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Introduction

By Jessica K. Miles

It has become more common to think about and talk about immigrants as a homogenous group. Yet, the people who make up the group we call “immigrants” are just as varied and complex as those who are U.S. citizens. Some have families; others are alone or have families they have chosen. Many work long, hard hours; some stay at home with children or are unemployed. Some have never broken a law—not even an immigration law—and others have been arrested. “Immigrants” are just as good and moral, and just as flawed as the rest of society because they are *part* of our society.

Accordingly, attorneys, judges and politicians encounter immigrants both as part of our vocation as well as in our daily lives. In that regard, we should be mindful of the history of our immigration policies, as laws meant to exclude people based on their national origin and race¹, and take that into account in the way that the issue is framed politically and socially, as well as how we talk about immigrants in our communities, homes and offices.

With this publication, the State Bar Immigration Law Section hopes that attorneys, judges, politicians and community members will not only benefit from the wealth of knowledge regarding immigration law and policy that is presented by notable immigration law practitioners in New Mexico, but that readers



will also take to heart that what we do as a society—the laws we pass (or fail to pass), enforce, and apply to immigrants—has real and lasting impacts on *people* within our community. ■

Endnotes

¹ *E.g.* Chinese Exclusion Act, Sess. I, Chap. 126; 22 Stat. 58. 47th Congress (Approved May 6, 1882); 1917 Immigration Act, H.R. 10384; Pub.L. 301; 39 Stat. 874; 64th Congress (February 5th,

1917) (prohibiting the immigration of the disabled and further restricting immigration of people from Asian countries); 1924 Immigration Act, H.R. 7995; Pub.L. 68-139; 43 Stat. 153; 68th Congress (May 26, 1924) (imposing immigration quotas that favored European countries and expanding same prohibitions on Chinese immigration to include Japanese immigrants); *see also* Presidential Proclamation 2525, Franklin Delano Roosevelt (December 7, 1941) (prohibiting naturalization of Italian, German, and Japanese immigrants, and severely curtailing their rights under the U.S. Constitution).

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Challenges in Business Immigration:

➔ E-Verify and H1-B Visas

By Tania S. Silva

There are many regulations governing immigration that apply only to the business community. Little to no media coverage is given to this topic because business immigration lacks the emotional component that family petitions or individual permits possess. Nonetheless, as American companies compete with their foreign counterparts daily, access to foreign employees with superior expertise and knowledge is a must if we are to maintain our place in the global economy. Likewise, it is only a benefit to the country to allow decent individuals who are bright

and talented the opportunity to enter and strengthen the American workforce.

This article briefly looks at two particular business immigration policies, the E-Verify program and the H-1B visas, and their effect on both U.S. employees and the immigrant population.

Business immigration laws are often associated with investor visas and national treaty workers. However, they also cover procedures for verification of employment within the country. In theory, anyone in

the U.S. receiving compensation for their goods or services should be authorized to work in the country. This, of course, is not the case at all. Millions of individuals who either entered the U.S. without inspection or who overstayed their visas currently work and contribute to the American economy. However, they do so in an underground manner that lends itself to multiple abuses by employers who overlook the illegality of their own actions (i.e., hiring individuals not authorized to work in the U.S.) in order to obtain cheap workers who often remains silent about their rights.

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In theory, anyone in the U.S. receiving compensation for their goods or services should be authorized to work in the country.

The Department of Homeland Security developed an internet-based system called E-Verify, which compares information from an employee's Form I-9, employment eligibility verification, to data from DHS and the Social Security Administration to confirm that an individual is authorized to work in the U.S. To-date, E-Verify is mostly a voluntary program. However, legislation introduced by members of the U.S. House of Representatives Judiciary Committee seeks to make the program mandatory for all employers, including those in the agricultural industry.

The main complaint about E-Verify from employers who do use the program is the dreaded tentative nonconfirmations, indicating that an employee may not be authorized to work in the U.S. An evaluation of the program by the research firm Westat indicated that at least one percent of legal workers were originally given an erroneous TNC by E-Verify.¹ Should the program become mandatory in the whole country, this one percent represents at least a million American citizens who will have to deal with a system that takes a "guilty until proven innocent" approach, requiring the employee to challenge any TNC.

The program is not very popular, in spite of U.S. Citizenship and Immigration Service's assertions. It has been established for almost 20 years, and still only three percent of all employers in the U.S.

participate in E-Verify.

² The E-Verify program is very intrusive for employers, businesses and particularly for employees because the government places the burden of proof on the employee, even

if the system itself made the mistake. Therefore, those individuals who may lack the documents, knowledge or the time to follow through with an appeal may end up losing a job opportunity due to the system's error. If the system became mandatory nationwide, an American citizen who never appealed a TNC may be permanently labeled unemployable. In addition, E-Verify may also encourage discriminatory practices against employees and other individuals who receive a TNC of their employment eligibility. According to the DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices, some employers have demanded that Hispanic candidates and others who "look foreign" provide evidence of their eligibility to work prior to being hired. Some employers failed to notify employees of a TNC and their right to contest the finding. These are unacceptable practices of E-verify, but USCIS is yet to come up with penalties for employers who misuse the system. The 20 states that mandate use of the system (New Mexico is not one of them) do provide for sanctions and loss of licenses. Yet, businesses are not signing up for the program, and states lack funding to enforce it. Ultimately, the system fails to accomplish its goal of detecting unauthorized workers.

