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ISSUES OF CAPACITY IN THE CONTEXT OF IMMIGRATION LAW PART II: DEVELOPING A STRATEGY

by

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This is the second of a two-part series addressing issues of capacity in the context of immigration law. A few critical issues that were addressed in Part I, which dealt with client evaluation and ethical concerns, will be reviewed here briefly in order to set the stage for the focus of this *Briefing*: how to address and utilize issues of capacity in the context of affirmative immigration and naturalization applications and in removal proceedings.

Part I of this series distinguished between the concepts of competence and capacity. The concept of *competence*, it was noted, refers to a judicial or legal determination that an individual is unable, either temporarily or permanently, to care for him- or herself and/or his or her property. [FN1] In contrast, the term *capacity* is properly used to refer to limitations relating to the ability to make decisions and, in the legal context, to assist in the preparation of one's case. [FN2] The *Briefing* stressed that such limitations may be limited in scope, as in the case of a mentally retarded individual who may be able to participate in some, but not all, decision making; or complete, as in the case of an individual who is in a coma. Further, limitations on capacity may be permanent, as is seen in mental retardation; temporary, such as when an individual is intoxicated; fluctuating, such as when an individual with severe mental illness suffers an acute break; or progressive, as in the case of Alzheimer's disease. [FN3]

Four actual scenarios with clients were presented in Part I. These same scenarios will be utilized here in the interest of consistency and because they provide an accurate picture of the types of issues involving capacity that may arise in the course of an immigration law practice. Again, these situations are real, but the individuals' names have been changed in order to protect their identities.

• Reynaldo, a self-identified young gay man from a Latin American country attempted to enter the U.S. illegally following the murder of his lover by a vigilante group seeking to eradicate gays from the small community in which he lived. He was discovered after he had crossed into the U.S. and has been detained. During his initial interviews with you, he indicated that he has been unable to sleep and has recurring nightmares of the slaughter of his lover in front of his eyes. He confides that he feels guilty because he was able to escape and that he believes he should have done more to save his lover. Despite the relatively brief period of detention, it appears to you that he has become increasingly depressed as well as almost completely mute and motionless, spending vast amounts of time face down on his bed.

• Teresa, a 16-year-old girl from an Eastern European country, had responded to an internet-posted advertisement soliciting young girls to work as nannies or housekeepers in the U.S. and U.K. She had dutifully supplied

all of the requisite information to the agency in her country that was listed for the processing of these applications. The agency made all of the necessary travel arrangements for her. On arrival into the U.S., she was met at the airport by a man purporting to be the father of the children she was to care for, only to later find that he was her captor. He and his wife kept her as a prisoner in their home, forcing her to attend parties with them and to participate in sexual activities with men and women in their social circuit in exchange for money paid to them by the patrons of the sex services. She was able to escape from one of the parties and was brought to your office by a middle-aged woman who she had approached on the street in her search for help following her escape.

• John, a U.S. citizen by birth, has consulted you about the filing of an I-130 petition for his wife. Following his consultation with you regarding the preparation of the petition, but prior to its adjudication, he is in a serious motor vehicle accident and suffers a traumatic brain injury. It appears that there may be some question regarding the validity of the marriage for immigration purposes in light of his previous marriages to wives who had obtained their permanent residence on the basis of their marriage to John. It is now extremely difficult for him to communicate his thoughts, and it is unclear how much he is able to understand of what is communicated to him.

• Francoise, a French citizen and lawful permanent resident alien, has decided at the age of 50 to apply for United States citizenship and has retained you to assist in the preparation of her application. At first blush, Francoise seems to be highly energetic, but somewhat scatterbrained and forgetful. Even though your contact with her is not extensive because of the seeming simplicity of the legal matter before you, it becomes apparent that Francoise is becoming increasingly forgetful. In a somewhat lighthearted and offhanded manner, in an effort not to offend, you joke with your client about the toll that increasing age is taking on your own memory. She suddenly confides to you that she has been diagnosed with early onset Alzheimer's disease. In view of the continuing lengthy delays from the time of filing to the time of swearing in, you wonder if Francoise will be able to understand the oath that is normally required for naturalization. You do not know whether her husband is aware of this diagnosis.

