capable of supporting the narrower social group articulated by the IJ's decision. *Id.* at 238.

Gruesome murders and violent crimes committed locally by members of Central American gangs are given extensive coverage in local newspapers around the country.3 For example, a recent Washington Post article describes how MS-13 operatives who emigrated from El Salvador to Northern Virginia routinely kill rival gang members and greet each other with the words "kill, rape, and control."4 Media portrayal of street gangs invading America surely does not escape the attention of immigration adjudicators, either behind the desk at the asylum office or on the bench in immigration court. Therefore, it comes as no surprise that asylum claims hinging on criminal street gang activity would receive an extra layer of scrutiny by an adjudicator. However, knowledge of the ruthless tactics employed by gang members also may lend support to an asylum applicant's story of persecution for resistance or defiance of the gang.





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FACES OF SORROW—Real Victims Behind Maras Abuses

The following people are actual asylum applicants who suffered at the hands of the Central American maras syndicate. One has a bittersweet ending, the other a hopeful beginning. Both scenarios show just how lacking and ill-equipped the U.S. immigration system is in handling such cases.

José—Forced Gang Recruitment

HILE ATTENDING HIGH SCHOOL IN EL SALVADOR, José was repeatedly approached by menacing MS-13 gang members who demanded money. José refused to pay them off and encouraged his friends not to relent to their demands. Because of his outspoken resistance, MS-13 members increasingly harassed José and threatened to force him into the gang by tattooing him with their gang insignia. José finally consented for fear of his safety. But rather than joining on the spot, he retreated to his parents' home and lived in virtual seclusion. He did not seek help from the local police since he knew they were ill-equipped to handle the gang problem and suspected some officers were complicit in gang activity. When José saw his harassers walking through his parents' neighborhood with a tattoo machine, he knew he was no longer safe in El Salvador.

José and his family decided that the only option to save his life was to get him out of El Salvador and into the care of an uncle in the United States. Too scared to wait for a passport and a visa to be issued, José took a bus to Guatemala where he purchased a passport and plane ticket from a street vendor for his journey to Washington, D.C. Airport inspectors were not fooled by José's documents and placed him in detention while they arranged to have him deported back to El Salvador. An asylum officer found that José had a credible fear of persecution in El Salvador, which allowed him to pursue his claim for asylum before an IJ. However, the Department of Homeland Security deemed José a flight risk and forced him to fight for his immigration case while in detention because he had few documents to verify his true identity, and his relatives in Washington, D.C., were not U.S. citizens or lawful permanent residents.

José's pro bono counsel argued that he had endured past persecution on account of his political opinion not to join a gang and because of his religious beliefs that conflict with a gang lifestyle. The IJ found that José's numerous encounters with the gang members did not rise to the level of past persecution and denied José's claims for asylum, withholding of removal, and protection under CAT.

Although the judge did not reach the issue of future persecution, the defeat in immigration court shattered José's desire to pursue an appeal to the BIA where success rates are even slimmer than before an IJ. Eventually, José elected to accept the judge's incomplete decision and was deported back to El Salvador.

The Menendez Family— **Retribution for Seeking Justice**

R. MENENDEZ SAW HIS COUSIN SHOT AND KILLED by gang members in a small town in El Salvador as the cousin was stepping out of a car. Local police offered protection to him and other Menendez family members while they were preparing to testify in court regarding the incident. They proceeded to testify despite repeated threats of being assassinated by the gang members responsible for their cousin's death. After their testimonies resulted in a guilty verdict for one of the gang members, the maras continually threatened and intimidated the Menendez family. Mr. Menendez and his wife secured tourist visas to the United States for themselves and their two young children, and they are now in the middle of asylum proceedings.

There is an 18-month gap between José's claim and the Menendez family's claim. Since the conclusion of José's asylum trial, local media has extensively covered horrific gang violence perpetrated in the vicinity of the immigration court by members of MS-13 and Mara 18. This coverage may benefit the Menendez family's claim by demonstrating the ruthless nature of the gangs that targeted them in El Salvador.

Additionally, the Menendez family represents a smaller subset of El Salvador than José, a teenage boy who was targeted by gang members for forced conscription. The social group of judicial witnesses whom the police cannot protect—which is significantly narrower than the social group of young males who are targeted for gang membership— may alleviate the "floodgates" fears of some adjudicators.

Another factor working for the Menendez family is that, unlike José, they are not pursuing their asylum claim while held in detention. They have been working with their attorney for months to build their asylum case and gather supporting documentation. Also, should an IJ deny the Menendez family's claims for asylum, withholding of removal, and CAT protection, they are much better positioned than José to pursue an appeal. Strong appellate claims benefit not only the asylum-seekers who stand to gain immigration relief from a higher court, but could also lead to much-needed favorable precedent for bona fide refugees fleeing gang violence in Central America.

PRACTICE POINTER: For asylum cases where the applicant was actively involved in a gang, attorneys should be prepared to address the charge that the applicant was a persecutor of others or committed a serious nonpolitical crime outside the United States, and as such is barred from asylum under INA §208(b)(2)(A) and withholding of removal under §241(b)(3)(B). Attorneys representing a former gang member may argue that any persecution committed by their client was not willing. See Hernandez v. Reno, 258 F.3d 806 (8th Cir. 2001) (holding that the BIA must consider the involuntariness of an applicant's involvement with persecutory actors). Furthermore, unless an asylum-seeker persecuted others "on account of race, religion, nationality, membership in a particular social group, or political opinion," he or she is not a persecutor of others under the immigration laws. See INA §208(b)(2)(A)(i). Alternatively, deferral of removal under CAT is not subject to the persecution or criminal bars.

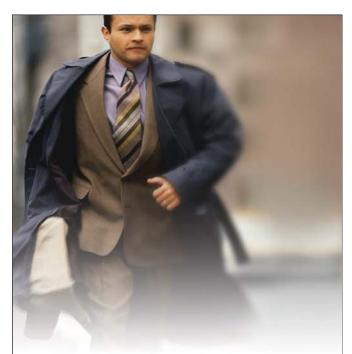
Profile of a Gang Member

Much of the discourse surrounding gang membership focuses on tattoos. As discussed further below, waves of gang members deported from the United States to Central America prompted the governments of El Salvador, Honduras, and Guatemala to criminalize gang affiliation. Strict laws introduced in Honduras in 2002 and quickly replicated in El Salvador empower those governments to imprison people merely on suspicion of gang membership. Tattoos—the most visible sign of gang membership—are often sufficient evidence for local police to detain a suspected gang member. Voluntary removal of gang-related tattoos can be presented to the adjudicator as evidence of an asylum-seeker's conviction to dissociate from the gang, since U.S. Immigration and Customs Enforcement (ICE) trial attorneys have cited the presence of tattoos as sufficient evidence that an individual poses a danger to the community.

Anti-Gang Policies in Central American Countries

In order to qualify for a grant of asylum under INA \$208, an individual must fear persecution by his or her own government or by a group that the government is unable or unwilling to control. The fact that gang violence in El Salvador, Guatemala, and Honduras is beyond the control of those governments is virtually unassailable. Additionally, some asylum-seekers argue that the local police are complicit in gang activity and receive bribes for not hindering the gang members' activities.

However, the regional governments are taking steps to take power back from the gangs. Central American countries have enacted strict anti-gang policies to clamp down on rampant crime and drug trafficking. These laws, known as *mano dura* or firm hand, make gang membership a crime punishable by harsh prison terms. But gang members imprisoned under these laws continue to operate their criminal enterprises from behind bars. For example, the government seized a jail in Guatemala recently after it was discovered that jail officials had relinquished wholesale



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For asylum cases where the applicant was actively involved in a gang, attorneys should be prepared to address the charge that the applicant was a persecutor of others or committed a serious nonpolitical crime outside the United States

control to inmates who had ruled the jail for the past 10 years.⁶ Thus, although government efforts in Central America to counter gang activity are prolific, their effectiveness is disputed.

Tackling the Obstacles

Rampant gang violence in Central America has been driving asylum-seekers to the United States for years, yet the lack of favorable governing precedent in these cases remains a persistent challenge. Representatives determined to bring asylum claims premised on gang violence must meet this challenge squarely by delivering well-documented, carefully reasoned cases to adjudicators. Per-



haps even more difficult is the hurdle of convincing an asylumseeker with a fear of gang violence in Central America to trust in a process that has only slowly begun to recognize the validity of gang-based asylum claims.

The CAT Plan

As gang violence in Central America worsens, and reluctance to recognize gang-based asylum claims gradually erodes, representatives of these asylum-seekers are relying on claims for protection under CAT. Ironically, the burden of proof is higher for a CAT claim (torture is more likely than not) than for an asylum claim (well-founded fear of persecution interpreted as a reasonable possibility of persecution). Yet, unlike asylum, CAT does not require that the feared persecution be on account of one of five designated grounds: race, religion, ethnicity/nationality, political opinion, or membership in a particular social group. The nexus between feared persecution and the five statutory grounds for supporting an asylum claim has been the largest sticking point for federal courts considering gang-based asylum claims.