Another example of this problem is the H1-B visa. Established in 1990, this non-immigrant visa allows an American

business to temporarily employ a foreigner in a "specialty" occupation.³ Many argue against this type of visa based on fear that jobs Americans can do are given to foreigners. However, this visa is often a last resort for U.S. employers.⁴ The process to apply for the H1-B visa is rather complex, expensive, and subject to a cap of 65,000 visas⁵ each fiscal year. Since the number of submitted applications often surpasses the number of visas available, applicants enter a lottery just to get a chance to have their applications reviewed. Thousands of applications are turned down or don't make the lottery.

There are misconceptions surrounding both E-Verify and the H1-B visa. Now that both systems have been in effect for almost two decades, an overhaul seems in order. There must be serious repercussions against those who abuse or misuse these programs. Further research is warranted to come up with solutions that keep the interests of the American worker first, while addressing the hiring needs of American employers. ■

Endnotes

¹ Source: Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications

² Source: The Practices and Opinions of Employers who do not Participate in E-verify

³ The term "specialty occupation" means an occupation that requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the U.S.. 8 U.S. Code §1184 (i)(1)

⁴ Source: The Charlotte Observer

⁵ An additional 20,000 slots are set aside for beneficiaries with a U.S. master's degree or higher, which are exempt from the cap. Also, H-1B workers who are petitioned for or employed at an institution of higher education or its affiliated or related nonprofit entities or a nonprofit research organization, or a government research organization are not subject to the numerical cap. (Source: USCIS)

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Special Immigrant Juvenile Status: Children at the Crossroads of Family and Immigration Law

By Lauren L. Armstrong and Eva E. Eitzen

"I can't remember the last time I saw my dad. It's hard to get ahead in life when you don't know who your parents are and you don't have status."

-Alejandro, a 16-year old client who was raised by his aunt after his father abandoned the family and his mother passed away

"While other kids in high school were worried about going to prom or going to college, I was worried about getting picked up by immigration and trying to figure out how to take care of my little brothers."

-Daniela, a 17-year old client who fled to the U.S. with her younger siblings due to poverty, gang violence and parental neglect in her home country

Immigrant youth who lack support from parents are some of the most vulnerable individuals encountered in an immigration practice. Fortunately, the Immigration and Nationality Act provides a humanitarian protection for these children known as Special Immigrant Juvenile Status, which includes a pathway to lawful permanent resident status, or a "green card." See INA §§ 203(b)(4), 101(a)(27)(J). LPRs may work with permission in the U.S., travel to other countries and return, and, in most cases, apply to become a U.S. citizen after five years with LPR status.

SIJS is a unique part of the INA that requires obtaining an order from state court before applying for a visa from U.S. Citizenship and Immigration Service, the primary federal agency which provides immigration benefits to immigrants. Because SIJS protections require an understanding of both family and immigration law, many eligible children in New Mexico are not screened for this form of relief. Those who are identified as eligible may face challenges in securing legal representation because of limited resources.

In order to apply for SIJS, a child must first obtain an order from a state court having jurisdiction over the care and custody of juveniles—this includes district courts, family courts and juvenile



courts across New Mexico. See 8 C.F.R. § 204.11. The state court order must include a dependency component which can be established one of three ways: 1) by finding that the juvenile is dependent upon the court; 2) by committing the child to a state agency; or 3) by placing the child under the custody of an individual or entity. The state court order also must find that reunification with

one or both of the child's parents is not viable due to abandonment, neglect, or abuse as defined by state law.¹ See, e.g., NMSA 1978, §§ 32A-4-2, 40-10A-102. The court must further find that it is not in the child's best interest to be returned to their country of origin.

New Mexico state law provides a number of different processes that can be used to obtain a predicate order. The most common vehicles for obtaining the SIJS findings are abuse and neglect proceedings, kinship guardianship, divorce, sole custody and dependency proceedings. However, attorneys have successfully brought cases using emancipation, juvenile delinquency, orders of protection and declaratory judgments as well. A practitioner who wishes to obtain a predicate order should follow the normal procedures for the type of proceeding that is appropriate for the situation, and add the specific SIJS findings which are set out by INA § 101(1)(27)(J).

To qualify for SIJS, the child must be unmarried and under the age of 21. See 8 C.F.R. § 204.11. As a practical matter, though, it is ideal to secure the state court order before age 18. Children between the ages of 18 and 20 may face challenges in obtaining the requisite court order in states such as New Mexico where the age of emancipation is 18. Additionally, USCIS has not maintained a uniform policy on how to

adjudicate cases for those over 18, and as such, it is critical to screen children for eligibility and connect them with legal services as early as possible.

After obtaining the predicate state court order, the child may file a self-petition for SIJS classification with USCIS using the Form I-360. If the self-petition is approved, the child is eligible to apply for permanent residence using the Form I-485. That application may be filed with an immigration court or with USCIS, depending upon which agency has jurisdiction over the application. In some cases, the I-360 and I-485 may be filed concurrently, and the child may become a permanent resident in four to six months. However, because there is a cap on the number of visas that may be issued through this process each year, the juvenile may not be able to file concurrent applications, or may have to wait some period of time before obtaining lawful

The most common vehicles for obtaining the SIJS findings are abuse and neglect proceedings, kinship guardianship, divorce, sole custody and dependency proceedings.

permanent residence. The Department of State issues a monthly Visa Bulletin which indicates whether visas are available for SIJS children based on their country of origin and the date the I-360 was filed.²

Securing legal status is a life changing event for immigrant children who have often faced years of trauma, instability and hopelessness. In all cases it allows immigrant children to focus on their future rather than the risk of deportation. ■

Endnotes

¹ Because only one parent must have abandoned, neglected or abused the child,

this can include a wide variety of situations. Practitioners should engage in an analysis to determine if SIJS is possible each time they encounter an immigrant child who is not living with both parents.

