Immigration Basics for All Lawyers

by TONY SILVA

Immigration is an area of law that impacts a breadth of other legal disciplines including labor, criminal, and family law. Its complexity is compared, quite accurately, to the U.S. tax code. Despite its importance, many lawyers have little to no experience with immigration law. As our country becomes increasingly diverse, lawyers will encounter immigration issues regardless of their areas of practice. Therefore, to properly advise clients, a well-rounded practitioner needs to understand the basics of immigration.

SOURCES OF AUTHORITY

The primary source of authority for U.S. immigration laws is the 1952 Immigration and Nationality Act ("INA"). Since its original passage, Congress has supplemented the INA with extensive modifications and additions, which include the Immigration Reform and Control Act of 1986 ("IRCA"), the Immigration Act of 1990 ("IMMACT90"), the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), and the REAL ID Act of 2005. In addition to the INA, the related statutes, and regulations, immigration law is also governed by federal case law.

There are several important secondary sources of authority in immigration law. Agency memoranda and Interpreter Releases are examples under this category. Additionally, U.S. immigration officers both in the United States and abroad follow agency-approved guidance found in the Adjudicator's Field Manual (AFM) and the Foreign Affairs Manual (FAM). Although these sources are not primary authority, they are, in many instances, de facto law. A skilled immigration lawyer must be wary of discrepancies between what the law actually says and how these secondary sources are applied.

KEY AGENCIES

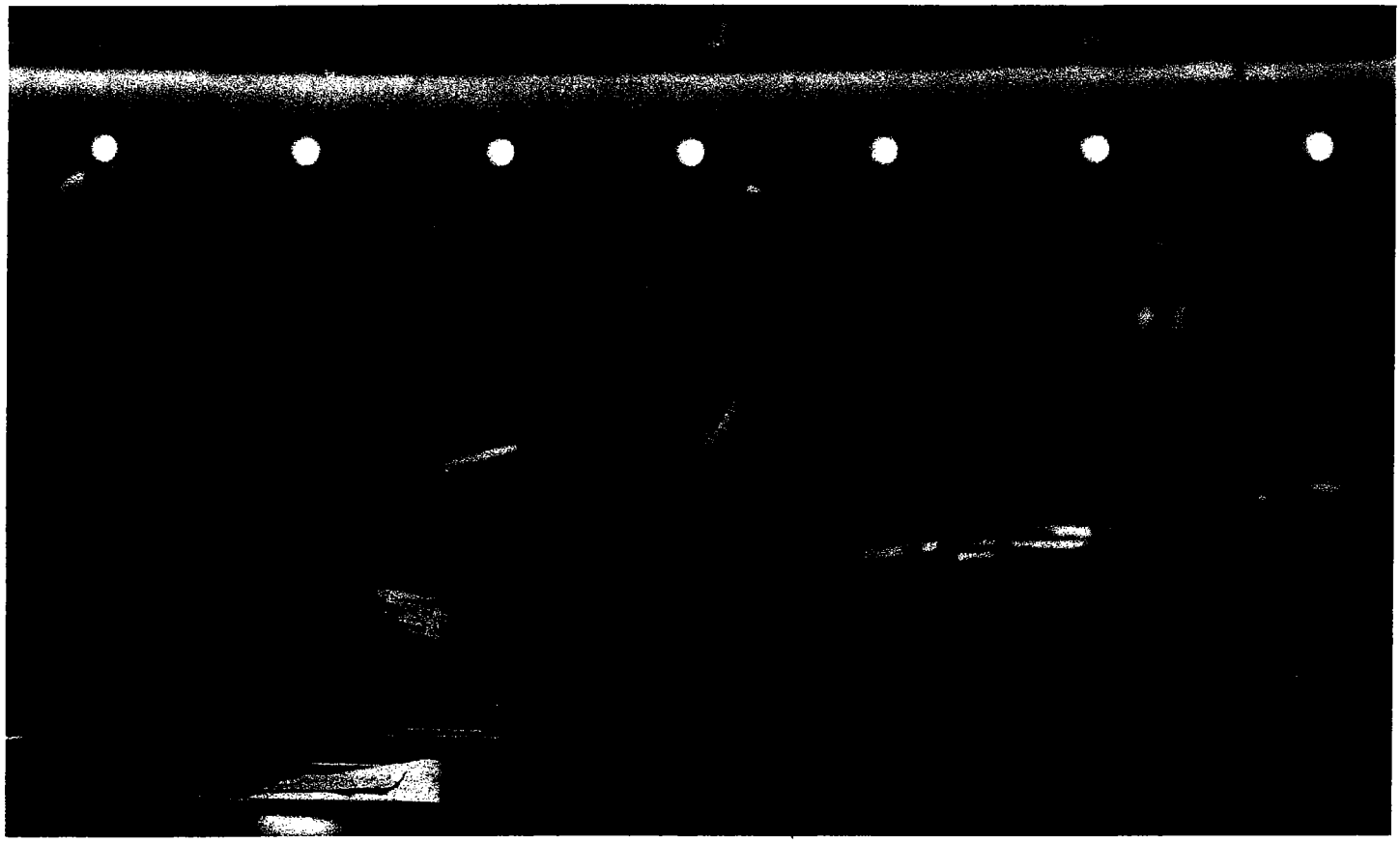
The federal government oversees the implementation and regulation of immigration law. This task is divided among several key government agencies. Under the Department of Homeland Security (DHS), important immigration sub-agencies include U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U:S. Customs and Border Patrol (CBP).

