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The Immigration Law Advisor is a professional newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

Fraud and the Unauthorized Practice of Law in Immigration Proceedings

by Sarah Martin

Many nonlawyers are unqualified to guide an alien through the immigration system. Some practice law with good intentions, while others do so unscrupulously. Nevertheless, the net effect of the unauthorized practice of immigration law is a negative one. *See* Margaret Mikyung Lee, Cong. Research Serv., R40822, *Legal Ethics in Immigration Matters: Legal Representation and Unauthorized Practice of Law* 1 (Sept. 18, 2009) ("The unauthorized practice of law by persons who are not attorneys, ineffective assistance by licensed attorneys, or other unethical conduct can cause irreversible harm to aliens seeking immigration benefits or relief. Aliens may forfeit, temporarily or permanently, the benefits they seek . . . ."). This article will review the contours of authorized representation and the efforts of the Executive Office for Immigration Review ("EOIR") to curb the unauthorized practice of immigration law by nonlawyers and fraudulent conduct by both lawyers and nonlawyers in immigration proceedings.

The Scope of "Representation"

"Representation" before the Board of Immigration Appeals, the Immigration Courts, and the Department of Homeland Security ("DHS") encompasses both practice and preparation. *See* 8 C.F.R. § 1001.1(m). "Practice" means "the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board." 8 C.F.R. § 1001.1(i). "Preparation" includes "the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers." 8 C.F.R. § 1001.1(k). Representation under 8 C.F.R. § 1001.1 does not include the lawful functions of a notary, including filling in blank spaces on immigration forms, as long as the notary is receiving only nominal

pay and does not profess to be qualified in legal matters regarding immigration and naturalization. *See* 8 C.F.R. § 1001.1(i), (k).

An individual in removal proceedings before the EOIR has the privilege of being represented by *authorized* counsel of his or her choice. *See* section 292 of the Immigration and Nationality Act, 8 U.S.C. § 1362; 8 C.F.R. §§ 103.2(a)(3), 1003.16(b). Representation is generally not provided at Government expense. *See* section 292 of the Act. *But see Franco-Gonzalez v. Holder*, No. CV 10-02211-DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (further implementing the permanent injunction in *Franco-Gonzalez v. Holder*, No. CV 10-02211-DMG (DTBx), 2013 WL 3674492, 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013) (requiring the provision of authorized representatives at Government expense to pro se persons deemed to lack mental competence who are detained in California, Arizona, or Washington)).

"Authorized" Representation

The Code of Federal Regulations describes who is authorized to represent aliens before the DHS and the EOIR. *See* 8 C.F.R. § 1292.1(a)(1)–(5). Only licensed attorneys and "accredited representatives" approved by the Board under 8 C.F.R. § 1292.2 can practice immigration law or represent clients in immigration matters. *See* 8 C.F.R. § 1292.1(a)(1), (4). Law students and law graduates can represent aliens, but without direct or indirect compensation and only under the supervision of a faculty member, licensed attorney, or accredited representative. *See* 8 C.F.R. § 1292.1(a)(2). Additionally, "reputable individuals" such as friends or family members may be permitted to represent aliens, but they cannot charge a fee or regularly represent the alien in immigration matters. *See* 8 C.F.R. § 1292.1(a)(3). Finally, an accredited official of the government of the alien's home country may represent the alien with the alien's consent. *See* 8 C.F.R. § 1292.1(a)(5).

Authorization To Practice

Apart from the Federal regulations regarding accreditation, some States permit individuals to assist aliens with their immigration cases. However, State law does not confer the same "authorized" representative status as that delineated by the Federal regulations. *See* 8 C.F.R. § 1292.1(a)(1)–(5). Only the Board can authorize an "accredited representative" to practice before the agency. *See* 8 C.F.R. § 1292.1(a)(4).

Moreover, the doctrine of preemption may apply to State authorization of immigration law practice. Federal law may preempt State law in three ways: (1) express preemption; (2) field preemption; and (3) conflict preemption. *Gadda v. Ashcroft*, 377 F.3d 934, 944 (9th Cir. 2004). Field preemption occurs when the Federal statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary regulation by the States. *Id*. Given the breadth of the Federal regulatory definition of "representation," *see* 8 C.F.R. § 1001.1(m), Federal law may preempt State-granted authorization to practice immigration law. *See* Careen Shannon, *To License or Not to License?: A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33:2 Cardozo L. Rev. 437, 453 (2011); *Sperry v. State of Florida ex. rel. The Florida Bar*, 373 U.S. 379, 404 (1963) (holding that if a Federal law allows nonlawyers to practice law before a Federal administrative agency, the State may not accuse those nonlawyers of unauthorized practice).