REYNALDO

The Way Things Were: Filing a Defensive Asylum Application

At the time that Reynaldo presented with his situation, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 [FN4] had not yet been signed into law. Accordingly, this *Briefing* first reviews Reynaldo's situation as it existed at that time, since many of the issues continue to be relevant. Following this discussion, the *Briefing* examines what might have occurred had this legislation been in force at that time.

Age, Cognitive Development, and Capacity. What is not stated in the foregoing facts is that Reynaldo was almost 17 at the time of his entry into the United States. The establishment of his age was critical both to the development of an underlying strategy for his asylum claim and to his ability to access services that are reserved for children. A child who is erroneously classified as an adult may be forced to endure less favorable detention conditions resulting in adverse physical and mental health consequences and may also have reduced access to appropriate legal counsel. Importantly in the context of an asylum application, the immigration judge may find the testimony of a child who is mistaken for an adult not credible due to inconsistencies in the child's testimony, gaps in the child's knowledge and understanding, and the judge's expectations about the age-appropriate communication skills of an individual believed to be an adult. [FN5]

As someone under the age of 18, Reynaldo was properly viewed as an “unaccompanied alien” child, defined as an individual “under the age of 18, who [has] no lawful immigration status in the United States and [has] no parent or legal guardian in the United States to care for them.” [FN6] As a male under the age of 18, Reynaldo fit the usual profile of an unaccompanied alien child; between the years 1999 through 2003, 57% of unaccompanied minor children in the United States were male and 79% of those in custody were between the ages of 15 and 18. [FN7] During Fiscal Year (FY) 2004, the Office of Refugee Resettlement reported more than 6,200 unaccompanied alien children in the United States. An annual average of 524 asylum cases in which a child was the principal asylum claimant were heard between the years 1999 and 2003; statistical analysis revealed that a child was 12 times more likely to present his asylum claim defensively in immigration court rather than through the filing of an affirmative application. [FN8] Unaccompanied alien children such as Reynaldo face an uphill battle to prevail on their defensive asylum applications. The first major barrier was the establishment of his age as a person under the age of 18.

The Office of Refugee Resettlement (ORR) relied on existing documentation, such as birth certificates and school records, to determine the individual's age if it was in doubt. In contrast, Immigration and Customs Enforcement (ICE) utilizes the results of dental examinations and bone x-rays to determine the individual's age, although such methods have been found to be outmoded and are of questionable scientific validity. [FN9] In cases where the person's age is at issue, it is critical that the attorney object on the record to the procedures utilized by ICE and/or the immigration court to establish the person's age.

There exists significant variation in the level of maturity and understanding among children applying for asylum on their own. [FN10] Adolescents, in particular, may face difficulties in immigration court because the immigration judge may have an unrealistically high expectation of the child's level of understanding and maturity specifically because of his or her age and appearance. [FN11] In Reynaldo's case, although he understood the seriousness of the court proceedings, he lacked the cognitive ability to convey the intent behind the persecution that he had fled. This was likely attributable to several factors.

Consider, again, the circumstances of Reynaldo's situation. He was almost 17 at the time of his entry into the United States. His relative inability to testify coherently and consistently was, at least in part, likely attributable to his level of psychosocial and cognitive development as a 17-year-old. Adults are more likely to process information through the frontal cortex, an area of the brain that is associated with impulse control and judgment. The neocortex, located at the top of the brain, mediates information-processing functions such as perception, reasoning, and thinking, [FN12] while the prefrontal cortex is associated with decision making, [FN13] risk assessment, [FN14] deception, [FN15] and making moral judgments. [FN16] Adolescents, in comparison, rely more heavily on the amygdala, that area of the brain that is associated with more primitive impulses, such as aggression, anger, and fear; [FN17] and that regulates protective responses, such as the “fight or flight” response, without conscious participation. [FN18] Research findings indicate that the brain's frontal lobes remain structurally immature until late adolescence [FN19] and that the prefrontal cortex is one of the last regions of the brain to mature. [FN20] During adolescence, increasing connections are developed between the prefrontal cortex and areas of the limbic system, which includes the amygdala. [FN21] Accordingly, although adults and adolescents may share the same logical competencies, there are vast differences between them in terms of social and emotional factors, specifically because of brain development. [FN22] Practically, this means that adolescents can be more strongly influenced by both their emotions and their surroundings; strong emotions, such as fear, anxiety, or embarrassment may override their ability to think logically or communicate effectively.