A CAT claim also requires that the government of the home country either acquiesces to the torture or is willfully blind to it. Again, harsh anti-gang laws enacted by most Central American countries could be considered proof that these governments are not acquiescing to gang violence, but in practice, these laws have done little to curb gang violence and even underscore the assent of law enforcement in ceding control to the gangs. Thus, if an applicant can demonstrate that his or her country has essentially yielded power to the gangs and that the gangs are more likely than not to target him or her, a CAT claim can provide relief from deportation.

Challenging Resistance

As gangs like MS-13 and Mara 18 expand their control over Central America, asylum claims in the United States based on gang violence are growing in number. Favorable decisions for asylum-seekers fleeing the gangs are rare. There is still no persuasive authority that enables victims of persecution by Central American gangs to meet the refugee definition. Until favorable precedent exists to reassure adjudicators that gang-based asylum claims can be meritorious, immigration attorneys will continue to encounter resistance and even bias against victims of Central American gang violence seeking asylum in the United States. Thus, the primary challenge in these cases is convincing



asylum officers and IJs that our immigration laws were intended to *protect*, *not keep out*, those who risk persecution and even death when they resist the *maras*.

Brittney Nystrom works for the Capital Area Immigrants' Rights Coalition in Washington, D.C.

Articles in ILT do not necessarily reflect the views of the American Immigration Lawyers Association.

Notes

- ¹ L.J. Rodriguez, "A Gang of Our Own Making," New York Times, Mar. 28, 2005, at A17.
- ² In re Calderon-Medina, U.S. Immigration Ct., Los Angeles, CA (May 1, 2002) (unpublished opinion); In re Enamorado, U.S. Immigration Ct., Harlingen, TX (Nov. 22, 1999) (unpublished opinion); In re Orozco-Polanco, U.S. Immigration Ct., El Paso, TX (Dec. 18, 1997) (unpublished opinion); In the Matter of —, U.S. Immigration Ct., Eloy, AZ (Feb. 17, 2005) (unpublished opinion); In the Matter of Sandra, U.S. Immigration Ct., Baltimore, MD (Nov. 8, 2006) (unpublished opinion with BIA appeal pending).
- ³ J. Seper, "Al Qaeda seeks tie to local gangs," *The Washington Times*, Sept. 28, 2004; *see also supra* note 1.
- ⁴ See www.washingtonpost.com/wpdyn/content/article/2006/10/17/ AR2006101701310.html.
- ⁵ See www.migrationinformation.org/Feature/display.cfm?id=394.
- 6 See http://news.bbc.co.uk/2/hi/americas/5380920.stm.





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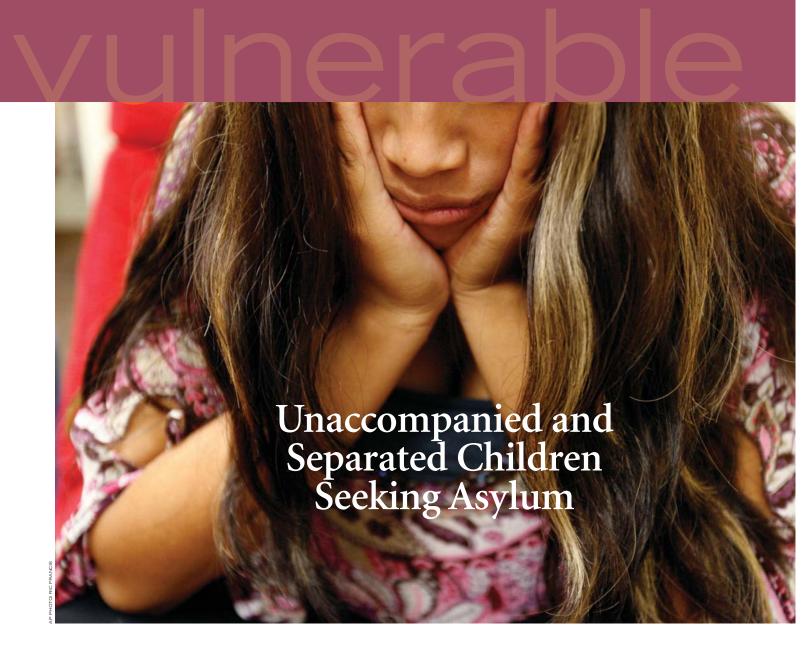


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BY JACQUELINE BHABHA

FORMER IMMIGRATION JUDGE (IJ) ONCE SAID, "Children are the biggest void in all of immigration law." Yet, despite their vulnerable and disenfranchised situation, these young migrants are more likely to encounter obstacles and hostility in comparison to their similarly situated adult counterparts from a system ostensibly designed to protect them. This void in immigration and refugee law is remarkable when contrasted with other areas of U.S. law, such as criminal and family law, which acknowledge the specificity of children's needs. The consideration given to alien children falls far short of the standards the U.S. society demands for its own vulnerable minors. The current immigration system generally ignores children's special needs and thrusts them into a complex and bewildering system. Of the 7,787 children that the Department of Homeland Security (DHS) arrested last year, at least four federal government departments and 15 agencies within those departments interacted with these unaccompanied and separated children in some way. This system is described as "Kafkaesque in its complexity and inefficiency."

and alone

Seeking Answers World-Wide

My hearing in immigration court was the first time I had ever talked in public about my experience in Uganda. It felt like I was reliving it. —CHILD ASYLUM-SEEKER

The Seeking Asylum Alone International Comparative Research Study (Study) conducted between 2004 and 2006—codirected by this author and supported by a grant from the John D. and Catherine T. MacArthur Foundation—focused on the circumstances of child asylum-seekers in the United States, the United Kingdom, and Australia, where the issue has been salient. The U.S. report of this Study—a 200-page document based on extensive field research, interviews, and statistical analysis—has just been published and presented to policy-makers and advocates.⁴

The U.S. research included solicitation of quantitative data from 14 federal government agencies interacting with unaccompanied and separated children, 70 voluntary and unremunerated interviews (both clustered around a particular city or region and targeted to selected individuals), and analysis of government legislation, case law, policy guidelines, and training manuals. The interviewees included current and former government employees at both the national and local level, state employees, advocates, legal representatives, nongovernmental organizations employees (including academic, mental health, and social service institutions), and children or youth involved in immigration proceedings. While some agencies were generous with their time and information, others were evasive or completely uncooperative. Attempts to interview staff at the U.S. Immigration and Customs Enforcement (ICE) within DHS were unsuccessful. A request to interview a key government official who is a former Immigration and Naturalization Service (INS) juvenile coordinator now employed by ICE with authority over matters concerning minors, was deferred because the "request was still pending with superiors."5 Requests to the ICE public relations office went unanswered. The requests for official data yielded written responses from 11 out of 14 agencies, statistical data from six agencies, and no response at all to three Freedom of Information Act (FOIA) inquiries sent to DHS. The response from the Executive Office of Immigration Review (EOIR) to the request for statistical information on children's appeals before the Board of Immigration Appeals (BIA) elicited this response: "EOIR's current electronic records system does not allow entries for dates of birth. Therefore, we are unable to

accurately identify cases, whether new decision or completed case decisions, involving children under the age of 18. Recognizing this and other limitations of our electronic records systems, EOIR has been dedicating tremendous resources over the past few years to designing and implementing a new system."⁶

System of Deficiencies

I was sent to the hole for five days. You are not supposed to go there for more than one day, but they just forgot about me.

—CHILD ASYLUM-SEEKER

The system's deficiencies, as documented in the Study, are both procedural and substantive. The procedures evidence an alarming disregard for children's needs or interests. Not only are children subjected to the same proceedings and evidentiary standards as adults, they are usually exposed to this adult-focused system without representation or mentorship. Despite the well-documented finding that legal representation significantly increases the likelihood of a positive outcome in an asylum case—by a factor of six according to one study—only 10 percent of unaccompanied or separated children have legal representation.7 While legal representation is considered a right in domestic juvenile delinquency court proceedings (children are often assigned a guardian ad litem as well as an attorney in those cases), the same protections do not apply in immigration proceedings despite the potentially devastating effect of a refusal of asylum and removal from the United States. Children are given a list of free legal service providers at the time of apprehension and are expected to find their own representation thereafter. In practice, even this very minimal official safeguard is deeply flawed. A DHS Office of Inspector General (OIG) report notes that legal service lists examined were not "consistently accurate," with more than 50 percent of the attorneys listed ultimately unavailable. An OIG examination of legal service lists distributed by three border patrol sectors revealed that out of 29 listed offices, eight did not represent children, three phone numbers were not in service, and four offices were unavailable despite multiple attempts.

Changes in the System

There is no statutory limit on the length of time that children can be deprived of their liberty pending adjudication of their asylum claims. The use of incarceration has diminished \rightarrow

Detention severely hinders [children's] cases. Kids are often so desperate to get out that they will say anything or sign anything just to get out. They often waive their legal rights.