Interestingly, following *Sperry*, many States have determined that the limited authorization for nonlawyers to practice law before the DHS and the EOIR does not constitute the unauthorized practice of law under their State laws and rules.[2] *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-2702(A)(4) (stating that an accredited representative is not engaging in the unauthorized practice of immigration law by providing immigration legal services); N.J. Stat. Ann. § 2C:21-31(d) (same); N.M. Stat. Ann. § 36-3-4(A)(4) (same); Va. Unauthorized Practice R. 9-103 (same); *see also* North Carolina State Bar, *Preventing Unlicensed Legal Practice*, http://www.ncbar.gov/public/upl.asp (last visited Oct. 19, 2015) (same).

How the EOIR Identifies and Polices Fraud

Some common examples of fraud by nonlawyers in immigration proceedings include claiming false qualifications to practice law and actually representing clients without authorization. Examples of fraud by attorneys include filing an application using the facts of another respondent's case or failing to file an application or appear in court after being retained. Accredited representatives may commit fraud by representing aliens who are not clients of the affiliated recognized organization.

The EOIR's Office of the General Counsel ("OGC") receives complaints from members of the public who allege fraud before the Board or an Immigration Court. *See* 8 C.F.R. § 1003.104(a)(1). OGC acts as a clearinghouse for these complaints. Disciplinary Counsel looks into complaints involving practitioners as defined at 8 C.F.R. § 1292.2, and Counsel for the Fraud and Abuse Prevention Program primarily looks into complaints involving individuals who are not authorized practitioners. An alien seeking to report a practitioner's violation of professional conduct can complete an Immigration Practitioner Complaint (Form EOIR-44). If the violation was at the hands of a nonpractitioner, that is, a nonlawyer who was not authorized to represent the alien in immigration proceedings, the alien may contact the EOIR Fraud and Abuse Prevention Program at EOIR.Fraud.Program@usdoj.gov. Once the complaint is received, Disciplinary Counsel and Counsel for the Fraud and Abuse Prevention Program then work together as separate but interlocking components of OGC to design a plan of action in response.

Any immigration practitioner, as defined at 8 C.F.R. § 1292.2, who *assists anyone* (except as authorized under 8 C.F.R. §§ 292 and 1292) in any activity that constitutes the unauthorized practice of law is subject to disciplinary proceedings. *See* 8 C.F.R. § 1003.102. If, upon completion of the preliminary inquiry, Disciplinary Counsel determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct, Disciplinary Counsel will issue the practitioner a Notice of Intent to Discipline, which is also filed with the Board. 8 C.F.R. § 1003.105(a)(1). The notice contains a statement of the charge(s), a copy of the preliminary inquiry report (not required in summary disciplinary proceedings), the proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing. *Id*. Disciplinary Counsel may also resolve a complaint by issuing warning letters and admonitions and/or entering into agreements in lieu of disciplinary proceedings. *See* 8 C.F.R. § 1003.104(c).

The Board has the authority to impose disciplinary sanctions on attorneys and accredited representatives who violate the rules of professional conduct in practice before the Board, the Immigration Courts, and the DHS. *See* 8 C.F.R. §§ 292.3; 1003.1(d)(2)(iii), (5); 1003.101–.106; *see also Matter of Gadda*, 23 I&N Dec. 645 (BIA 2003). The Board also has the authority to discipline practitioners who *assist* in the unauthorized practice of law. *See* 8 C.F.R. § 1003.102(m); *see also Matter of Singh*, 26 I&N Dec. 623 (BIA 2015) (holding that an attorney who admitted to engaging in conduct prejudicial to the administration of justice by enlisting his legal assistant to impersonate him during multiple telephonic appearances before Immigration Judges was appropriately suspended from practice before the Immigration Courts, the Board, and the DHS for a period of 16 months and prohibited from appearing telephonically in the Immigration Courts for 7 years). However, the Board and the Immigration Courts do not have authority to discipline individuals such as "immigration specialists," "visa consultants," "notarios,"[1] and other individuals who engage in the unauthorized practice of law. Counsel for the Fraud Prevention Program refers these cases to appropriate Federal and State law enforcement agencies and assists these agencies in their investigations and prosecutions.