Reynaldo's inability to testify coherently and consistently may have also been impacted by the emotional and physical consequences of the trauma that he experienced. Recall that he had only recently witnessed the brutal slaughter of his male lover and had had his own life threatened because of his sexual and romantic involvement with a man. He feels guilty, has difficulty sleeping, and may be depressed. Stated simplistically, research has demonstrated that various areas of the brain--the thalamus, amygdala, hippocampus, and prefrontal cortex--are involved in the integration and interpretation of incoming sensory information. [FN23] The integration of that information can be disrupted as the result of a high degree of activation of the amygdala which, as indicated above, is the area of the brain that is associated with primitive impulses and protective responses. This high level of activation may lead to the generation of emotional responses and sensory perceptions that are based on fragments of information instead of complete and integrated perceptions of objects and events. [FN24] In essence, the emotion may be the memory, rather than merely a process that influences memory. The experience itself may only be retrievable later in the form of isolated images and bodily sensations, rather than as an intact whole. [FN25] Consequently, the individual's multiple accounts of the traumatic experience(s) may be inconsistent as he or she becomes increasingly able over time to retrieve these various, disconnected fragments of the experience from memory.

Substantive Eligibility Criteria. The question that logically follows is whether Reynaldo's level of capacity as a function of his age is relevant to either his substantive claim to asylum or the procedures that are to be followed in adjudicating his defensive application. The 1989 United Nations Convention on the Rights of the Child (UNCRC) utilizes the “best interests of the child” standard, which seeks the protection and welfare of the child, even when to do so would restrict parental rights. The UNCRC provides that:

> ...in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be the primary consideration. [FN26]

The UNCRC additionally provides that the child's own views of his or her situation are to be considered in the legal proceedings, a view that is consistent with that of scholars, [FN27] child advocates, and attorneys. [FN28] The United States has signed the Convention but, unlike every country other in the world except Somalia, it has not ratified it. [FN29] Because it has signed but not ratified the Convention, the United States is not required to enforce the Convention's provisions in its domestic law, but it may not enact any legislation that is contrary to the Convention's provisions. [FN30] One must query at what point the development and relatively consistent implementation of policy and procedures that contravene the underlying precepts of the Convention become challengeable as a violation of the United States' obligations under international law, notwithstanding the lack of ratification. [FN31]

EOIR's “Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children” [FN32] minimally recognize the principle of the “best interest of the child” in the conduct of the asylum hearing:

> The concept of “best interest of the child” does not negate the statute or the regulatory delegation of the Attorney General's authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge's discretion in taking steps to ensure that a “child appropriate” hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim. [FN33]

In Reynaldo's case, assuming that all requirements for a grant of asylum could be met, adherence to the UN-

CRC meaning of the “best interest of the child” would dictate that he be granted asylum as a member of a social group and be permitted to remain in the United States. Reynaldo knew, beyond a doubt, that continued residence in his country of origin would have meant his certain death and that his “best interest” required that he escape to a place of perceived safety, wherever that might be and by whatever means necessary. This would require that he demonstrate that he had been persecuted or had a well-founded fear of persecution in a particular country on account of his race, religion, nationality, membership in a particular social group, or political opinion. [FN34] He must be unable or unwilling to avail himself of the protection of the country of nationality (or habitual last residence if he does not have a country of nationality), because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. [FN35] The persecution must have been effectuated by the government or an agent of the government or a group that the government is unable or unwilling to control. To establish that the fear of persecution is well-founded, Reynaldo would be required to establish (1) that the persecutor is aware or could become aware of his or her membership in a particular group; (2) the persecutor is capable of persecuting him; and (3) the persecutor is inclined to persecute him. [FN36]