The Department of Justice is heavily involved in immigration, as are its sub-agencies, the Executive Office for Immigration Review (EOIR) and the Board of Immigration Appeals (BIA). Immigration issues also arise under the Department of State's Bureau of Consular Affairs, and the Department of Labor handles many aspects of the intersection of immigration and labor laws.

DISTINGUISHING VISA AND STATUS

In most situations, admission into the United States first requires applying for and receiving a visa. In and of itself, the visa does not grant the right to be present in the United States; it merely allows the foreign national to request permission to enter at the border or at a port of entry. Once the foreign national is inspected by an immigration officer and admitted into the country, he is admitted under a specific status. This specific status governs the activities or events in which the foreign national may participate. In addition, the officer also admits the foreign national for a specified period of time during which he may be lawfully present in United States.

While the foreign national is present in the United States, he must maintain his status by adhering to all the terms and conditions of entry. For example, foreign nationals present in the United States under a B-2 visitor visa are generally not permitted to work. If such a foreign national engages in work without authorization, he has not followed the terms and conditions of entry – or, in



other words, he has violated his B-2 status. Harsh penalties may accrue for violations of status, which can include visa cancellation, future bars to admission, or removal (formerly known as deportation) proceedings in immigration court.

IMMIGRANT AND NONIMMIGRANT VISAS

Visas fall under two major categories: nonimmigrant and immigrant visas. Nonimmigrant visas allow a foreign national to enter the United States for a temporary period of time. Moreover, most nonimmigrant visas require that the foreign national prove nonimmigrant intent -- that he does not have, at the time of entry, the pre-conceived intent to stay in the country and become a lawful permanent resident or U.S. citizen.[1]

There are numerous different types of nonimmigrant visas, and each has its own specific rules and requirements. One of the most common nonimmigrant visas is the visitor visa, which is divided into business travelers (B-1) and tourists or other visitors (B-2).[2] Visas are also available for foreign academic students (F-1), nonacademic/vocational students (M-1), and exchange visitors (J-1).

For foreign workers, there are a wide variety of options available. These types of visas include but are not limited to treaty traders (E-1) and treaty investors (E-2), individuals in "specialty occupations" (H-1B), intracompany transferee executives/managers (L-1A) or employees with "specialized knowledge" (L-1B), individuals with extraordinary ability (O-1), internationally recognized athletes, entertainers, or entertainment groups (P), cultural exchange visitors (Q), temporary religious workers (R-1), and Canadian or Mexican NAFTA professionals (TN).

For most nonimmigrant visas, immediate family members such as spouses and children are also permitted to enter as derivative beneficiaries of the principal beneficiary. In some categories, derivative beneficiaries are also authorized to work while lawfully present in the United States.

To pursue becoming a lawful permanent resident, a foreign national must first submit an application for an immigrant visa. These visas are further divided into family-based and employment-based visas.[3] A critical factor to remember is that most immigrant visas are subject to per-country annual limitations on availability. If visas are not currently available for a specific country, the applicant must wait until a visa number becomes available before he

1 Some nonimmigrant employment-based categories allow a foreign national to have "dual intent" to both stay in the United States temporarily and to seek possible avenues for lawful permanent residency. The H-1B visa is an example of a dual intent visa. *See, e.g.*, INA § 214(b); 8 C.F.R. § 214.2(h)(16)(i).