The Department of Justice also launched a Notario Task Force ("NTF") in 2013 as part of an interagency initiative, begun in June 2011, against the unauthorized practice of immigration law. The NTF is engaged in intradepartmental and interagency efforts targeting fraud involving the unauthorized practice of immigration law. The NTF focuses on internal coordination to support public engagement and outreach on the issue, increasing the number of authorized immigration practitioners, and protecting the immigration system from abuse. The EOIR chairs the NTF. Externally visible results to date include the development of outreach materials and hosting webinars focused on these fraud issues.

How Can Adjudicators and Practitioners Combat Fraud?

Any attorney or accredited representative who practices before the Board, the Immigration Courts, or the DHS has an affirmative duty to report if he or she has been found guilty of, or pled guilty or nolo contendere to, a serious crime (as defined in 8 C.F.R. § 1003.102(h)), has been suspended or disbarred, has resigned with an admission of misconduct, or has resigned while a disciplinary investigation or proceeding is pending. *See* 8 C.F.R. §§ 292.3(c)(4), 1003.103(c). The practitioner must report the misconduct, criminal conviction, or discipline to both EOIR Disciplinary Counsel and DHS Disciplinary Counsel within 30 days of the issuance of

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CIRCUIT COURT DECISIONS FOR SEPTEMBER 2015

by John Guendelsberger

The United States courts of appeals issued 167 decisions in September 2015 in cases appealed from the Board. The courts affirmed the Board in 153 cases and reversed or remanded in 14, for an overall reversal rate of 8.4%, compared to last month's 12.2%. There were no reversals from the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for September 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	5	5	0	0.0
Second	27	24	3	11.1
Third	6	5	1	16.7
Fourth	11	11	0	0.0
Fifth	12	12	0	0.0
Sixth	6	6	0	0.0
Seventh	1	1	0	0.0
Eighth	3	3	0	0.0
Ninth	85	75	10	11.8
Tenth	2	2	0	0.0
Eleventh	9	9	0	0.0
All	167	153	14	8.4

The 167 decisions included 75 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 47 direct appeals from denials of other forms of relief from removal or from findings of removal; and 45 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	75	67	8	10.7
Other Relief	47	43	4	8.5
Motions	45	43	2	4.4

The eight reversals or remands in asylum cases involved credibility (two cases), the 1-year filing bar for asylum (two cases), well-founded fear (two cases), particular social group, and protection under the Convention Against Torture. The four reversals or remands in the "other relief" category addressed the categorical approach (two cases), administrative closure, and the "terrorist activity" bar to relief. The two motions cases involved changed country conditions.

The chart below shows the combined numbers for January through September 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	27	21	6	22.2
Ninth	622	498	124	19.9
Tenth	42	36	6	14.3
First	27	24	3	11.1
Third	82	74	8	9.8
Eleventh	57	52	5	8.8
Second	216	199	17	7.9
Sixth	51	47	4	7.8
Fourth	82	77	5	6.1
Eighth	34	32	2	5.9
Fifth	94	92	2	2.1
All	1334	1152	182	13.6

Last year's reversal rate at this point (January through September 2014) was 14.3%, with 1,730 total decisions and 248 reversals or remands.

The numbers by type of case on appeal for the first 9 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	663	564	99	14.9
Other Relief	364	308	56	15.4
Motions	307	280	27	8.8

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Fifth Circuit:

Esquivel v. Lynch, No. 13-60326, 2015 WL 5750816 (5th Cir. Oct. 1, 2015): The Fifth Circuit granted the petition for review of the Board's decision finding the petitioner ineligible for cancellation of removal under section 240A(a) of the Act as the result of a marijuana conviction. The Board concluded that the petitioner's 2003 Texas conviction for possession of marijuana in a drug-free zone made him removable under section 237(a)(2)(B)(i) as an alien convicted of a drug offense other than a single offense involving possession for one's own use of 30 grams or less of marijuana. The Board concluded that the possession of the substance in a school zone distinguished the offense from a less severe offense involving only "simple possession." The Board also held that the conviction had invoked the "stop-time" rule contained in section 240A(d)(1) of the Act, thus preventing the petitioner from accruing the required 7 years of continuous residence for section 240A(a) cancellation of removal. The court of appeals found that the "stop-time" rule did not apply because the petitioner's conviction fell within the statutory exception involving 30 grams or less of marijuana for personal use. The court favorably cited the Board's observation in *Matter of Davey*, 26 I&N Dec. 37, 39 (BIA 2012), that the personal use exception "refers not to a common generic crime but rather to a specific type of conduct." The court further concluded that the petitioner's offense fell within this exception, notwithstanding the fact that it occurred in a drug-free zone. The Fifth Circuit did not accord *Chevron* deference to the Board's interpretation in *Matter of Moncada*, 24 I&N Dec. 62 (BIA 2007), holding that the "personal use" exception applies only to the least serious category of offenses analogous to simple possession. The court found the interpretation set forth in *Moncada* to be at odds with the plain meaning of the statutory language.

Seventh Circuit:

Darinchuluun v. Lynch, No. 14-2212, 2015 WL 5868309 (7th Cir. Oct. 8, 2015): The Seventh Circuit denied the petition for review of the Board's decision upholding the denial of asylum from Mongolia based on the petitioner not having met his burden to corroborate his claim for relief. The Immigration Judge had concluded that corroborative evidence was necessary from the petitioner to support his claim. The Immigration Judge expressed concern about the petitioner's credibility because, although his testimony had been consistent, the petitioner had lived in Switzerland and Russia for lengthy periods without seeking asylum and was dishonest in his visa application about his reasons for traveling to the United States. The Board affirmed the Immigration Judge's determination that the petitioner did not submit sufficient corroborative evidence to meet his burden of proof to establish eligibility for relief. The Seventh Circuit found the Immigration Judge's determination to be reasonable and consistent with the circuit's own case law. The court acknowledged that the petitioner did submit some documentation at his hearing, but it agreed with the Board that such documentation was insufficient to corroborate key elements of the claim where one such document was unintelligible and several others contained information that was inconsistent with the petitioner's version of events. The court was not persuaded by the petitioner's argument that the Immigration Judge was required to give him notice of the need for corroboration and a subsequent opportunity to provide it. The court cited its observation in *Rapheal v. Mukasey*, 533 F.3d 521 (7th Cir. 2008), that the REAL ID Act itself provides notice of the potential consequences where corroboration is not provided. The court held in that case that requiring the Immigration Judge to provide additional notice "would seem imprudent" in requiring additional hearings and adjournments that would burden Government resources "where the law clearly notifies aliens of the importance of corroborative evidence."

Ninth Circuit:

Dimaya v. Lynch, No. 11-71307, 2015 WL 6123546 (9th Cir. Oct. 19, 2015): In a panel decision, the Ninth Circuit granted the petition for review of the Board's decision holding that the petitioner's burglary conviction under California Penal Code section 459 categorically constitutes an aggravated felony crime of violence under section 101(a)(43)(F) of the Act, which defines a crime of violence in relation to 18 U.S.C. § 16. During the pendency of the petition for review, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding that the "residual clause" of the Armed Career Criminal Act ("ACCA") is unconstitutionally vague. Noting that the statute included crimes that do not normally cause physical injury in and of themselves, the Court concluded that the residual clause required courts to look beyond the elements of the crime and engage in an indeterminate "wide-ranging inquiry" that "both denies fair notice to defendants and invites arbitrary enforcement by judges" by requiring the latter to assess risk based on "a judicially-imagined 'ordinary case' of a crime," rather than actual

facts or statutory elements. The Court in *Johnson* also found that the residual clause left uncertainty as to the amount of risk required for a crime to constitute a violent felony. In *Dimaya*, the determination that the petitioner's burglary conviction was for a crime of violence relied on 18 U.S.C. § 16(b), which defines a crime of violence as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Ninth Circuit found that this language encompasses the same types of uncertainty as the ACCA's residual clause. It therefore concluded that § 16(b), as incorporated in section 101(a)(43)(F) of the Act, was unconstitutionally vague under *Johnson*. The record was remanded to the Board for further proceedings consistent with the court's opinion. A footnote stated that the majority decision "does not reach the constitutionality of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast any doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence." The decision contains a dissenting opinion.