² Practitioners must follow the priority dates listed under the EB-4 category of the Visa Bulletin. The Visa Bulletin can be accessed online at <https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html>.

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The Sunset of 245(i) and the Rise of New Hope in Immigration Waivers

By Alfredo J. Bonilla



It is often said that immigrants come to the U.S. in search of a better life. Images of suburban sprawl, a white picket fence and a family dog spring to mind—it's the American Dream. For many immigrants, however, their focus is more on obtaining a rectangular plastic card that reads, "Permanent Resident."

Procedurally, there are two ways for an immigrant to obtain a green card: *adjustment of status* in the U.S. or *consular processing* outside of the U.S. An immigrant may be in a position to choose between adjustment of status and consular processing, but that is rare. Obtaining a green card through consular processing applies to immigrants who are physically outside of the U.S. and have an approved visa petition. A visa is either immediately available or the immigrant is placed in a preference category until his or her priority date becomes current and a visa becomes available. If the immigrant is eligible for an immediate visa or his or her priority date becomes current, the immigrant submits a green card application and attends an interview at the U.S. consulate in his or her home country for final adjudication. Unlike consular processing, adjustment of status may be available when the immigrant is physically in the U.S. In that case once the visa petition is approved, the immigrant applies

Adjusting status to become a lawful permanent resident in the U.S. is the goal for the overwhelming majority of immigrants.

for a green card through an office of U.S. Citizenship and Immigration Services, and the adjudication takes place entirely in the U.S. Generally, processing times for adjusting status in the U.S. are faster than consular processing abroad.

Adjusting status to become a lawful permanent resident in the U.S. is the goal for the overwhelming majority of immigrants. Ideally, an immigrant can obtain a green card if they entered the U.S. legally, are admissible to the U.S. and are eligible for an immigrant visa at the time of their application. Unfortunately, for millions of immigrants who entered the U.S. illegally, this is not an option. These individuals must find an alternative route to obtaining a green card. The Immigration and Nationality Act of 2011 is the body of law that provides these alternative routes.

INA 245(i)¹ is designed to help people who are in the U.S. illegally. This includes those who entered illegally and those who

entered legally but remained in the U.S. after their visa expired. INA 245(i) allows an immigrant to become a permanent resident if an employer or close family relative petitioned them by April 30, 2001, and the immigrant was physically present in the U.S. on Dec. 21, 2000.

INA 245(i) allows immigrants to adjust their status in the U.S., without having to travel to a U.S. Consulate in their country to apply for a green card. This is a good thing because consular processing is often a roulette wheel for immigrants, who risk remaining outside of the U.S. and separated from loved ones in the U.S. if things do not go well at the U.S. Consulate. Unfortunately, the sun is setting on the INA 245(i) option because it only applies to a select demographic and excludes millions of undocumented immigrants living in the U.S.

In 1996, the Illegal Immigration Reform and Responsibility Act created the three and 10 year bars to admission to the U.S. for immigrants who violated immigration laws. The three year bar is triggered when an immigrant has been unlawfully present in the U.S. for a continuous period of more than 180 days (six months), but less than one year, leaves the U.S. The bar prevents the immigrant from lawfully entering the U.S. for a period of three years. The 10 year bar is triggered when an immigrant has been unlawfully present in the U.S. for a continuous period of more than 365 days (one year) leaves the U.S. These bars have a devastating effect on immigrants seeking to obtain a green card when INA 245(i) is not an option because they have to leave the U.S. to consular process and the mere act of leaving the U.S. is what triggers these bars. Thus, these immigrants are often stuck and can only rely on an immigration waiver of the three and 10 year bars.

When an immigrant is married to a U.S. citizen or lawful permanent resident or has a U.S. citizen or lawful permanent resident parent, a waiver may be available for the three and 10 year bars. To qualify

for this waiver, the immigrant must prove that his or her U.S. citizen or lawful permanent resident spouse or parent will suffer extreme hardship if the waiver is not approved. This is a tough standard to meet and the processing time can take more than a year. If approved, the immigrant can lawfully re-enter the U.S. with a green card and does not have to wait outside the U.S. for three or 10 years. For years, immigrants applying for waivers still had to play the roulette wheel that is consular processing. This all changed in March 2013 with the introduction of the provisional waiver process.

The provisional waiver only applies to those immigrants seeking waivers for unlawful presence (whether 3 or 10-year bars) who are married to U.S. citizens. It allows the immigrant to apply for the waiver in the U.S. prior to the consulate interview in their country. The immigrant stays in the U.S. with their spouse during

... the immigrant must prove that his or her U.S. citizen or lawful permanent resident spouse or parent will suffer extreme hardship if the waiver is not approved.

the adjudication of the waiver and only leaves for the consulate interview itself at the tail end of the case. This cut the time immigrants have to remain abroad drastically. Now immigrants who qualify for the provisional waiver only have to wait in their home country for weeks rather than months. Recently, in August 2016, the provisional waiver was expanded to include those being sponsored by permanent residents, those over the age of 21 sponsored by U.S. citizens, diversity lottery winners², and employers. These are positive trends that undoubtedly provide hope to millions of immigrants in the U.S. hoping to become legal one day. ■

Endnotes

¹ 8 U.S.C. §1255 (i).