A grant of asylum is discretionary and, as such, would permit consideration of various additional factors surrounding Reynaldo's circumstances, including:

(1) whether he had passed through other countries en route to the U.S.;

(2) whether “orderly” procedures were available to assist him in the countries that he passed through en route to the U.S.;

(3) whether Reynaldo had attempted to obtain asylum prior to coming to the U.S.;

(4) the length of time that Reynaldo had remained in the transit (third) country;

(5) the living conditions, safety, and potential for long-term residency in the third country;

(6) whether Reynaldo has any relatives who were legally resident in the U.S. or has other personal ties to the U.S.;

(7) whether Reynaldo has ties to any other countries where he does not fear persecution;

(8) whether fraudulent means were used to effectuate entry into the U.S.; and

(9) whether any humanitarian considerations might exist. [FN37]

Various other circumstances, not present in Reynaldo's case, would bar a grant of asylum. These include the conviction of a “particularly serious crime,” [FN38] an aggravated felony, [FN39] or a non-aggravated felony that constitutes a particularly serious crime; [FN40] the commission of a serious non-political crime committed outside of the U.S; [FN41] participation in the persecution of others; [FN42] the existence of reasonable grounds to believe that the individual is a danger to the security of the U.S.; [FN43] participation in a terrorist activity; [FN44] denial of a previous application for asylum in the absence of changed circumstances; [FN45] failure to file for asylum within one year of the date of arrival in the U.S., absent extraordinary or changed circumstances; [FN46] firm resettlement in a third country; [FN47] and a determination that the individual may be removed to a

safe third country. [FN48] Although not constituting bars to a grant of asylum, individuals may be denied relief as a matter of discretion if they have participated in Nazi persecution or in genocide. [FN49]

Reynaldo could claim membership in a social group characterized by a nonheterosexual, i.e. homosexual, sexual orientation and demonstrate both past persecution and a well-founded fear of future persecution. [FN50] The most difficult element to establish in his case was the unwillingness or inability of the government to control the individuals responsible for his persecution. In fact, homosexuals have been found to constitute a particular social group in a number of countries, including Brazil, [FN51] Cuba, [FN52] Venezuela, [FN53] Mexico, [FN54] Honduras, [FN55] Turkey, [FN56] Iran, [FN57] Jordan, [FN58] Lebanon, [FN59] Nigeria, [FN60] and Pakistan. [FN61]

Nevertheless, a substantive argument resting on the principle of the best interests of the child could not prevail. Reliance on this principle procedurally at the time of Reynaldo's application, and even now, may be more successful. EOIR guidelines for the conduct of hearings involving unaccompanied alien children stipulated that "[e]very immigration judge is expected to employ child sensitive procedures whenever a child respondent or witness is present in the courtroom" [FN62] and, in cases involving unaccompanied children, "consideration should be given in appropriate circumstances to some modifications to the ordinary courtroom operations and configuration." [FN63] Such modifications may include

• orienting the child to the courtroom;

• scheduling cases involving unaccompanied alien children on a separate docket or at a fixed time in the week or month;

• permitting the physical modification of the courtroom by the child's counsel to accommodate the child's physical and emotional needs;

• holding the hearing in person rather than via videoconferencing;

• conducting master calendar hearings and status conferences telephonically when the child does not reside in close proximity to the court; and

• removing the judicial robe. [FN64]

Additional suggestions include:

• providing an explanation of the proceedings at the outset;

• allowing adequate time for the development of rapport between the child respondent and the interpreter;

• permitting frequent breaks for the child as needed;

• limiting the amount of time that the child is required to testify;

• verifying that the child is competent to testify, including verification that the child has the mental capacity to understand the oath and to give sworn testimony;

• employing child-sensitive questioning, with particular attention paid to language and tone; and

• limiting access to the courtroom during the hearing.