Chavez-Solis v. Lynch, 2015 WL 5806148 (9th Cir. Oct. 6, 2015): The Ninth Circuit granted the petition for review of the Board's decision holding that the petitioner's conviction for possessing child pornography in violation of California Penal Code section 311.11(a) was for an aggravated felony under section 101(a)(43)(I) of the Act. The court concluded that under the categorical test, the State statute is broader than any of the three sections of 18 U.S.C. that comprise the aggravated felony offense defined in section 101(a)(43)(I). The court noted that the California statute's definition of "sexually explicit conduct" includes the same five elements contained in the Federal statutes, but it also includes "any lewd or lascivious sexual act as defined in Section 288," which the court described as "quite broad." The court further examined California case law, where it found examples that demonstrated a reasonable probability of prosecution for behavior broader than the generic Federal offenses. The court concluded that the California statute is indivisible under the holding in *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014). The court explained that under *Rendon,* a statute must describe "different crimes" with separate elements, as opposed to listing different means for committing the same crime. The court disagreed with the Government's position that the California statute's definition of "sexual conduct" is divisible, finding instead that it lists "numerous ways in which an image may be considered to depict 'sexual conduct' and thus qualify for the single crime of child pornography." Looking to jury instructions for further guidance, the court did not find the Government's emphasis on the use of brackets to divide the different types of acts that would constitute sexual conduct to be dispositive. The court stated that the jury instructions require that one such bracketed type of sexual conduct be chosen, not that jury members must unanimously agree on the same type of sexual conduct. The court therefore found that the petitioner's conviction was not for an aggravated felony and remanded the record for further proceedings.

Zumel v. Lynch, No. 12-70724, 2015 WL 5692524 (9th Cir. Sept. 29, 2015): The Ninth Circuit granted the petition for review and remanded to the Board. The Board had found the petitioner to be inadmissible under section 212(a)(3)(B)(i)(I) of the Act for having engaged in terrorist activity. Noting that the Act defines terrorist activity to cover a wide range of actions, the court stated that the relevant question was whether the petitioner "(1) planned an activity either individually or as a member of an organization (2) that was unlawful under the laws of the place where it was committed and (3) involved the use of explosives, firearms or other weapons or dangerous devices (4) with the intent to endanger, directly or indirectly, the safety of individuals or cause substantial damage to property" (citations omitted). The Immigration Judge had found that an "intent to endanger" was not present given the petitioner's testimony that the coup that he helped plan involved capturing military bases without the use of bloodshed. The Board concluded that the coup participants must have anticipated that that the use of force of some type would be taken against the government where weapons would be used to capture an air force base. On review, the court noted that no Board precedent has determined whether intent is a question of fact or law. The court further noted that both parties referred to intent as a factual issue. Assuming it to be a question of fact, the court found that the Board erred (1) where it mentioned its application of the "clearly erroneous" standard of review only in its review of the Immigration Judge's credibility finding, but not as to her finding of intent, and (2) where the decision did not address whether the intent finding was clearly erroneous or explain why the intent determination was "illogical or implausible, or without support in inferences that may be drawn from the facts in the record." The court

stated that the Board's explanation that it was clear from the record that the coup participants "intended to, and did, use weapons to endanger others" was insufficient to satisfy the "clear error" standard it was required to apply. Accordingly, the record was remanded for the Board to consider the Immigration Judge's intent finding under the clear error standard of review.