-ASYLUM ATTORNEY

significantly since responsibility for the care of unaccompanied and separated children was transferred in March 2003 from legacy INS to the more welfare-oriented Organization of Refugee Resettlement (ORR) within the newly established DHS. There also is a substantial decrease in the percentage of detained children—from more than 30 percent to under 3 percent—placed in secure detention facilities alongside juvenile offenders.8

Lingering Negative Impact

They let me out for only 15 minutes a day. I was sick. There was a button I could push to get medical attention, but no one ever came. -CHILD ASYLUM-SEEKER

Continued use of secure facilities to detain children—including cases where this option is selected by default because no alternative accommodation is available—constitutes one of the most egregious failings of the U.S. system. Children interviewed for the Study confirmed the deeply traumatizing effect of secure detention and said, "They let me out for only 15 minutes a day. I was sick. There was a button I could push to get medical attention, but no one ever came."9 Secure detention is sometimes compounded by additional punishment. One child stated, "I was sent to the hole for five days. You are not supposed to go there for more than one day, but they just forgot about me." While the use of handcuffs and shackles on children in secure immigration detention has been reduced, it has not disappeared. The Study cites (1) the routine use of shackling by Marin County Juvenile Hall in San Rafael, CA, when it sends detained children to immigration court; and (2) the continued use of shackling by some border patrol sectors. To the researchers' knowledge, no other country uses these harsh and inappropriate restraints for unaccompanied or separated children.

Even nonsecure but prolonged detention can exacerbate a child's sense of anxiety or depression. A predictable consequence of the negative impact of incarceration is the desperation to secure release—a reaction that can permanently prejudice the child's chances of securing protection. One attorney commented, "Detention severely hinders cases. Kids are often so desperate to get out that they will say anything or sign anything just to get out. They often waive their legal rights."10

Immigration Court

In court, I was nervous. I am afraid. I am ready to do whatever the immigration judge says because he is powerful.

-CHILD ASYLUM-SEEKER

It is not just the custodial arrangements during the asylum process that are deeply unsatisfactory for children. This blindness to children's needs is also evident in the absence of mandatory child-specific procedures for immigration court hearings involving children. Sometimes, this produces anxiety about the judge's response to the child. One child said, "The [immigration] judge was sitting up high. [He] [n]ever takes [the] pen out of [his] mouth when he talks. I don't think he likes me much." Inappropriate procedures can elicit a traumatic reaction mirroring the original experience of persecution, as another child stated, "My hearing in immigration court was the first time I had ever talked in public about my experience in Uganda. It felt like I was reliving it."

Though the chief immigration judge told researchers that there was "nothing wrong with [the immigration hearing] being an adversarial setting,"12 many of the children interviewed had a radically different perspective. "I would have been less nervous if the setting was not so formal," commented one child. In response to a question about whether he understood what was going on, another replied, "In court, I was nervous. I am afraid. I am ready to do whatever the immigration judge says because he is powerful." Far from protecting vulnerable applicants and assisting with recovery from the effects of past persecution or traumatic loss, immigration proceedings may cause the reverse—further punishment to the child by forcing him or her to relive horrors past, and thus, introducing new stressors into already complex social and psychological situations.

Inadequate Legal Standard

I was denied asylum because the immigration judge did not believe my story because I didn't look him in the eye when I was testifying. It is not in my culture to look older people in the eyes. The immigration judge was very strict. He should have understood that I'm from a different culture and [that] I was raised that way. -CHILD ASYLUM-SEEKER

The immigration and asylum system's procedural defects in unaccompanied and separated children's cases are compounded by substantive inadequacies in the application of the relevant legal standard. Though the U.S. definition of a refugee or asylumseeker—based on the 1951 Convention Relating to the Status of Refugees—is age-neutral, its application has traditionally been adult-centered. One reason is that there has been a failure to explore the open-endedness of key concepts in the refugee definition including "persecution" and "well-founded fear," and apply them to child-specific situations. In fact, there are three distinct categories of child persecution that are relevant: (1) persecution for both adult and child asylum-seekers (fleeing to escape politically or religiously motivated persecution); (2) child asylum-seeker is central to the harm inflicted or feared (including fleeing from gangs or armies, child abuse, or forced marriage); and (3) the behavior complained of rises to the level of persecution when inflicted on a child, even though the same behavior may not be considered persecution in the case of an adult (being incarcerated for short periods of time or witnessing violence inflicted on close family members).

Furthermore, there has been an assumption that children are not really "refugees," that they are either too insignificant to be targets of persecutory hostility, or they are too immature or innocent to be activists or otherwise engaged in circumstances giving rise to persecution. This adult-centric approach undermines the children's chances of articulating successful claims. There is a widespread belief that even if these children are minors, these applicants are not really "children" like our "children," but young adults whose tough life experiences and cultural expectations prepare them for treatment appropriate to adults. This approach is compounded by an extensive skepticism about applicants' claims to be children, which frequently results in age determination tests. These tests are generally unsatisfactory—relying on discredited single-factor tests that purport to translate an anatomical measurement into a precise age. As a prominent doctor quoted in a recent report, "I am extremely troubled by the inaccuracy of the current INS [sic] practice of using bone-age and dental-age standards to judge chronologic age among undocumented immigrants and asylum seekers."13

Lack of Case Precedent

Given the numerous shortcomings in the protections afforded unaccompanied and separated children in the asylum process, the number of federal court cases addressing the issue is surprisingly small. The Study suggests that this is more a reflection of a dearth of available legal representation than of significant protection issues. It discusses the most significant and relevant U.S. Supreme Court cases including *Plyler v. Doe*, 457 U.S. 202 (1982), which prohibits states from discriminating against the undocumented (including asylum-seeking children) in the provision of public education, and promotes the notion that children likely to become permanent members of American society should not be barred from access to fundamental rights and effective membership in the society. Reno v. Flores, 507 U.S. 292 (1993), considered legacy INS policy regarding detention and treatment of unaccompanied children in government custody and articulated the important principle that these children should be placed in the "least restrictive" setting appropriate to their specific needs.

The Study also reviews relevant decisions by circuit courts of appeal and comments on the expansion of advocacy in this area in recent years, resulting in the gradual development of an innovative and trend-setting body of case law that provides a welcome model of excellence for other countries. For example, the courts recently have recognized children with "disabilities that are

The Seeking Asylum Alone International Comparative Research Study concluded with 10 principal recommendations outlined below:

- 1 Federal agencies should improve coordination, consistency, management, performance, and data-gathering throughout the immigration and asylum systems as these impinge on unaccompanied and separated children. Children's needs and vulnerabilities must be at the center of the system.
- 2 Consistent and uniform definitions of unaccompanied and separated children need to be implemented across agencies to ensure that vulnerable children no longer fall through administrative cracks.
- 3 Guardians ad litem should represent children in federal custody for immigration violations, and federal agencies with an interest in fair and efficient court proceedings for children (such as EOIR, ORR, and ICE) should fund legal orientation and representation programs for children in immigration proceedings.
- 4 Secure detention, handcuffs, and shackles should never be used for children in immigration proceedings unless there is a risk of harm to the child or to others.
- There should be noninstitutional placements particularly for longer-term placements. Children should be released to family whenever possible, and children without relatives should be cared for in home-like arrangements as promptly as possible. Federal agencies should uniformly adopt a policy of considering the best interests of the child and the least restrictive setting in placement decisions.
- **6**The notion of child-specific prosecution should be developed and incorporated into training decision-makers across all agencies.
- **7** Responsibility for making age determinations in disputed cases should be transferred from the enforcement-driven ICE to the more welfare-oriented ORR.
- All child asylum applicants should have their claims heard initially in the more child-friendly affirmative procedures at the asylum office and staffed by specially trained asylum officers. When children's cases end up in immigration court, the proceedings should be child-friendly and accommodate children's particular needs as set out in the EOIR "Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children," which should become requirements rather than mere suggestions.
- Judges should be encouraged to specialize in children's asylum cases, and there should be more frequent training of all officers involved in these cases, including the asylum office—especially immigration judges, trial attorneys, and the BIA.
- 10 Child asylees should be allowed to confer derivative status to their immediate family members (parents and siblings) just like adult asylees.

Whether the cause is cultural ignorance or adult-centered indifference, the consequences for child asylum-seekers can be devastating.

long-lasting or permanent in nature and parents who care for them" as members of a particular social group within the meaning of the refugee definition. Female circumcision also has been held to constitute persecution, as has domestic and familial violence. Other attempts to expand the protective scope of asylum for children have not so far been upheld, though this may change in the future. For example, Honduran street children and children fleeing forced recruitment have not been successful in claiming asylum. However, a child who left China without the requisite official permission and claimed that he risked torture if returned because of his illegal departure succeeded in having his removal order vacated by the Seventh Circuit.14

Dismissing Children's Credibility

Judge [X] hates me.

-CHILD ASYLUM-SEEKER

The Study outlines several other factors that contribute to the difficulties encountered by unaccompanied and separated child asylum-seekers. A central one is the problem of credibility. A pervasive institutional culture of suspicion—often approximating hostility—seems to characterize the entire system within which children's asylum claims are processed. "I was denied asylum because the immigration judge did not believe my story because I didn't look him in the eye when I was testifying," said one child. "It is not in my culture to look older people in the eyes. The immigration judge was very strict. He should have understood that I'm from a different culture and [that] I was raised that way."15 A child's response to his judge's unsympathetic manner during the hearing was, "Judge [X] hates me." 16 Whether the cause is cultural ignorance or adult-centered indifference, the consequences for child asylum-seekers can be devastating.