Importantly, immigration judges are cautioned to recognize that children may be unable to provide testimony with the same degree of precision as adults, that inconsistencies do not constitute proof of dishonesty, and that a child's testimony may be limited both by his or her ability to understand and by his or her ability to describe the relevant events in a manner that is intelligible to adults. [FN65] An attachment to the Guidelines provides examples of "child-sensitive questioning," which includes the avoidance of leading questions, technical terms, complex questions, and abstract or hypothetical terms; recognition of children's hesitation when describing painful events; and the use of open-ended questions. [FN66]

A simple assertion, without more, that a child client's cognitive abilities are not equal to those of an adult would have been unlikely to serve as a sufficient basis to advocate for the utilization of such child-sensitive approaches in a particular case, or to provide a sufficient foundation for an appeal premised on a lack of procedural due process. [FN67] Rather, a psychological evaluation that included a focus on the child's developmental level and capacity for reasoning and understanding would be critical. The focus of such an evaluation is discussed further, below.

Asylum Post-Passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)

Asylum Applications. The enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) [FN68] significantly changed the landscape for a child in Reynaldo's situation. Rather than jurisdiction over Reynaldo's asylum application resting with the immigration court, it now lies with the U.S. Citizenship and Immigration Services (USCIS) Asylum Office; an asylum officer has the responsibility of adjudicating all asylum applications filed by an unaccompanied alien child. [FN69] Consequently, an attorney representing Reynaldo now could seek termination of the proceedings or administrative closure in the interests of time and resource conservation. The statute also provides for the review of children's asylum applications that are currently pending in immigration court, are on appeal to the Board of Immigration Appeals, or are on petition for review in federal courts. [FN70]

In addition to this procedural change, the TVPRA effected other changes. The adjudicating official is specifically instructed to consider the developmental needs of the child. Although not relevant to Reynaldo's specific situation, the TVPRA also exempts unaccompanied alien children applying for asylum from the safe third country limitation [FN71] and from the one-year filing deadline. [FN72]

Many of the issues that existed prior to the passage of the legislation continue to exist. Two of the major issues that would confront an unaccompanied child are the determination of his or her age and his/her status as unaccompanied. In situations in which an asylum application has already been filed in Immigration Court, Immigration and Customs Enforcement (ICE) will provide the applicant in Immigration Court with "[i]nstructions for an unaccompanied alien child in immigration court to submit Form I-589 asylum application to USCIS." [FN73] Inclusion of this instruction sheet in the application to the Nebraska Service Center (NSC), which is now charged with jurisdiction over the asylum applications of unaccompanied minor children, is to serve as evidence that the individual is an unaccompanied minor at the time of his/her filing of the asylum application. [FN74]

The Asylum Office is to confirm that the applicant for asylum status as an unaccompanied minor is under the age of 18. This can be done on the basis of various forms of documentation, including:

• the apprehending agent's notation on Form I-213 of the date of the individual's birth;

• evidence that the individual was in the custody of the Office of Refugee Resettlement (ORR); or

• the ORR Interim Placement Authorization document as an attachment to the asylum application.

Instructions to asylum staff specify that "[u]nless there is clear contradictory evidence in the file, jurisdiction should not be refused on the basis of age." [FN75]

The Asylum Office is also charged with the responsibility of determining whether the child was unaccompanied at the time that he/she filed the asylum application. Instructions to asylum officers indicate:

> Where, at the time of filing the applicant has no parent or legal guardian in the U.S. who is available to provide care and physical custody, the applicant is unaccompanied...A child is unaccompanied even if he or she is in the informal care and custody of other adults, including family members. For instance, if a UAC [unaccompanied child] is released from ORR custody to a sponsor who is not a parent or legal guardian, the child continues to be unaccompanied. [FN76]

Special Immigrant Juvenile Status. Some children may be eligible to apply for special immigrant juvenile status (SIJS) as well as asylum. A child is potentially eligible for this status if he or she is in the United States and is a child

> (i) who has been declared dependent on a juvenile court located in the United States or whom a court has legally committed to or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
>
> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interests to be returned to the alien's or parent's previous country of nationality or country of last habitual residence. [FN77]

Unlike the previously effective legislation, there is no longer a requirement that the child be "eligible for long-term foster care," which was sometimes interpreted as meaning that the child must have been in or must have remained in foster care in order to qualify for this status. [FN78]