² A class of immigrants from countries with historically low rates of immigration to the U.S. A limited number of visas are available each fiscal year. Visas are distributed among six geographic regions and no single country may receive more than seven percent of the available visas in any one year.

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Simple Possession, Dire Consequences:

The Story Behind *Ramirez v. State**

By Rebecca Kitson

Martin Ramirez, a citizen of Mexico, entered the U.S. as a teenager in the 1980s. He dreamt of a better future for himself and eventually found it in the form of a family. In 1993, he married a U.S. citizen and became a stepfather to four U.S. citizen stepchildren, ages 5, 6, 7 and 8 years old. He loved his wife dearly and took his role as father to the stepchildren seriously.



On Jan. 4, 1997, Martin was arrested at a local park for smoking marijuana. He was charged with three misdemeanors: possession of marijuana under 1 oz., possession of drug paraphernalia and concealing identity, in violation of NMSA 1978, §§ 30-31-23(B)(1)(1990, amended 2011), 30-31-25.1 (1981, amended 2001), and 30-22-3 (1963). He was arrested and booked. Martin first met with his public defender right before his arraignment, who conveyed an offer of time served in return for a guilty plea to all three charges. Martin accepted the offer. What Martin did not know—and was not told—was information concerning the immigration consequences of his guilty plea. This was despite the fact that Form 9-406(1990) was required to be completed by the judge, the defendant, and the defendant's counsel, certifying that the defendant had been advised as to the effect upon the defendant's immigration status.

In April of 2001, Martin's wife started the process to obtain Legal Permanent Residency, or LPR status (colloquially known as a "green card"), for him. Unfortunately, Martin's wife passed away less than five months later from an accidental drug overdose. In addition to the emotional upheaval of her death, the petition on Martin's behalf for LPR status died with her¹.

Immigration Law Regarding Simple Possession of Marijuana

In 2008, Martin applied for LPR status through his 21-year-old U.S. citizen stepdaughter, who qualified as an "immediate relative" parent pursuant to INA §201(b)(2)(A)(i); 8 USC §1151(b)

Most noncitizens in New Mexico face dire immigration consequences of apparently minor criminal offenses.

(2)(A)(i), because his marriage to her biological mother took place prior to the date his stepdaughter turned 18. However, the requisite relationship is only the first step—he still needed to demonstrate "admissibility" in order to qualify. It was his burden to show that he did not have any legal violations or conditions that barred LPR status.

Generally, those who have not been "admitted" to the U.S. are subject to the grounds of inadmissibility under Immigration and Nationality Act §212, 8 USC §1182. "Admission" is "the lawful entry of the alien into the U.S. after inspection and authorization by an immigration officer." INA §101(a)(13). Those who have been admitted are generally subject to the grounds of deportability under INA §237; 8 USC §1227. The statute contains a laundry list of grounds related to health, immigration violations and crime, among others. Some are of limited duration, and some are permanent. Some are waivable under certain conditions, some are not. In Martin's case, the primary barrier to his residency was his misdemeanor marijuana convictions.

Martin's convictions from 1997 made him inadmissible because they were offenses

related to a controlled substance as defined in 21 USC §802, under INA §212(a)(2)(A)(i)(II); 8 USC §1182(a)(2)(A)(i)(II). Convictions (or even, in some circumstances, admissions of the essential elements of a crime without a technical "conviction") for controlled substances are nearly always permanent and are not waivable grounds of inadmissibility for purposes of permanent residency². The law regarding inadmissibility for controlled substances, while allowing for some argument

(see *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015)), is relatively strict and "bright line"—there exists a sole waiver, given that the offense relates to a single possession offense of marijuana for personal use, under 30 grams. See INA 212(a)(2)(A)(i)(ii); 8 USC §1182(a)(2)(A)(i)(ii), which is available only for a single offense of single possession of 30 grams or less of marijuana and under limited circumstances. While a single paraphernalia conviction may also qualify for the waiver, the burden is on the applicant to demonstrate that the paraphernalia related to 30 grams or less of marijuana for personal use. See *Escobar Barraza v. Mukasey*, 519 F.3d 388 (7th Cir. 2008), but see *Mellouli v. Lynch*, *supra*. If an INA §212(h) waiver is available to a person convicted of drug paraphernalia the immigration court should use a "circumstance-specific" approach and the applicant must demonstrate his eligibility by a preponderance of the evidence. *Matter of Martinez Espinosa*, 25 I&N Dec. 118, 120-22 (BIA 2009), overruled on other grounds by *Mellouli v. Lynch*.

INA §212(h) (8 USC §1128(h)) contains the waiver for a single conviction related to marijuana for personal use (under 30 grams). There are two forms of the waiver: 1) that the conviction occurred 15 years prior to the date of application for the benefit, that that the admission would not be contrary to the welfare and security of the U.S., that the person has been rehabilitated, the applicant meets all other qualifications and is deserving of the exercise of discretion; and 2) if he or she is the spouse, parent, son or daughter of a U.S.

citizen or LPR who would suffer extreme hardship if the person is removed from the U.S., and is deserving of the exercise of discretion. INA §212(h)(1)(A),(B); 8 USC §1182(h)(1)(A),(B).