Incomplete Data Collection

Another serious problem is the remarkable lack of rigorous or systematic data collection. The Study's findings for statistical records are disappointing—with the exception of the asylum office that evidenced a significantly higher standard of record-keeping than the border patrol, the immigration court, or the other agencies. This defective information-gathering system is indicative of an official indifference to the problem of unaccompanied and separated child asylum-seekers and a serious impediment to diligent monitoring of official conduct. Benchmarks for improved performance, increased access to legal representation, or appropriate disposal of cases cannot be rigorously tested without consistent data collection.

Policy and Practice Recommendations

The Study ends with a series of conclusions and detailed policy

and practice recommendations. The first main argument is that the United States simply does not provide adequate protection to unaccompanied and separated children—a protection deficit that needs to be recognized as a systematic failure to acknowledge the primacy of childhood in this population. Second, children applying for asylum may have a stronger claim to asylum than has been recognized or acknowledged so far because they are being inappropriately excluded from the asylum system or denied protection. Third, the problems and solutions identified in the Study can be addressed easily in the United States without jeopardizing government migration management agenda or establishing reckless incentives to use children as migration anchors or investment commodities. Hopefully, the system will pay closer attention to these recommendations and begin to follow the widely accepted principle articulated in the 1989 U.N. Convention on the Rights of the Child regarding the primary consideration of a child's "best interest" in deciding the fate of an unaccompanied or separated child asylum-seeker.17

Jacqueline Bhabha is the Jeremiah Smith Jr. Lecturer in Law at Harvard Law School, the executive director of the Harvard University Committee on Human Rights Studies, and an adjunct lecturer in Public Policy at the Kennedy School.

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Notes

- ¹ J. Bhabha & S. Schmidt, Seeking Asylum Alone, United States: Unaccompanied and Separated Children and Refugee Protection in the U.S. 7 (Human Rights at Harvard 2006). See www.humanrights.harvard.edu.
- 2 Id. at 6.
- 3 Id. at 40, 42.
- 4 Id. at 3.
- 5 Id. at 10.
- 6 Id. at 186.
- ⁷ *Id.* at 7.
- 8 Id. at 85-86.
- 9 Id. at 87.
- 10 Id. at 89.
- 11 Id. at 112.
- 12 Id. at 151.
- 13 Id. at 116.
- 14 Id. at 162-164.
- 15 Id. at 111-112.
- 16 Id. at 112.
- ¹⁷ Convention on the Rights of the Child, adopted Nov. 20, 1989, entered into force Sept. 2, 1990, G.A. Res. 44/25, 44 UN GAOR, Supp. (No. 49), U.N. Doc. A/44/49 at 166 (1989), reprinted in 28 ILM 1448 (1989) (hereinafter Convention on the Rights of the Child).

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Pro BONO / by Regina Germain and Ana Dubrovsky

Top Firm Attorneys Advocate Asylum

HE DENVER FIRM of Otten Johnson Robinson Neff + Ragonetti (Otten Johnson) is considered by many to be the number one real estate firm in Colorado, according to *Chambers and Partners' Guide to America's Leading Lawyers for Business*. Despite hectic schedules, attorneys at this firm still find the time to do pro bono asylum work. Thomas Macdonald and Robert Attai have each taken cases through the Rocky Mountain Survivors Center (RMSC). RMSC is a nonprofit organization that assists immigrants who are survivors of torture. Thomas and Robert have no prior immigration law experience, but both are excited about the challenge to use their legal strengths in a new field.



Thomas Macdonald

Macdonald's Philosophy

Thomas has been involved in land use litigation at Otten Johnson since 1985. He graduated from the University of Colorado School of Law and has done pro bono work with the American Civil Liberties Union in Colorado. Thomas took his first asylum case through RMSC in May. His client—a woman from Colombia—had been granted asylum at her merits hear-

ing, but the government appealed the decision and Thomas became involved from that point. It is an ideal case, since his expertise—land use law—is largely at the appellate level.

"It's hard to think of something more important than helping victims of torture," said Thomas. He is dismayed by the recent furor over immigration and added, "It's the worst kind of fear-mongering. Politically, we seem to be demonizing immigrants." The pro bono asylum work gives Thomas an opportunity to counteract that negative political force.

Attai's Advantage

Robert is a 1997 graduate of George Washington University Law School and holds a master's degree in Foreign Service. He joined Otten Johnson in 2004 and handles cases dealing with corporations, partnerships, securities, business mergers and acquisitions, international transactions, and corporate finance. Prior to his legal career, Robert worked at the U.S. Department of State and in the Office of the Secretary of Defense in Washington, D.C.

Several years ago, Robert attended an RMSC informational session while doing pro bono guardian ad litem work with abused children. He liked the idea of being directly helpful to asylum-seekers. He explained that as a transactional attorney, "opportunities for pro bono legal work are



Robert Attai

sometimes fairly limited." After joining Otten Johnson, Robert soon became involved with RMSC and began devoting some of his time to asylum cases.

Robert's first asylum case in May 2006 required a good deal of research and retrieval of corroborating documents from the client's home country and in the United States. His client is an African woman victimized by female genital mutilation and faces persecution for her religious beliefs. RMSC was able to provide a translator to assist with communication and other support—including medical doctors willing to donate their time to examine the client and document physical evidence of torture. The asylum application is almost complete and will be submitted soon.

Because of Thomas [Macdonald], Robert [Attai], and other attorneys willing to donate time and effort in assisting survivors of torture, immigrants have access to incredible resources and invaluable legal expertise.

Asylum work enables Robert to use his transactional skills, government experience, and expertise in international matters. This work also appeals to his "sense of patriotism," he said. "It's what America is all about—helping those who face physical persecution and abuse as a result of their religious beliefs, ethnicity, or political views."

Robert's father immigrated to the United States in the 1950s, and he credits his father with fostering a long-standing interest in international issues. His education, work experience, and personal interests all blended to make asylum work a good fit for an attorney seeking to do meaningful pro bono work.

A Firm's Commitment

Both Thomas and Robert appreciate the support offered by Otten Johnson in carrying out their pro bono work. Thomas said, "Attorneys can utilize the firm's infrastructure to do pro bono work." In fact, at Otten Johnson, the staff librarian maintains thorough research on up-to-date country conditions, and partners are willing to discuss pro bono ideas and issues, while reliable secretaries help process all of the paperwork. Several attorneys at Otten Johnson are involved with pro bono work in a variety of other fields and many contribute to charities that do not involve legal services.

Asylum applicants have a right to

representation but access to counsel is limited. Otten Johnson is one of several firms that support pro bono work by their employees. Because of Thomas, Robert, and other attorneys willing to donate time and effort in assisting survivors of torture, immigrants have access to incredible resources and invaluable legal expertise.

Regina Germain is legal director of RMSC and a member of AlLA's Pro Bono Services Committee, and **Ana Dubrovsky** is a second-year student at Northeastern University School of Law and research assistant for the Domestic Violence Institute.

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PRO BONO PROFILE

Meet Heather Toft and H. Anne Nicholson

eather Toft and H. Anne Nicholson accepted a pro bono challenge presented to them by a partner at their Dorsey & Whitney Minnesota office in late 2005. They were asked to represent a client in removal proceedings through the South Texas Pro Bono Asylum Representation (ProBAR) project located in Harlingen, TX.

Anne has been an associate in the firm's banking and commercial group for two years, while this is Heather's fifth year as a commercial litigation associate. Both have represented affirmative asylum-seekers but have minimal experience in removal proceedings. Heather and Anne were not prepared for how invested they would become in this case. Anne reminisced, "The whole experience was heightened emotionally because of the unique setting of detention."

Their client was a 27-year-old Somali man named Abdirisak, who confided in his lawyers that he had made the arduous journey to the United States "because all I want is to be safe." The immigration judge (IJ) initially denied the case, finding that Abdirisak had been firmly resettled in South Africa; he then ordered Abdirisak deported to that country.

Heather and Anne lost no time in preparing the appeal to the Board of Immigration Appeals (BIA). They were certain that the IJ's decision was faulty. "We slaved and labored over every legal issue knowing that every word and sentence was so important," Heather recounted. Fortunately, their hard work paid off when the BIA reversed the IJ's finding on firm resettlement and remanded the case for an evaluation of the current conditions in Somalia.

Back in detention, Abdirisak heard news that his brother had been murdered on the streets of Somalia. Armed with this newly discovered evidence, Heather was able to convince the judge during the remand hearing to grant Abdirisak's case. Abdirisak had been detained for 14 months, and thanks to Heather and Anne, he finally received the freedom for which he had fought long and hard.



Heather Toft



H. Anne Nicholson

Courtesy of **Meredith Linsky**, Director of the South Texas ProBAR and a member of AlLA's 2006–07 Pro Bono Services Committee.

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Practice Tips for the Busy Immigration Lawyer

ONG-TIME IMMIGRATION LAW ATTORNEY Steve Clark offers practice tips for the busy immigration lawyer and answers to commonly asked questions. This issue's Q&A focuses on nonimmigrant extensions and adjustment of status.

Is it advisable to maintain nonimmigrant status once adjustment of status has been filed?