Tenth Circuit:
De Niz Robles v. Lynch, No. 14-9568, 2015 WL 6153073 (10th Cir. Oct. 20, 2015): The Tenth Circuit granted the petition for review of the Board's decision denying the petitioner's application for adjustment of status. The Board had concluded that the petitioner was ineligible for adjustment based on the retroactive application of its holding in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). The petitioner filed his adjustment application shortly after the Tenth Circuit issued its initial decision in *Padilla-Caldera v. Gonzales*, 426 F.3d 1294 (2005), holding that applicants for adjustment of status under section 245(i) of the Act were not barred from adjustment by section 212(a)(9)(C)(i)(I) of the Act, which bars aliens from admission for 10 years if they have accrued more than 1 year of unlawful presence in the United States prior to departing the country. During the pendency of the petitioner's adjustment application, the Board issued its decision in *Matter of Briones*, which held to the contrary. The court then reversed its own prior ruling in *Padilla-Caldera v. Holder* (*"Padilla-Caldera II"*), 637 F.3d 1140 (10th Cir. 2011), according *Chevron* and *Brand X* deference to the Board's decision in *Briones*. Two years later, the Board relied on its decision in *Briones* to find the petitioner ineligible for adjustment. The issue in the present case was whether it was permissible for the Board to apply its interpretation in *Briones* to an application filed prior to its issuance. The court observed that legislation is presumptively prospective, while judicial determinations are presumptively retroactive. The court therefore examined how to classify policy decisions of the Board, which the court observed to be a quasi-judicial body within an executive agency exercising delegated legislative authority. The court reasoned that an executive agency interpreting statutes under the second step of the *Chevron* test is relying on its "delegated policy-making authority" in interpreting a law that under step one was found to be ambiguous. The court therefore concluded that a new executive agency rule of general applicability announced in an administrative adjudication should be treated the same as the notice-and-comment announcement of a new agency rule and therefore should not be afforded retroactive status. The case was therefore remanded to the Board for further proceedings consistent with the court's decision.

REGULATORY UPDATE

80 Fed. Reg. 59,503 (Oct. 1, 2015)
DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
8 CFR Parts 1003, 1240, and 1241 [EOIR Docket No. 164P; A.G. Order No. 3565–2015] RIN 1125–AA62

List of Pro Bono Legal Service Providers for Individuals in Immigration Proceedings

AGENCY: Executive Office for Immigration Review, Department of Justice.
ACTION: Final rule.
SUMMARY: This final rule adopts, as amended, the proposed rule entitled "List of Pro Bono Legal Service Providers for Aliens in Immigration Proceedings." The final rule changes the name of the "List of Free Legal Service Providers," maintained by the Executive Office for Immigration Review (EOIR), to the "List of Pro Bono Legal Service Providers" (List). It enhances the eligibility requirements for providers to be included on the List. It authorizes the Director of EOIR, or his or her designee, to place providers on the List and remove them from the List. The rule also allows the public to comment on eligible applicants and requires approved providers to certify their eligibility every 3 years.

DATES: This rule is effective November 30, 2015.

80 Fed. Reg. 63,376 (Oct. 19, 2015)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Parts 214 and 274a
[DHS Docket No. ICEB–2015–0002] RIN 1653–AA72

Improving and Expanding Training Opportunities for F–1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F–1 Students

AGENCY: Department of Homeland Security.
ACTION: Notice of proposed rulemaking.
SUMMARY: The Department of Homeland Security (DHS) proposes to amend its F–1 nonimmigrant student

visa regulations on optional practical training (OPT) for certain students with degrees in science, technology, engineering, or mathematics (STEM) from U.S. institutions of higher education. Specifically, the proposal would allow such F–1 STEM students who have elected to pursue 12 months of OPT in the United States to extend the OPT period by 24 months (STEM OPT extension). This 24-month extension would effectively replace the 17-month STEM OPT extension currently available to certain STEM students. The rule also improves and increases oversight over STEM OPT extensions by, among other things, requiring the implementation of formal mentoring and training plans by employers, adding wage and other protections for STEM OPT students and U.S. workers, and allowing extensions only to students with degrees from accredited schools.

As with the current 17-month STEM OPT extension, the proposed rule would authorize STEM OPT extensions only for students employed by employers enrolled in U.S. Citizenship and Immigration Services' (USCIS') E-Verify employment eligibility verification program. The proposal also includes the "Cap-Gap" relief first introduced in 2008 for any F–1 student with a timely filed H–1B petition and request for change of status. This Cap-Gap relief allows such students to automatically extend the duration of F–1 status and any current employment authorization until October 1 of the fiscal year for which such H–1B visa is being requested.

In addition to improving the integrity and value of the STEM OPT program, this proposed rule also responds to a court decision that vacated a 2008 DHS regulation on procedural grounds. The proposed rule includes changes to the policies announced in the 2008 rule to further enhance the academic benefit provided by STEM OPT extensions and increase oversight, which will better ensure that students gain valuable practical STEM experience that supplements knowledge gained through their academic studies, while preventing adverse effects to U.S. workers. By earning a functional understanding of how to apply their academic knowledge in a work setting, students will be better positioned to begin careers in their fields of study.