In Martin's case, the fact that he pled guilty to possession of under 30 grams of marijuana *and* paraphernalia precluded him from qualifying for the waiver because that meant he had *two* convictions related to marijuana³. The agency considering Martin's application for residency, the U.S. Citizenship and Immigration Service also did not find a sufficiently "extreme hardship" to his family members to warrant a waiver.

Once denied LPR status, Martin faced imminent removal proceedings in front of the Immigration Court in El Paso, Texas (the court having jurisdiction over those in New Mexico). At that point, he moved to vacate his guilty plea for the marijuana convictions under a claim of ineffective assistance of counsel.

Law Regarding Post-Conviction Relief and Immigration Consequences

The law in New Mexico regarding ineffective assistance of counsel in advising as to the immigration consequences of a guilty plea had been established in 2004 by *State v. Paredes*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799, which held that a "[d]efendant's attorney had an affirmative duty to determine his immigration status and provide him specific advice regarding the impact a guilty plea would have on his immigration status." The duty stems from the waiver of constitutional rights, including the right to a jury trial, and the waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 7, citing *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The U.S. Supreme Court followed suit in 2010 in *Padilla v. Kentucky*, 559 U.S. 356, 373, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010), holding that both misadvice and non-advice regarding the immigration consequences of a guilty plea could amount to ineffective assistance of counsel and thus undermine the voluntary nature, and by extension the constitutionality, of a guilty plea.

However, Martin's writ of error *coram nobis* requesting that his guilty plea be withdrawn was denied by the district court on the basis that both *Paredes* and *Padilla* were not retroactive. In 2011, Martin was arrested and placed in federal

immigration detention in Otero County, New Mexico. He was formally placed in removal (deportation) proceedings in front of the Immigration Court. Immigration and Customs Enforcement exercised their discretion and released Martin on a \$5,000 cash-only bond.

Meanwhile, the New Mexico Court of Appeals overturned the district court's ruling, holding that *Padilla* and *Paredes* did not establish new rules and thus could be applied retroactively, and that counsel's failure to advise Martin of the immigration consequences of his guilty plea prejudiced him. *State v. Ramirez*, 2012-NMCA-057, 278 P.3d 569, aff'd, 2014-NMSC-023, 333 P.3d 240. However, in 2013 the U.S. Supreme Court took up the issue of federal retroactivity of the *Padilla* in *Chaidez v. United States*, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). The Court concluded that *Padilla* was not retroactive. With that, Martin's future in the U.S. swung between state and federal case law.

Martin's case was reviewed by the New Mexico Supreme Court, which held that as matter of first impression that *State v. Paredes* (the state decision which required attorneys to advise noncitizen clients of the immigration consequences of guilty pleas), applied retroactively to people like Martin. *Ramirez v. State*, 2014-NMSC-023, 333 P.3d 240. The NMSC held that the responsibility of criminal defense counsel to affirmatively advise as to the immigration consequences of a guilty plea was retroactive to 1990 in the state of New Mexico. *Id.* As a result, Martin's guilty pleas for the 1997 misdemeanor marijuana convictions were vacated.

The Final Court Frontier: Immigration Proceedings in Martin's Case

Martin's legal battle, however, was not over. He still had to face the Immigration Court and convince the Immigration Judge that he was deserving of discretionary relief from removal in the form of an adjustment of status to LPR⁴. During the two days of testimony before the Immigration Court, the judge heard his entire life story: his role as a stepfather, step-grandfather, and caregiver for his quadriplegic stepson. He was grilled, both by the ICE counsel as well as by the immigration judge, as to his fitness as a parent and to his fitness as a potential LPR of the U.S. Martin was required to explain in minute detail the day he was arrested, and take responsibility for the now vacated convictions⁵.

In June, 2016, Martin was granted LPR status. This closed a near 20 year battle that traversed the New Mexico judiciary and the federal immigration system, due principally to a single incident of marijuana possession. Martin's case is only unique in that it reached the NMSC. Most noncitizens in New Mexico face dire immigration consequences of apparently minor criminal offenses.

This is a complex area of the law. It is incumbent upon the criminal defense bar to understand these consequences in order to advise their clients appropriately. Through the joint efforts of the immigration and criminal defense bars, counsel can work together to secure the best future for their clients, assuring both their liberty and their freedom to remain in the U.S. ■

Endnotes

¹ The law regarding widows and widowers has changed significantly, and now allows for greater forgiveness for surviving beneficiaries. *Please see* INA §204(l); 8 USC §1154(l).

² There is a limited waiver for non-immigrant visas found at INA §212(d)(3); 8 USC §1182(d)(3). However, these waivers are highly discretionary and difficult to obtain. *See Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978); *See also* Department of State guidance at 9 FAM 40.301 N3.

³ The U.S. Citizenship and Immigration Service (USCIS) office did not recognize the holding of *Escobar Barraza v. Mukasey*, *supra*, because it was in the 7th Circuit, and thus did not consider the waivability of the paraphernalia conviction.