Maintaining nonimmigrant status can be a significant expense and may be difficult for nonimmigrant classifications other than those where dual intent is mentioned in the rules—H and L, and perhaps E and O. It also may be extravagant since the benefits of nonimmigrant status—employment and travel—may be obtained more easily and inexpensively by filing for an employment authorization document (EAD) and advance parole. However, if one routinely allows the nonimmigrant status to expire, the clients are exposed to a number of risks that may be quite difficult to anticipate. For example, when traveling under parole, the officer must electronically verify the validity of the parole document in a



About Steve Clark

AILA past President Steve Clark (1999–2000), of Flynn & Clark, P.C., has practiced business immigration in Cambridge, MA, for more than 30 years. As a long-time AILA member, Clark authored a monthly practice advisory on employment-based

issues, which appeared in the AILA Monthly Mailing (a predecessor of Immigration Law Today) from 1989 to 1996. In addition, he has served as senior editor of AILA's annual conference handbook, the Immigration and Nationality Law Handbook, and editor-in-chief of AILA's monograph, Representing Professionals Before the Department of Labor. He also is a contributor to AILA's David Stanton Manual on Labor Certification (Third ed. (2005)). Clark currently updates the chapter on labor certifications in the Matthew Bender treatise, Immigration Law and Procedure. He is a graduate of Yale College and Harvard University Law School, and he is listed in Who's Who Legal, Best Lawyers in America, and Super Lawyers.

secondary inspection where the traveler may have to wait in line behind cases that are far more complex. If the traveler has a connecting flight, the delay of secondary inspection would most likely mean missing the flight and making further travel arrangements. Hence, the obvious benefit of extending an H or L visa is avoiding the delay of secondary inspection when traveling.

But the benefits of maintaining nonimmigrant status are more substantial than convenience during travel. If the employee relies only on an EAD and parole and the employer lays off the employee, or if the employee runs into job difficulties making continuing employment unbearable while the adjustment is pending, the employee will—in most instances—have no option but to depart the United States. Even though the alien has worked with authorization, an extension or change of status would be denied because the alien failed to maintain nonimmigrant status. It may be difficult to obtain a new petition and apply for a visa at a consular post. On the other hand, if the nonimmigrant status continues and the employee is forced to change employment, it will be possible to do so if nonimmigrant status continues; and one can plan accordingly so that a new petition can be filed before a significant lapse of employment occurs. Also, one cannot count on a U.S. Citizenship and Immigration Services (USCIS) holding that the alien is maintaining status while adjustment is pending if the nonimmigrant stay has expired. If adjustment is denied for any reason and the nonimmigrant status has ended, the alien cannot resume such status and no Notice to Appear document could be issued.

There are more practical reasons in maintaining nonimmigrant status. One can no longer obtain an interim EAD when USCIS takes more than 90 days to adjudicate the I-765 EAD application. USCIS has been refusing to adjudicate when there is a security hold. Even absent a security hold, one cannot count on adjudication of the interim EAD now that USCIS has taken the position that field offices cannot issue EADs and that USCIS should dedicate resources to initial processing rather than interim card production. AILA-USCIS Liaison Meeting Minutes (Sept. 26, 2006), *published on* AILA InfoNet at Doc. No. 06112165 (*posted* Nov. 21, 2006). If an H or L visa is not extended, the alien has no assurance of continuing employment given this gaping hole in the regulatory promise of an EAD within 90 days (8 CFR §274a.13(d)). If security can trump the Bill of Rights, it can certainly trump the Code of Federal Regulations (CFR).

Also, even with an H or L visa extension, one should still apply

for parole and EAD status. The need for parole becomes clear if the alien loses his or her passport and travels to a consular post to replace the visa. Without parole, there is no assurance the alien will be able to return to the United States should the visa be denied. An EAD is advisable should the alien be laid off or wish to moonlight or change jobs. With extensive adjudication delays and an unpredictable economy, one cannot assume a job will remain secure for the full duration of adjustment processing.

For these reasons, it makes sense to extend the nonimmigrant stay even though the adjustment application has been filed. This is true whether the immigration attorney is retained by the employer or the alien. If a G-28 is filed along with the adjustment application, there is no doubt that one is representing the alien. Should the employer need to lay off the alien, it will be far easier and less apt to result in litigation if the alien has been protected.

Why is an I-94 sometimes issued for less than the full nonimmigrant petition validity period?

When applying for a visa, the passport generally must be valid for six months beyond the expiration of the initial period of stay (22 CFR §41.104). However, USCIS may grant a change of status or an extension of stay longer than the passport validity period. The passport must be valid at the time of request and the alien is expected to extend it as a condition of maintaining status (8 CFR §214.1(a)(3)(i)). When the person travels, the U.S. Customs and Border Protection (CBP) officer at the port of entry will be required to limit the stay to the passport validity period plus six months (8 CFR §214.1(a)(3)(i)). Thus, your client may have been granted an extension or change of status for the full three-year period of the H petition, but be granted a new I-94 upon re-entry from traveling that expires after only a year of the passport expiring. Travelers who are not attentive to what is entered on their new I-94s will inadvertently lose their status. For this reason, it is prudent to warn clients of this potential trap when advising them of their change of status or extension.

There has been a recent surge in this problem. CBP seemed to have been lax about this in the past. Now that most passports are machine-readable, expiration dates are popping up on the computer at primary inspection—making it difficult for the officer to overlook these lengthy stays.

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Must the passport be valid for the full duration of the initial stay plus six months in all instances?

Immigration and Nationallity Act (INA) \$212(a)(7)(B)(i)(I) requires nonimmigrants to have a passport valid for the initial period of stay plus six months. Passports of certain countries will be valid for six months beyond the passport's stated date of expiration under international agreements. Most visa waiver countries are included in this list as well as many others. For a full list of such countries, see 9 FAM 41.104, Exhibit I. Individuals bearing such a passport will be admitted for the full validity period of their passport if otherwise admissible, but others will be admitted only until a date six months prior to their passport expiration. This is to allow for the extra six months of passport validity required by INA §212(a)(7)(B)(i)(I). Nationals of certain countries arriving by land and sea will be passport-exempt until January 2008. See 8 CFR \$212.1 for a complete listing of exemptions to the passport requirements for nonimmigrants.

The rules are different for immigrants. They generally must have a passport valid for the duration of the immigrant visa plus 60 days (22 CFR §42.64; 8 CFR §211.2(a)). The following documents are acceptable in lieu of a passport:

- Unexpired Form I-551 Permanent Resident Card;
- Unexpired Form I-327 Re-entry Permit;
- Unexpired Form I-571 Refugee Travel Document and an expired Form I-551 accompanied by I-797 receipt issued within the past six months for Form I-751 extending the validity of the I-551; or
- Expired Form I-551 (8 CFR §211.1) for U.S. government employees traveling on official orders and their dependents.

Also exempt from the passport requirements under 8 CFR §211.2(a)) are:

- Parents, spouses, and unmarried sons or daughters of U.S. citizens and legal permanent residents (LPRs);
- Children born during a temporary visit abroad of a mother who is a citizen or national of the United States or LPR—provided the child applies for admission within two years of birth and is accompanied by the parent upon the parent's first return to the United States after the child's birth; and
- Members of the U.S. Armed Forces.

Notwithstanding these exceptions to the passport requirements, the traveler will want to carry a passport because the airlines may be unaware of these regulations and thus refuse boarding without the passport.

Is it possible to substitute the employer where there has been a change in ownership or acquisition of the employer?

Yes, provided there has not been a change in the area of intended employment or job duties. In the Ask the Expert column appearing at 25-6 Immigration Law Today 36 (Nov./Dec. 2006), I explained how the Board of Alien Labor Certification Appeals (BALCA) has allowed substitution of the employer even if there is no connection between the new employer and the old one.

EDITOR'S NOTE: The Department of Labor (DOL) has proposed a rule that would cause a labor certification to expire within 45 days of approval if an I-140 is not filed. 71 Fed. Reg. 7655 et seq., (Feb. 13, 2006), published on AILA InfoNet at Doc. No. 06021312 (posted Feb. 13, 2006). This rule was submitted to the Office of Management and Budget (OMB) for review on January 26, 2007. Generally, OMB has 90 days to review immigration-related rules. Copies of regulations in process can no longer be obtained prior to their submission to the Federal Register, so the best anyone can do is speculate what the final regulation says. See "Rumor of the Day: Is the Regulation Eliminating Substitutions Imminent?" (Jan. 26, 2007), published on AILA InfoNet at Doc. No. 07013170 (posted Jan. 31, 2007). The rule could curtail employer substitution in cases where an I-140 has not been approved prior to publication unless it was filed within 45 days of approval of the underlying labor certification. While this would not preclude all employer substitutions, it might preclude many.

In a previous column, you mentioned substitution of the employer. In our experience, this is only possible once the I-140 has been approved and the adjustment has been filed for 180 days or more. Please clarify.

The reader is confounding substitution with portability of the I-140. We have successfully substituted the employer where labor certification has and has not been issued and whether or not an I-140 has been filed. It is true that DOL generally takes the position that the labor certification is for a specific job opportunity, but BALCA has ruled that it makes no difference if the new employer has the same position with identical duties in the same geographic area. See e.g., Matter of International Contractors Inc. and Technical Programming Services, 89-INA-278 (BALCA June 13, 1990). DOL has often been flexible in allowing amendments prior to certification to change the employer where there is some continuity or connection. Once certified, DOL defers to USCIS—which has followed BALCA in a number of cases. However, BALCA decisions are not precedential and DOL may not follow the caselaw under PERM. Furthermore, USCIS may not follow BALCA with any degree of consistency. But substitution can be a miracle cure when the agencies are receptive.