2 Foreign nationals from certain enumerated countries may also be eligible for admission without first obtaining a visa under the Visa Waiver Program. 8 U.S.C. § 1187.

3 Another immigrant visa option is the Diversity Visa (DV) lottery. It is not as popular as the options discussed herein given the uncertainty of selection. INA § 203(c).

may be admitted as a lawful permanent resident.

Since the Supreme Court's 2013 landmark decision in *U.S. v. Windsor*, immigration benefits have also been extended to same-sex couples who are legally married as determined by the laws of the state in which the marriage was originally solemnized.[4] Such benefits are available in both family-based and employment-based immigrant visa petitions.

First and foremost, the petitioner for a family-based immigrant visa must be either a lawful permanent resident or a U.S. citizen. Immediate relatives of U.S. citizens (defined as spouses, parents, or "children"[5]) are given the highest priority. Visas for immediate relatives are always available in unlimited numbers. In all other situations, the availability of family-based immigrant visas is governed by the family preference system, which is divided into four preference categories:

- First preference (F1): unmarried sons and daughters of U.S. citizens
- Second preference (F2A/F2B): spouses, minor children, and unmarried sons and daughters of lawful permanent residents.
- Third preference (F3): married sons and daughters of U.S. citizens
- Fourth preference (F4): brothers and sisters of adult U.S. citizens

If the relationship is not recognized as explicitly stated above, a family-based immigrant visa is not possible. Therefore, family preference visas are not possible for grandparents, aunts, uncles, cousins, or other more distant relationships.

Similar to the family preference system, employment-based visas are governed by a five-tier employment preference system subject to annual per-country limitations:

- First preference (EB-1): aliens of extraordinary ability, outstanding professors or researchers, and multinational managers or executives
- Second preference (EB-2): advanced degree holders, aliens of exceptional ability, and national interest waiver applicants
- Third preference (EB-3): skilled workers, professionals, and unskilled or other workers
- Fourth preference (EB-4): special immigrants
- Fifth preference (EB-5): immigrant investors

Most employment-based immigrant visas require a sponsoring employer to petition for the foreign worker. Moreover, in most situations, the employer must work with the Department of Labor to complete a process called labor certification. To obtain labor certification, the sponsoring employer must establish that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.[6]

NATURALIZATION

Once a foreign national has been a lawful permanent for a prescribed period of time, he may submit an application to become a U.S. citizen through a process called naturalization. Most foreign nationals must be lawful permanent residents for five years before applying for naturalization, but spouses of U.S. citizens may seek naturalization after three years.

Naturalization has several specific requirements. First, the foreign national must prove that he has been continuously residing in the United States. Absences from the United States of six months or longer may break continuous residence, and absences of a year or longer have more serious consequences. Second, the foreign national must prove that he has been physically present in the United States for half as many months as the prescribed period (e.g., 30 months of physical presence for foreign nationals under the five-year statutory period). Though they sound similar, continuous residence and physical presence are distinctly different concepts.

The foreign national must also successfully complete a citizenship interview and government history & civics test – both in English – and prove that he has been and continues to be a person of good moral character during the prescribed period, though conduct outside this period may also be considered.[7]

REMOVAL FROM THE UNITED STATES

When the U.S. government seeks to expel a foreign national from the United States, the individual is placed in removal proceedings (formerly known as deportation). Removal proceedings are initiated by the issuance of a Notice to Appear to the foreign national (or "respondent") that describes the allegations and the legal basis upon which the government seeks removal. The notice orders the respondent to appear before an immigration judge to determine whether he should be removed from the United States. Grounds for removal include but are not limited to:

- entry and/or presence in the United States without permission
- inadmissibility at the time of entry or at adjustment of status

4 *United States v. Windsor*, 570 U.S. 12 (2013); see also "Same Sex Marriages," available at http://www.uscis.gov/family/same-sex-marriages (last viewed April 22, 2014).

5 For immigration purposes, a "child" is an unmarried person under 21; in contrast, a child who is 21 or over is defined as a "son" or "daughter." See INA § 101(b)(1).