⁴ Applicants for relief or protection from removal have the burden of establishing: 1) satisfaction of the applicable eligibility requirements; and 2) that a favorable exercise of discretion (where relevant) is warranted. INA §240(c)(4)(A); 8 USC §1229a(c)(4)(A).

⁵ *See Schroeck v. Gonzales*, 429 F.3d 947 (10th Cir. 2005) [the immigration judge's consideration of a dismissed criminal case did not violate respondent's constitutional rights against double jeopardy or by requiring him to prove his innocence.]

Rebecca Kitson practices immigration law at Rebecca Kitson Law. She attended the University of New Mexico School of Law and is the current budget officer for the State Bar Immigration Law Section.

**Explicit client permission was obtained to share details regarding his life and case.*

Deferred Action:

A Tool for Community Development

By Allegra S. Love

In 2012, in the absence of action from Congress to reform the American immigration system, President Barack Obama signed the executive order creating Deferred Action for Childhood Arrivals. DACA identifies certain young immigrants, known as Dreamers, who were brought to the U.S. as children and are studying or earning degrees. It provides them with access to work authorization, a Social Security number and a reprieve from deportation.

It is an imperfect remedy. It is a temporary designation and not a path to citizenship or legal residency and, as an executive order, and therefore, subject to the support of the President of the U.S. Yet suddenly, undocumented immigrants were offered sincere economic and educational tools with which to plan their futures. DACA, in theory, provides a pathway for some individuals away from the economic and social margins that make progress so difficult.

Community members in Santa Fe saw these challenges as an opportunity and formed the Santa Fe Dreamers Project—a non-profit organization that provides free legal representation to immigrant youth and their family members. The foundations of the Project, were to explore whether we could use DACA as a tool to improve conditions for young immigrants in Santa Fe and support their economic and educational success.

With that goal in mind and in collaboration with community partners from the schools, churches, the City of Santa Fe and local immigrant organizers,



DACA, in theory, provides a pathway for some individuals away from the economic and social margins that make progress so difficult.

the Santa Fe Dreamers Project has held a weekly free legal clinic for the last three years to offer young immigrants free representation in their Deferred Action cases. The clinic is not a place to find pro-se help but is instead a place where immigrants can seek high quality representation in a comfortable setting using a model that is designed around that barriers they experience to accessing lawyers. Through this model the Project has filed almost 900 cases free of charge. They are funded by grants, foundations and private donations. Attorney fees can be very expensive for a Deferred Action case and in the immigrant community that money often simply doesn't exist. If it does, it often comes out of monthly expenses used to keep families afloat—rent, diapers, milk, car repairs, dentist appointments, etc. Yet with creativity and the generosity

of the community The Project has been able to develop a model that costs the organization \$200 per client to file a Deferred Action case. For an investment of \$200 they can help young people in our community make an authentic transformation that supports their personal educational and economic success.

The Santa Fe Dreamers Project is seeing extraordinary success. Dreamer clients are significantly outpacing Santa Fe's general population in their high school graduation rate. Clients are enrolling in community college and

graduate school. Families are seeing huge income bumps as a result of receiving Deferred Action. They are finding jobs that come with health care, sick days and are free from exploitation. Many immigrants are opting to address pressing social problems in our town whether they are bilingual pre-school teachers, dental aides in community clinics or community organizers. In Santa Fe, for the first time ever, English language learners showed more improvement on standardized tests than their English speaking peers. That is due to excellent teaching and better bilingual pedagogy and extraordinary efforts from students but I'd like to think our services played a at least a very small part. Many families are even buying their first homes. Administrators of the Project have seen clients from 15 counties in New Mexico and three surrounding states. The small investment in creating a ladder out of poverty is making families all over New Mexico more capable and healthier but also making our whole community stronger as well. At a time where New Mexico is consistently ranked one of the worst places to be a child, we are in desperate need of models that make our state a healthier place to be for everyone.

What is coming into focus through our work in Santa Fe is a model of community supported legal services where we ask for financial investment from our leaders and neighbors to support an extraordinary social impact from the immigrant community. This is particularly relevant as study after study points out that immigrants indeed make our economy stronger whether propping up money making industries in our state, starting businesses, or getting trained in the STEM or medical fields where we have extreme shortages in this state.

In 2014, President Obama tried to expand the scope and impact of Deferred Action by creating DAPA, a similar program for the parents of U.S. Citizens. DAPA would have offered the same benefits as DACA and affected 5 million undocumented people living in the U.S. Immigrant families. Immigration advocates and leadership in progressive cities were looking forward to the community and economic development opportunities that would accompany the expansion. But the State of Texas successfully sued for an injunction which was upheld by the fifth circuit court of appeals. In June 2016 a



Now the fate of DACA and any future DAPA program depends on November's election.*

split Supreme Court declined to rule on the injunction and DAPA was effectively dead in the water.

Now the fate of DACA and any future DAPA program depends on November's election.* Hillary Clinton has vowed to continue DACA and fight to actualize DAPA and Donald Trump has vowed to end DACA and deport undocumented

immigrants. This difference is critical. When individuals choose to see the capabilities and contributions of immigrants in communities as a resource, supporting immigrants becomes a smart economic and community development strategy instead of simply an exercise in compassion and humanity, as it is so often viewed. This is an important argument not only as administrations change in the White House, but also as Congress reconfigures and the potential for real immigration reform is a possibility. When that reform comes, it will be important to come together as a community to support and invest in excellent legal services to our immigrant families in New Mexico and afar so that economic and social impacts can be maximized to make everyone stronger. ■

*This issue of the *New Mexico Lawyer* went to press prior to the announcement of the 2016 Presidential Election results.