When substituting the employer, the geographic area must remain the same. But what are the limits of the geographic area—is it the metropolitan area, city, county, or other geographical parameters?

The geographic area is the commuting area. If the new location is within the same metropolitan statistical area (MSA) as the old, then it is deemed to be in the same commuting area (20 CFR

The Department of Labor (DOL) has proposed a rule that would cause a labor certification to expire within 45 days of approval if an I-140 is not filed.

§656.3). The MSAs are listed in the Online Wage Library at www. flcdatacenter.com. If the MSA is not the same, you may use Map-Quest or Google to show the distance and travel time between the two locations. There is no standard for what is acceptable travel time—it will vary with commuting patterns. In areas where jobs are scarce or housing is inexpensive, people tend to commute longer distances, so it is not possible to provide a rule of thumb.

Can an alien substitute an employer where the former employer who filed a labor certification on the alien's behalf wishes to use that labor certification for another employee?

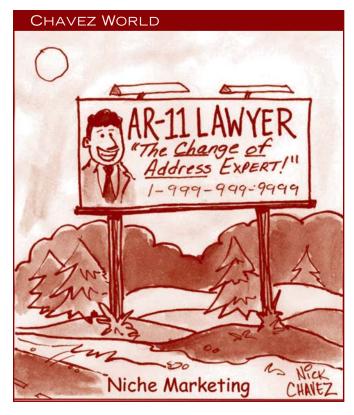
The privilege of substituting belongs to the petitioner. The employee is not entitled to substitute a new employer.

Is it permissible to file an I-140 when the alien is no longer working in the position that was the subject of the labor certification?

Now that the backlog elimination centers (BEC) are finally beginning to adjudicate labor certification, we are faced with approved labor certifications that were drafted several years ago. This includes many instances where the employee may have been promoted or is currently using newer technology. Unfortunately, the rules provide no provision to amend or allow for life to go on while the employee endures the backlog. The practitioner must determine whether it is feasible to file an I-140 based on the existing certification. Once approved, the priority date can be used under 8 CFR §204.5(e) in a new PERM filing for the current position.

One school of thought says that the I-140 does not express intent to employ the worker in the position—only to classify the alien for preference purposes and determine the alien's qualifications and the petitioner's ability to pay the required wage. There is no requirement that the alien work in the position prior to certification. Another school of thought believes the basis of the process is an offer to employ the alien. If the employer no longer intends to employ the alien or the alien no longer intends





to pursue the position, then the I-140 cannot be filed. There is relatively little guidance for practitioners in determining whether the I-140 remains viable.

If the occupation remains the same and the position remains in the same occupational classification, the conventional wisdom has been that the certification remains valid and the I-140 can be pursued. But what if the software engineer is now a manager, which is an entirely different SOC code? This is where the slope becomes slippery. The more prudent practitioner would have the employer file a new PERM case based on the updated job duties and required technological skills. If the older position has an approved I-140, then the priority date can be carried over to the new position under 8 CFR §204.5(e). If the I-140 has not been approved, the practitioner has to decide whether it is ethical to file one and which school of thought to follow. If no I-140 is filed, the old priority date is lost. The ethical issue is quite clear if the employer has closed or the job no longer exists—one must start from scratch with a new labor certification and a new priority date.

Will it be possible to substitute where the employee has left the employer and now works for a new, unrelated employer?

If the labor certification is made available by the old employer, then the alien's new employer may be able to use it for the new job—provided the duties and geographic area remain the same. If USCIS follows International Contractors, it will assign the initial priority date and require proof that the employer had the ability to pay the prevailing wage when the labor certification was filed and that the new substituted employer has the ability to pay at the time the substitution was made. This is based on case experience rather than published authority. The fact that the original employer no longer intends to employ the employee does not seem to be an issue, as that was implicit in the facts of *International Contractors*. There seems to be more flexibility for a change of employers than for a change in the duties.

What documents are needed in order to substitute the employer?

You will need the following:

- The original labor certification. If it was filed with an I-140, you will need to provide the I-140 approval notice copy of the labor certification and indicate that the original resides in the service center's file for the approved I-140.
- Documentation of the employer's ability to pay the required wage during the year the labor certification was filed, i.e., at least the employer's tax return, annual report, or audited financial statement. Payroll tax information also may be helpful. Note that 8 CFR §204.5(g)(2) does not specify whether this must be the tax return of the new employer or the old one. It is also plausible to furnish the old employer's return since the new employer may not have been in existence at the priority date. I have successfully used the tax return of the original employer, but the new employer's return possibly would be acceptable. One can reference the regulatory language calling for the tax return of the "prospective" employer, which would arguably be that of the new employer since the old employer is no longer intending to employ the alien. 8 CFR §204.5(g)(2).
- A new I-140 along with documentation of the new employer's ability to pay the prevailing wage, i.e., tax return, annual report, or audited financial statement for the year of filing of the new I-140. You will need documentation of the alien's qualifications as required in the certified Form ETA-750A or ETA-9089.
- A detailed job description for the new position; and point out that it is identical to the certified job description.
- A cover letter citing *International Contractors*, a copy of the decision, and a reminder that DOL has delegated to USCIS the exclusive authority to amend a labor certification once it has been certified.
- If the new workplace location is not in the same city or town as in the approved labor certification, then provide documentation that it is within the same commuting area as the one specified in the approved labor certification. Use a listing of the communities within the MSA from DOL or a Google or MapQuest map showing the distance and travel time between the locations.

This endeavor requires a degree of cooperation from the initial employer. Cooperation often will be available if the employee left on good terms. However, it will be more difficult if the initial employer wishes to use the certification for another worker. Bear in mind that the service centers have no policy or regulation on substitution of the employer, so expect some degree of inconsistency. But when it does work, you will avoid the hassle of obtaining a second labor certification and reap the benefit from carrying over the original priority date.

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The Art of Blogging

HERE ARE APPROXIMATELY 70 MILLION WEB LOGS (BLOGS) on the Internet and an estimated 30 percent of all Americans regularly read them. The term "blog" was coined in December 1997 and generally refers to an online diary or journal. Blogs range from simple web pages where a person posts comments about his or her life experiences, to those run by major news organizations like CNN and the BBC. Blogging is the latest rage, and immigration practitioners should take advantage of this new phenomenon.

Creating a Blog

Some people create personal blogs limiting access to friends and family. Others create a blog for marketing purposes or as a way to communicate with clients about immigration law.

I set up an "online diary" in May 1998, for legislative developments surrounding the H-1B cap. The page was extremely popular, and in one day, it received more than 50,000 hits. The site as it looked in December 1998 is located at http://web.archive.org/web/19980612151807/www.visalaw.com/h1b.html. Our firm still has a blog on its website where I post breaking news or just random thoughts about immigration law. See the blog's modern incarnation at www.visalaw.com/blog.html.

In the course of writing this article, I decided to set up a new blog to demonstrate just how easy it is to get started. It took five minutes to log-in to Blogger, create a blog, and configure it. This blog is at http://gregstips.blogspot.com, and I now use it to post messages about blogging, immigration-related websites, technology, and practice management tips for immigration practitioners.

Blogging Software

One of the wonderful things about blogging is that no expertise is required in web programming or website creation. One can set up a blog simply by completing a form

online. Like blog readers, there are many companies that provide blogging software. Four popular choices are Google's Blogger (www.blogger.com), Typepad (www.typepad.com), LiveJournal (www.livejournal.com), and Windows Live Spaces (http://spaces.live.com/). Some of these services—like Blogger—also allow the blog to be integrated into a website.

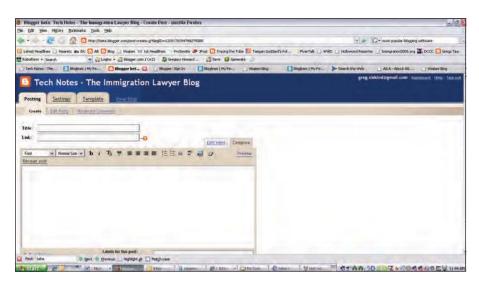
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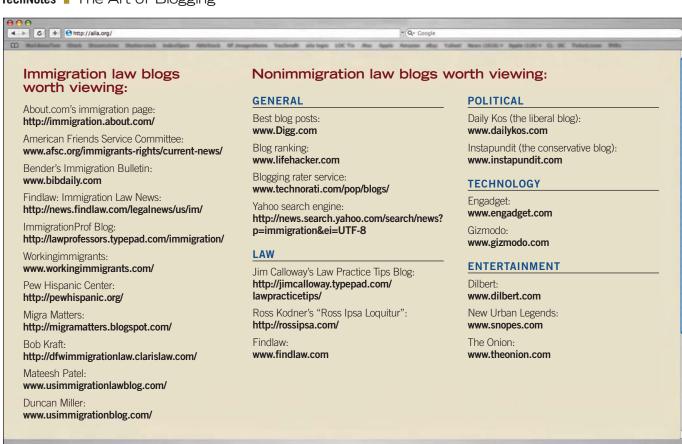
ware and hosts the blog, three of the market leaders for this type of software are Movable Type (www.movabletype.org), Word Press (www.wordpress.org), and Text Pattern (www.textpattern.com). I have used Blogger to run the firm's Visalaw blog. Configuring the blog was easy, and I can post messages to it by sending an e-mail from my personal computer or personal digital assistant.