6 20 C.F.R. § 656.1(a)(1)-(2).

7 INA § 101(f).

- violation or cancellation of status
- convictions of certain crimes
- fraud, misrepresentation, or false claims of U.S. citizenship in the immigration process
- national security or public safety grounds

The respondent's first court hearing is referred to as the master calendar hearing. At this hearing, the respondent admits or denies the charges as alleged in the Notice to Appear and the immigration judge determines whether the foreign national is removable from the United States. Even if the immigration judge finds that the respondent is removable, the respondent may still have legal relief from removal depending on the facts and circumstances of the situation. In most situations, the immigration judge schedules a second hearing, referred to as an "individual hearing" or "merits hearing," to allow both the government and the respondent to establish their respective cases.

DEFENSES IN REMOVAL PROCEEDINGS

There are numerous different forms of relief from removal. Common defenses include cancellation of removal for permanent residents (green card holders) or non-permanent residents (e.g. undocumented immigrants), waivers for certain crimes, protection under the Violence Against Women Act (which, despite its name, applies to battered spouses of either sex and, therefore, is available to men), temporary protected status, and special immigrant juvenile status.

Visas may be available to aliens who aid law enforcement officers in the investigation of criminal or terrorist organizations (S) and victims of serious criminal offenses or human trafficking (U and T). A respondent may also seek protection under the laws of asylum, withholding of removal, or the United Nations Convention Against Torture.

In recent years, foreign nationals in removal proceedings have increasingly taken advantage of the nation's current immigration enforcement policies by requesting relief under the prosecutorial discretion policy memorandum authored by former ICE director John Morton (the 2011 Morton Memo). Additionally, younger individuals have sought relief via the Deferred Action for Childhood Arrivals program initiated in 2012. These two forms of relief, however, are not true removal relief in the traditional sense because they do not provide a permanent resolution of the foreign national's case. Rather, they provide a temporary and indefinite suspension of the case and protection from physical removal from the country. The removal action, however, may be reinstated by the government at any time.

If no relief from removal is available, the respondent may request voluntary departure at either the onset or the end of removal proceedings. Voluntary departure allows the respondent a period of time to settle his affairs in the United States and voluntarily return to his home country at no expense to the government. Failure to depart the country

by the required date, absent very limited circumstances, will convert the voluntary departure order to an order of removal. This may also result in serious civil penalties and consequences for any future immigration benefits.

APPEALING IMMIGRATION DECISIONS

The appropriate venue for appealing an immigration decision depends on the type of decision being appealed. In some situations, it is advisable to file either a motion to reopen or a motion to reconsider with either the issuing agency or immigration judge. If that is not a viable option, petitioners may file an appeal of USCIS denials with the Administrative Appeals Office. Appeals of an immigration judge's decision are filed with the Board of Immigration Appeals.

Generally, appeals must be filed within 30 days of the lower court's or agency's decision. If the agency denies the appeal, the petitioner may seek review in the U.S. District courts, U.S. Courts of Appeals, or the Supreme Court, depending on the nature and subject of the appeal.

Denials issued by officers at U.S. consulates abroad are exceedingly difficult to overcome. Under the doctrine of consular nonreviewability, the issuance or refusal of a visa is exclusively within the jurisdiction of the consular officers and may only be reviewed by the Department of State for errors in the interpretation of law. Federal courts, in general, cannot review consular denials.[8]

PARTING THOUGHTS

The United States has always been and continues to be a nation of immigrants. Our immigration laws represent a patchwork of shifting national priorities over the past sixty years. From attempting to reaffirm our belief in the importance of familial relationships to the prioritizing of talents that contribute to our economic growth, our immigration laws cut across all walks of life and socioeconomic boundaries. These laws, of course, do not sit in isolation but are intertwined with the realities of life and to best represent our clients in any aspect of the law, we as counselors must have a foundational understanding of how these laws work.

ABOUT THE AUTHOR
Tony Silva practices immigration law with Donati Law Firm LLP, with particular emphasis on issues in the performing arts, academic research, business, and technology sectors. He is regularly engaged as an author and speaker on immigration topics.

8 A recent Ninth Circuit decision, however, provides hope for future consular reviewability. *Din v. Kerry*, 718 F.3d 856 (2013) (absence of any allegations of proscribed conduct provides facially insufficient basis for consular denial).