Allegra Love is an attorney and director of the Santa Fe Dreamers Project. She attended the University of New Mexico School of Law. She is a board member of the State Bar Immigration Law Section.



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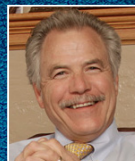
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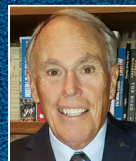
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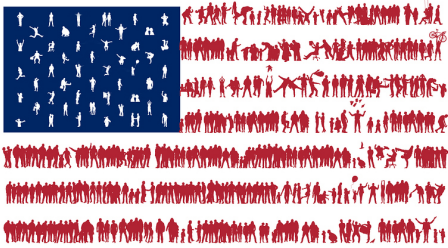


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Some Thoughts About American Immigration Law Policy

By L. John Russo

(The views expressed in this article are solely those of the author and do not necessarily reflect the views of the State Bar Immigration Law Section.)

I. The Power of Capitalism, Materialism, and the Status Quo

There has been a robust national debate about immigration policy throughout the recent presidential primary and general election campaigns. Sometimes, on all sides of the debate, people come to the debate with a pre-formed assumption that illegal immigration is a problem, without actually having analyzed the issue. Is all illegal immigration really a problem for everyone? If it is, why is it a problem? For whom is it a problem?

The magnet of American small businesses and large corporations that use “contractors” offering to pay American wages is a strong attracting force to workers from Mexico, and many other foreign countries, where their wages, working conditions, and legal rights are often significantly worse than in the U.S.. The economic differential between wages and working conditions in a wealthy country (like the the U.S.) and a somewhat poor country (such as Mexico) attracts millions of Mexican laborers to the U.S..

Recognition of economic and political reality is a prerequisite to an accurate analysis of transnational migration. The power of capitalism and materialism will always trump federal statutory law. The insatiable desire to acquire property and to live a “better life” is probably the single most active motivator for people all over the world. As an example, the desire to shop helped bring down the Berlin Wall.

Human rights conditions in Mexico have also driven people to leave the country. Human rights-related problems in Mexico include “law enforcement



and military involvement in serious abuses, such as unlawful killings, torture, and disappearances.” U.S. Bureau of Democracy, Human Rights, and Labor, “Mexico 2015 Human Rights Report,” available at <http://www.state.gov/documents/organization/253239.pdf>. The report also pointed to “[i]mpunity and corruption in the law enforcement and justice system” and pointed out that “[o]rganized criminal groups killed, kidnapped, and intimidated citizens, migrants, journalists, and human rights defenders.”

Many American small businesses, for decades, have eagerly welcomed undocumented immigrants. They can and almost always do pay lower wages to undocumented workers than they pay to documented immigrants and to workers who are U.S. citizens. They frequently pay cash, either under the table or over the table, and do not pay federal payroll taxes. Undocumented workers, as a practical matter, do not benefit from federal labor laws designed to protect the workforce, including basic safety rules enacted to protect human life. Most of the American business community has a strong vested interest in preserving the status quo. At the same time, American micro and small businesses that seek to recognize

and obey the federal labor and taxation laws are frequently at a significant competitive disadvantage when attempting to compete against companies that hire unlawfully present undocumented foreign workers.

One other cog in the status quo is the relatively porous border between Mexico and the U.S., coupled with the demonstrably ineffective U.S. Border Patrol. Low wages, high profit margins, and the status quo depend

on an uninterrupted, if modest, stream of undocumented foreign labor into the U.S.. If illegal immigration were ever completely ended, would small businesses, and even large American corporations, maintain their profit margins?

Low-wage, relatively unskilled workers are necessary to keep the economy functioning. In the absence of undocumented workers who are not lawfully authorized to work in the U.S., who would pick the fruit? Who would do the housekeeping work at the hotels? Who would work in the kitchens of many restaurants, including fast-food restaurants? Who would do the office janitorial work? Who would do the roofing work? Who would do the concrete work? Who would shovel the cow manure at our dairy farms?

These are some of many occupations that require very hard physical labor but do not pay well. Many, but not all, citizens and documented foreign workers do not want to do this kind of work. If approximately 11 million unlawfully present foreign workers and their mixed-citizenship families were to be deported, it would cause an economic disaster.

II. “They All Must Leave Now”

As with every issue, there are competing policy proposals aimed at addressing immigration. Generally, an immigrant visa is a prerequisite to lawfully immigrating to the U.S.. The policy of “they all must leave now” entails the enforcement of the visa requirement. *See* Immigration Act of May 26, 1924, 43 Stat.153, as amended, § 211(a) Immigration and Nationality Act of 1952, P.L. 82-414, 66 Stat. 163, as amended, 8 U.S.C. § 1181(a).

It may come as a surprise to some, but most undocumented Mexican immigrants would voluntarily return to Mexico if they knew beforehand that they would be eligible to receive the immigrant visa upon returning. *See, e.g.*, Alex Nowrasteh, “Removing the 3/10 Year Bars Is Not Amnesty,” *Cato Institute* (April 23, 2014). Those immigrants would have to “get in line” for re-entry through a process called Consular Processing, meaning they would apply for a visa at a U.S. consulate or embassy in their home country. While the visa does not entitle the applicant to be admitted into the U.S., it does provide an opportunity to “knock on the door” and request permission to enter as a lawful immigrant.