Blog Readers

I bookmarked several blogs and checked them periodically until I learned about something called "content syndication," which quickly made blogs a much more important part of my Internet experience, and removed the additional steps of having to bookmark and check each blog separately. Content syndication generally refers to a common way of formatting a blog

Content syndication generally refers to a common way of formatting a blog that allows the content to easily be picked up as a "feed" by blog-reading software and other blogs.





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that allows the content to easily be picked up as a "feed" by blog-reading software and other blogs. There are two common formats for bloggers to create a feed: really simple syndication (RSS) and Atom. Blogs that are created in one of these formats usually will have a button that says RSS, Atom, XML, Subscribe, or something similar. The latest Microsoft Internet Explorer and Firefox browsers will show an RSS orange button in the browser toolbar.

A blog reader is needed to read these "feeds." This can be found on the Internet or downloaded as stand-alone software. According to www.feedburner.com, there are more than 2,000 different feed-reading applications. I use Bloglines to organize my blogs and have been very satisfied. This is available for free at www.bloglines.com and can be configured to organize the blog feeds by category. By clicking on the RSS button on a blog, the subscription page automatically pops up and one can assign the feed to any Bloglines section.

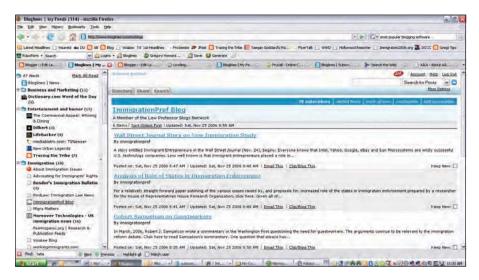
Other free web-based blog readers can be found at www.newsgator.com, http://my.yahoo.com, www.rojo.com, and www.newsburst.com. Newsgator also sells one of the more popular software applications for reading blogs for \$29.95 that contains features not available in the free and online readers.

Tips and Advice from AILA National

The American Immigration Lawyers Association (AILA) has two new resources for its members. Reid Trautz, head of the Practice and Professionalism Center, is no stranger to blogging and regularly maintains one at www.reidmyblog.com/reidmyblog/. Reid can offer tips and advice on how to start a blog. Second, AILA launched its Annual Conference blog at www.ailaac.blogspot.com/. AILA Education Director Michelle Gergerian manages this site and posts regular updates, fun facts, and behind-the-scenes reports about this year's AILA Annual Conference in Orlando.

Greg Siskind practices immigration law in Memphis and has been a guest speaker on technology at numerous AILA conferences.

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egal ACTION / by Beth Werlin

Supreme Court Finds "Theft Offense" Includes Aiding and Abetting

the courts apply a two-step process set forth in *Taylor v. United States*, 495 U.S. 575 (1990). Under the "categorical approach," courts compare the statute under which the person was convicted with the generic definition of theft rather than look to the facts of the case. If the defendant's conduct falls within the generic definition, the conviction qualifies as a theft offense. But the court applies a "modified categorical approach" if the defendant's conduct only partially falls within the generic definition. Under this approach, courts may look at the record of conviction to determine whether the offense of which the person was convicted falls under the generic definition of theft. The U.S. Supreme Court applied the *Taylor* approach on January 17, 2007, when it held that a "theft offense" includes the crime of aiding and abetting a principal theft offender. The case is *Gonzales v. Duenas-Alvarez*, No. 05-1629, 549 U.S. ____ (2007), which overruled a U.S. Ninth Circuit Court of Appeals' precedent, *Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir. 2005).

Petitioner's Plea and the Penuliar Precedent

Luis Alexander Duenas-Alvarez is a lawful permanent resident who was convicted of violating California Vehicle Code §10851(a), which permits conviction for the crime of aiding and abetting. He was charged with being removable based on a theft offense and an immigration judge (IJ) sustained the charge. The Board of Immigration Appeals (BIA) upheld this finding and Duenas-Alvarez sought review in the Ninth Circuit.

While Duenas-Alvarez's petition for review was pending, the Ninth Circuit decided on *Penuliar* and found that the California Vehicle Code §10851(a) is broader than the generic definition of theft. Penuliar had been convicted under the same section of the code as Duenas-Alvarez. The Ninth Circuit applied the *Taylor* approach to determine whether a California conviction for unlawfully driving or taking a vehicle qualifies as a theft offense. The BIA had held that this conviction qualified as a theft offense as defined by Immigration and Nationality Act (INA) §101(a)(43)(G) and rendered



Penuliar removable as an aggravated felon. INA \$101(a)(43)(G) defines aggravated felony as including "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least 1 year"

On review, the Ninth Circuit reversed the BIA's decision by finding that a conviction for aiding or abetting a theft offense does not fit within the generic definition of theft offense. Therefore, California Vehicle Code §10851(a) was broader than the generic definition of theft. The court then looked to the record of conviction and determined that it did not establish whether Penuliar had been convicted of aiding or abetting. The court concluded that the government had failed to establish that Penuliar was removable based on the theft offense charge.

Relying on Penuliar, the Duenas-Alvarez court issued a short, unpublished decision and remanded the case to the II for further consideration. Following this decision, Solicitor General Paul D. Clement filed a petition for certiorari in the Supreme Court. The government argued that the Ninth Circuit's analysis in Penuliar was wrong. Specifically, the government criticized the court for distinguishing between aiders and abettors and the principal offender. According to the government, modern criminal statutes hold principal offenders and aiders and abettors equally culpable, and it argued that aiders and abettors should be covered by the generic definition of theft.

Duenas-Alvarez did not defend the Ninth Circuit's decision in *Penuliar*. Rather, he argued that California Vehicle Code §10851(a) is unusually broad and covers conduct not included in the generic definition of theft. For example, he pointed out that California's definition of aiding or abetting includes any crime that "naturally and probably" results from the intended crime.

The Court agreed to hear oral arguments in the Duenas-Alvarez case on December 5, 2006. The issue presented was "[w]hether a 'theft offense,' which is an 'aggravated felony' under Immigration and Nationality Act, 8 U.S.C. 1101 (a)(43)(G), includes aiding and abetting." Dan Himmelfarb, Assistant to the Solicitor General, argued for the government and Christopher J. Meade, Wilmer Cutler Pickering Hale and Dorr, argued for Duenas-Alvarez.



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The Court considered the government's argument regarding [equal culpability between] principals and aiders and abettors and agreed that modern law has eliminated a distinction between the two categories.

Aiders and Abettors' Culpability

Justice Stephen G. Breyer wrote the majority opinion, which was joined by seven justices. The Court considered the government's argument regarding principals and aiders and abettors and agreed that modern law has eliminated a distinction between the two categories. The Court noted that every jurisdiction treats aiders and abettors similarly, therefore, "the generic sense in which' the term 'theft' is now used in the criminal codes of most states covers such 'aiders and abettors' as well as principals." Thus, the Court concluded, the term "theft offense" in INA

\$101(a)(43)(G) includes aiders and abettors. Furthermore, after reviewing the California cases cited by Duenas-Alvarez, the Court rejected his argument that the California statute reaches beyond the generic definition of theft.

The Court declined to consider two additional claims raised by Duenas-Alvares: (1) the California statute holds liable accessories after the fact (which does not require the government to show that the person committed a theft); and (2) "theft offense" includes joyriding or the limited deprivation of car use. The Court found that the Ninth Circuit had not considered

these claims and remanded the case for further proceedings.

Justice John Paul Stevens wrote a separate opinion, concurring in part and dissenting in part. In his view, the Court should have declined to address Duenas-Alvarez's arguments regarding the broad scope of the statute. He pointed out that the court of appeals had not yet addressed this argument and it was not included in the question presented to the Court.

Beth Werlin is the Litigation Clearinghouse attorney for the American Immigration Law Foundation's (AILF) Legal Action Center.





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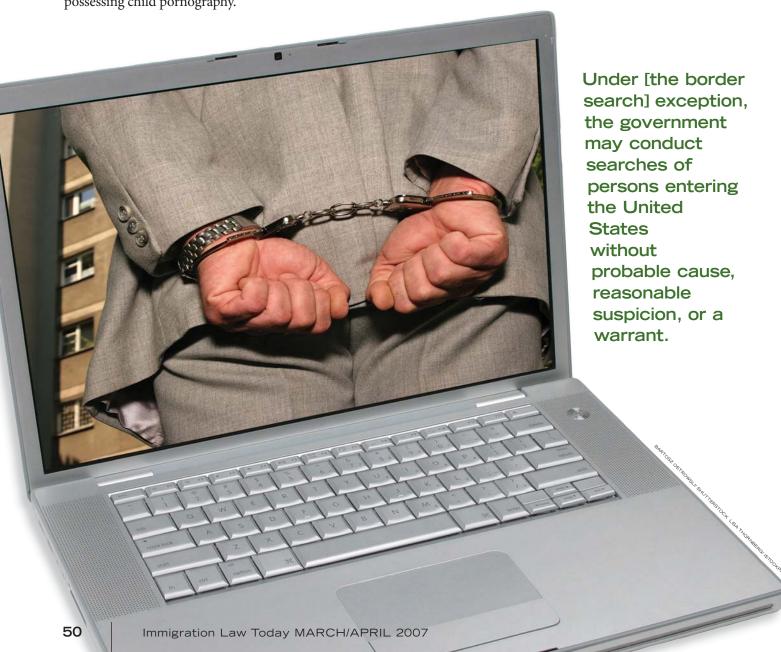


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Case NOTES / by Sergio R. Karas

Privacy at Risk: Warrantless Laptop Search at the Border

HE NINTH CIRCUIT COURT OF APPEALS SENT SHOCKWAVES throughout North America with its ruling regarding a warrantless search at an international border. In *U.S. v. Romm*, 455 F.3d 990 (9th Cir. July 24, 2006), the court was confronted with a case involving the search of data contained in the defendant's laptop when he was denied entry to Canada and sent back to the United States. U.S. Immigration and Customs Enforcement (ICE) agents were able to extract 40 deleted images from the defendant's Internet cache that led to his conviction of knowingly receiving and possessing child pornography.