These on-the-job educational experiences would be obtained only with those employers that commit to developing students' knowledge and skills through practical application. The proposed changes would also help ensure that the nation's colleges and universities remain globally competitive in attracting international STEM students to study and lawfully remain in the United States.

DATES: Comments must be received by DHS on or before November 18, 2015. Comments on the information collection provisions proposed in this rule must be received by DHS and the Office of Management and Budget (OMB) on or before November 18, 2015.

Fraud and the Unauthorized Practice of Law *continued*

the relevant initial order. *See* 8 C.F.R. §§ 292.3(c)(4), 1003.103(c). This duty applies even if an appeal of the conviction or discipline is pending.

Adjudicators may advise aliens of the importance of securing authorized legal counsel. *See* Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 Fordham L. Rev. 577, 617 (2009). Additionally, they may continue to encourage attorneys to report the unauthorized practice of law. *Id.* at 619. The EOIR also encourages anyone harmed by the unauthorized practice of law to report it to appropriate law enforcement, consumer protection, or other authorities.

In addition to adjudicators and the parties, third-party actors such as State governments may combat the unauthorized practice of immigration law. The Stop Notario Fraud taskforce of the American Immigration Lawyers Association provides a useful tool for this action, listing every State and relevant fraud notification agency on its website at http://www.stopnotariofraud.org/get-help.php.

Conclusion

Fraud and the unauthorized practice of law in immigration proceedings affect all aspects of the practice of immigration law. Such conduct delays relief to those who merit it and impedes the adjudication of all immigration proceedings. For these reasons, the EOIR is actively combating the unauthorized practice of immigration law and instances of fraud. Since the inception of the EOIR's Attorney Discipline Program 15 years ago, over 1,500 practitioners have been disciplined for the many types of professional misconduct identified at 8 C.F.R. § 1003.102, including assisting the unauthorized practice of law. This discipline has included approximately 200 disbarments, 600 suspensions, 700 warning letters and informal admonitions, and 10 published Board decisions. As of September 1, 2015, the EOIR Fraud and Abuse

Prevention Program had 56 active cases involving the unauthorized practice of immigration law. Cooperation is truly important to helping these efforts succeed.

Reporting Information

- Complete an Immigration Practitioner Complaint (Form EOIR-44), available at http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/eoir44.pdf
- Register complaints at EOIR.Fraud.Program@usdoj.gov

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[1.] In many Spanish-speaking countries, a "notario" is an attorney and not a notary public. Memorandum from National State Attorneys General Program at Columbia Law School, Re: Attorneys General and the Protection of Immigrant Communities (Jan. 12, 2007), *available at* http://web.law.columbia.edu/sites/default/files/microsites/attorneys-general/Immigrant%20Communities_Feb%2013.pdf. Individuals seeking to defraud Spanish-speaking clients often take advantage of this misunderstanding and advertise unauthorized legal services under the title of "notario." *Id*. at 2 n.5. Operators of these illicit businesses often charge high fees, disappear after payment, or file paperwork that can lead to deportation. *Id*.

[2.] The Supreme Court has refrained from directly opining as to whether Federal law preempts State regulation of immigration consultants. In *Burrier v. Superior Court of California for Los Angeles*, 537 U.S. 819 (2002), the Court denied an alien's petition for writ of certiorari in a case challenging, on Federal preemption grounds, the power of States to regulate the practice of immigration law. The petitioner, an attorney, was a defendant in a State civil action and injunction request brought by the California Attorney General under a California law legalizing the profession of "immigration consultant" for non-lawyers and regulating the actions of these nonlawyers and the attorneys who assist them. Petition for Writ of Certiorari, *Burrier*, 537 U.S. 819 (No. 01-1739), 2002 WL 32191599; *see also* Cal. Bus. & Prof. Code §§ 22440–22448 (2005) ("California Immigration Consultants Act"). The petitioner argued that the California Immigration Consultants Act is unconstitutional because it conflicts with Federal law. Specifically, he contended that if Federal regulations authorize immigration practitioners, then Federal rules *regulate* immigration practice as well, and therefore preempt California's regulation of his conduct as an attorney who may have assisted nonlawyers in violating regulations concerning professional conduct. The petitioner was unsuccessful in this argument.

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