The visa holder is almost always permitted to lawfully enter the U.S.. However, this traditional procedural mechanism that has been used for decades is no longer a realistic option for millions of people who have overstayed their temporary visas or who have entered illegally. President Bill Clinton signed a law that virtually destroyed traditional American immigration. *See* Section 212(a)(9)(C), INA, added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 , P.L. 104-208, 110 Stat. 3009, 8 U.S.C. § 1182(a)(9)(C) (“Section 9C”).

Section 9C requires a 10-year mandatory non-waivable absence from the U.S. for most people who are unlawfully present in the U.S. for a year or more, depart the U.S. for any reason, and then re-enter or attempt to re-enter unlawfully. This is a common fatal impediment to legal status for most Mexican immigrants because of geography, history, economics, and family.

Consequently, Section 9C has “trapped” most of the 11 million people living in the U.S. without documentation. At a minimum, to accomplish a goal

of removing all of the undocumented immigrants currently living in the country, Congress would have to tweak just a few sections of the 1996 Bill Clinton-era law such that millions of Mexican and other unlawfully present immigrants would be incentivized to leave the country at their own expense and then apply for immigrant visas. There would be no need to hire and train thousands of additional highly compensated U.S Immigration and Customs Enforcement (“ICE”) Enforcement and Removal Officers.

III. “Let Them Stay and Pay a Fine”

Another competing policy—my proposal—would permit the approximately 11 million people to stay in the country and regularize their immigration status without being compelled to travel abroad for a visa. This could be called The Uncomprehensive Immigration Reform Act of 2017. It need not be 1,198 pages long like the Senate “Gang of Eight” drafted and passed in 2013. No more than 20 pages, double-spaced, are all that would be required to un-comprehensively but effectively address the presence of 11 million unauthorized workers.

Suggested revisions to our lawmakers could include:

- 1) Amending Section 249 Registry INA, 8 U.S.C. § 1259, to record permanent resident status for certain immigrants who entered the U.S. before Jan. 1, 2012, coupled with payment of a \$1,000 fine, or more accurately, an “additional sum”, per person;
- 2) Extending the sunset date of Section 245(i) INA, 8 U.S.C. § 1255(i) adjustment of status to immigrants who are physically present in the U.S. with respect to family-based or labor certification applications that have been filed on or before April 30, 2018;
- 3) Repealing the bars to adjustment of status at Section 245(c) INA, 8 USC § 1255(c), regarding prior unauthorized employment and failure to maintain a continuous lawful status in the U.S. before filing an application for adjustment of status, USCIS form 1-485;
- 4) Repealing Section 212(a)(9)(C) INA, 8 U.S.C. § 1182(9)(C), (which presently requires a 10-year non-waivable absence bar to receiving an immigrant visa) before, on,

- and after the effective date of the Uncomprehensive Immigration Reform Act of 2017;
- 5) Repealing Section 212(a)(9)(B) INA, 8 U.S.C. § 1182(9)(B), (generally a 10-year absence bar for more than one year of “unlawful presence”) before, on, and after the effective date of the uncomprehensive Immigration Reform Act of 2017;
- 6) Limiting the Section 212(a)(6)(C)(i) INA, 8 U.S.C. § 1182(6)(C)(i) dishonesty bar to immigration to a one-year absence from the U.S. plus payment of a \$1,000.00 “additional sum”;
- 7) Limiting the Section 212(a)(6)(C)(ii) INA, 8 U.S.C. 1182(6)(C)(ii) false claim to U.S. citizenship bar to a one-year absence from the U.S. plus payment of a \$1,000.00 “additional sum”;
- 8) Deleting the words “extreme hardship” as a requirement for waivers of inadmissibility, and replacing them with the word “hardship”;
- 9) Expanding the scope of qualifying family relatives required to request a waiver of a ground of inadmissibility, to include U.S. citizen children and adult sons and daughters and the applicant himself/herself;
- 10) Codifying President Obama’s Deferred Action for Childhood Arrivals program (“DACA”) into statutory law; and
- 11) Reducing by 50 percent all U.S. government filing fees, sometimes referred to as “customer service fees”, from their present levels. (The filing fee for a family of four to adjust status to lawful immigrant in the U.S. is presently set at \$5,960.)

Does this proposed legislation in an Uncomprehensive Immigration Reform Act of 2017 amount to “amnesty”?

No. These recommended changes are some reasonable, practical and sensible amendments to the Immigration and National Act of 1952, as amended. ■

John Russo practices with the Law Offices of L. John Russo in Albuquerque and specializes in immigration, citizenship and deportation law. He has practiced law for more than 33 years and is a member of the State Bar Immigration Law Section. Russo graduated from the UNM School of Law.

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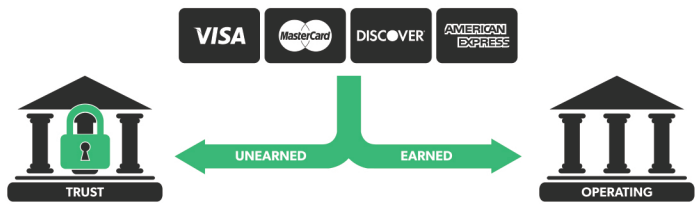
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