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Detecting Deleted Images

Stuart Romm was attending a training seminar in Las Vegas where he connected to the Internet from his hotel room and visited child pornography websites. The laptop automatically saved copies to his Internet cache of all the images he viewed and enlarged. When the seminar ended, he flew from Las Vegas to Kelowna, British Columbia (BC), on business.

The Canada Border Services Agency (CBSA) at the BC airport discovered that Romm has a criminal record and detained him for further questioning. Romm admitted that he was currently on probation. A CBSA agent asked him to turn on his laptop for a brief examination, and when he complied, several child pornography websites appeared in the laptop's Internet history. The agent then asked Romm if he had violated the terms of his probation by visiting those websites. Romm answered in the affirmative and was placed under detention until he could take the next flight to Seattle. CBSA agents then informed the U.S. Customs Service in Seattle that Romm had been denied entry and probably had illegal images on his computer—a violation of his probation order. ICE agents interviewed Romm when he arrived at the Seattle-Tacoma airport and arranged for a preliminary forensic analysis of the laptop hard drive, revealing 10 images of child pornography. When confronted with the evidence, Romm admitted that he had downloaded the images and breeched the terms of his probation. The officers conducted the investigation as a "border search" and never obtained a warrant to examine the data contained in the laptop.

Border Search Exception

During trial, the U.S. government called three witnesses to testify about the hard drive forensic analysis in Romm's laptop and describe the different types of software that were used to recover the deleted files. The government also submitted evidence to show when the images were downloaded, viewed, and deleted. Before trial, Romm's defense counsel moved to suppress the evidence obtained through the border search of his laptop. The court denied that motion and Romm was eventually convicted of possession of child pornography, which he is currently appealing.

The most important issue of this case is the legality of the laptop search. The Ninth Circuit held that the forensic analysis of Romm's laptop fell under the "border →



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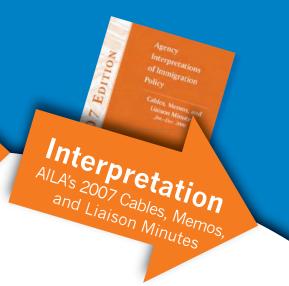
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search" exception to the requirement of obtaining a warrant. Under this exception, the government may conduct searches of persons entering the United States without probable cause, reasonable suspicion, or a warrant as previously held in U.S. v. Montoya de Hernandez, 473 U.S. 531, 538 (1985). The court also affirmed that under the Fourth Amendment's protection of individuals from unreasonable search and seizure, an international airport terminal is the "functional equivalent" of a border. Thus, passengers arriving from an international flight are subject to routine border searches. The court rejected Romm's contention that the search was illegal and required a warrant because he never legally crossed the American-Canadian border, as he had been denied entry to Canada. The court held that there is no

authority for the proposition that a person who fails to obtain legal entry at his or her destination may freely reenter the United States. On the contrary, he or she may be searched just like any other person crossing the border.

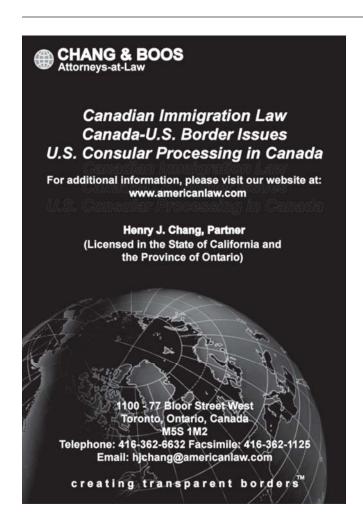
The court further held that the border search doctrine is not limited to those cases where the searching officers have reason to suspect that the entrant may be carrying foreign contraband. Instead, "searches made at the border are reasonable simply by virtue of the fact that they occur at the border," as the U.S. Supreme Court previously held in U.S. v. Flores-Montanyo, 541 U.S. 149, 152-53 (2004), quoting U.S. v. Ramsey, 431 U.S. 606, 616 (1977). Thus, the routine border search of Romm's laptop was reasonable and a warrant was not necessary.

Advising Clients

The Ninth Circuit decision has raised serious concerns about the limits of border searches made without warrants. While Romm deserves no sympathy for his actions, the decision may result in further searches of laptop data at U.S. borders and airports. Practitioners must be diligent in advising clients concerning the risks involved in international travel—including the possibility that data contained in laptops and electronic devices can be searched without a warrant at any U.S. port of entry.

Sergio R. Karas is a certified specialist in Canadian citizenship and immigration law by the Law Society of Upper Canada and vice chair of the Ontario Bar Association Citizenship and Immigration Section.

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statusCHECKS

On the Move

- Berry Appleman & Leiden, LLP of San Francisco has joined forces with Jenkens & Gilchrist and other immigration attorneys in Texas to form an expanded global firm with new offices in Dallas and Houston. Along with this expansion, the firm welcomes Steven Ladik, Shawn Orme, and Paige Taylor as partners.
- Maria M. Odom has joined, as partner, the Atlanta firm of Kuck Casablanca, LLC. Maria has successfully litigated complex asylum matters and high-profile immigration removal and cancellation of removal cases.
- Angel X. Viera-Vargas is the new partner at Goldman Antonetti
 Córdova, PSC of San Juan, PR.
 Angel heads the business immigration practice group.
- Tiffany V. Biason has joined the fast-growing corporate immigration law group of Littler Mendelson, PC in San José as an associate. Tiffany practices business immigration law and began her legal career in New York.
- Sullivan & Worcester, LLP of Boston is pleased to welcome Lawrence D. Bastone as of counsel.

- Larry comes from Bastone Associates in Fort Lauderdale and brings years of experience in representing international and domestic clientele.
- John T. Rotterman has joined The Hammond Law Group, LLC of Cincinnati as an associate. John graduated from the Case Western Reserve School of Law and handles the firm's business and health care immigration.
- Jo Anne C. Adlerstein now heads the new immigration practice at the New York firm of Thelen Reid Brown Raysman & Steiner, LLP, following the merger of Brown Raysman Millstein Felder & Steiner, LLP and Thelen Reid & Priest, LLP.
- Thomas Ragland has joined Maggio & Kattar of Washington, D.C., as a senior associate. Thomas was formerly with Elliot & Mayock, LLP and has worked in government service for more than 10 years.
- Murtha Cullina LLP welcomes Jacqueline D. Bucar as of counsel in its New Haven, CT, location. Jacqueline was most recently a partner at Tyler Cooper & Alcorn, LLP in New Haven.

Announcements

Matthew I. Hirsch organized and moderated a forum at Widener University
School of Law entitled, "The City of
Hazleton v. Illegal Immigration: A discussion of local initiatives to challenge undocumented immigration." The event was co-sponsored by the American Immigration Law Foundation, and discussed the recent spate of local initiatives to regulate undocumented immigration in their communities.

Paula N. Singer is a guest speaker in the upcoming forum, "Understanding Payments to Foreign Workers," at the 25th Annual Congress of the 18,000-member American Payroll Association, taking place on May 24 in Las Vegas.

Nachman & Associates, P.C. has moved offices to 7 West 36th Street, 14th Floor, in New York. The firm also opened a new location at 65 Broadway Street, Suite 844.

Laurie Woog has opened a new office at 506 North Avenue East, Westfield, NJ. Laurie's practice has an emphasis on EB-1, EB-2, and E-3 petitions.

Author, Author

Paula N. Singer has authored two tax guidebooks, U.S. Taxation of Foreign Students and International Aspects of Individual U.S. Income Tax Returns.

Awards and Achievements

Aggie R. Hoffman was awarded more than \$50,000 in attorney's fees after the U.S. Ninth Circuit Court of Appeals ruled in her client's favor pursuant to the Equal Access to Justice Act in *Yeghiazaryan v. Gonzalez*, _____ F.3d _____.

Ken Stern and Nancy Elkind have been selected as Colorado SuperLawyers 2007. Ken is the only immigration lawyer listed in the "Top 50 Attorneys," and Nancy is the only immigration lawyer in the "Top 25 Women Attorneys."

In Memoriam

Former AILA President **Esther Kaufman** (1971) passed away on March 10, 2007. Esther was a great mentor to many AILA members, and her kind and generous spirit will be missed by family, friends, and loved ones.

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