SIJS was not available to Reynaldo at the time of his removal proceeding because he was not dependent on a juvenile court and, in any event, would have "aged out" of juvenile court jurisdiction relatively rapidly since he was already almost 17. [FN79] This would not be an issue now, as the TVPRA provides that an individual

> may not be denied special immigrant [juvenile] status...after the date of the enactment of this Act based on age if the alien was a child on the date on which the alien applied for such status. [FN80]

Previously, a child who was already in immigration custody was required to seek the specific consent of the federal government in order to enter into state juvenile court. [FN81] Under the TVPRA, authority to grant the specific consent was transferred from the U.S. Department of Homeland Security to the U.S. Department of

Health and Human Services. [FN82] Consent is required only in those situations in which the state court's jurisdiction is for the purpose of determining custody status or placement. [FN83]

These modifications will likely facilitate and expedite the processing of both asylum claims and applications for special immigrant juvenile status for unaccompanied minor children, such as Reynaldo. They may lead to a more consistent adjudication approach across applications and to more child-friendly encounters.

TERESA: T VISA, U VISA?

Recall the situation faced by Teresa. She was a 16-year-old girl from Eastern Europe, who traveled to the United States in response to an Internet advertisement to work temporarily as a nanny or housekeeper, only to find that she was essentially a captive for sex work. Teresa's experience unfortunately mirrors the internationally utilized definition of trafficking, defined by the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, as:

> [t]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability...or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation...forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs. [FN84]

Several countries of Central and Southeastern Europe--Albania, Bulgaria, Lithuania, and Romania--have been ranked very high as origin countries for trafficking. [FN85] The Czech Republic, Estonia, Hungary, Latvia, Poland, and Slovakia have been ranked as high. At the global level, the vast majority of persons trafficked, many of whom are young girls, are subject to sexual exploitation. [FN86]

Several potential courses of action are available to Teresa, depending upon the details of her circumstances and what she would like the ultimate outcome to be. (These issues are examined further, below.)

T Visa

First, Teresa may be eligible to apply for a T visa. The Victims of Trafficking and Violence Protection Act, [FN87] made it possible for USCIS to grant continued presence to a trafficked individual following the request of a law enforcement agency on behalf of the individual. [FN88] The individual must be a potential witness who will be able to assist in some way with an investigation or prosecution of a human trafficking offense. If the individual's application for T status is not granted, however, the continued presence will cease with the termination of the criminal investigation or prosecution and the individual will have to leave the United States, absent the existence of an alternative remedy.

A maximum of 5,000 “T” visas are available each year to individuals who are or who have been the victim of a severe form of trafficking in persons; are physically present in the United States or various territories; are under the age of 18 or have complied with any reasonable request for assistance in the investigation or prosecution of trafficking; and would suffer extreme hardship involving unusual or severe harm upon removal from the United States. [FN89] The definition of “sex trafficking” is consistent with the definition of the Protocol to Pre-

vent, Suppress and Punish Trafficking in Persons, Especially Women and Children: "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." [FN90] "Severe trafficking" is defined by the law as

> sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. [FN91]

The T visa allows the individual to remain in the United States only for a temporary period of time. Additionally, even though the issuance of the visa is based on the individual's cooperation in the investigation or prosecution of the trafficking, witness protection is not generally provided to the trafficked individual.

Successful application for a T visa would require that Teresa:

(1) demonstrate that she has been the victim of a severe form of human trafficking; [FN92]

(2) be physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands or a port of entry to one of these locations as a result of the trafficking [FN93] and, if a noncitizen, that entry may have been either legal or illegal; [FN94]

(3) establish that she will suffer "extreme hardship involving unusual and severe harm" if removed from the United States; [FN95] and

(4) be admissible to the United States, that is, have been admitted or paroled into the United States, or obtain a waiver of inadmissibility.

Because Teresa is a minor under the age of 18, [FN96] she will not be required to demonstrate what would otherwise be an additional requirement for eligibility: that she have complied with a "reasonable" request for assistance in law enforcement's efforts to investigate or prosecute the human trafficking crime, [FN97] which must minimally include either reporting the crime or responding to law enforcement inquiries. [FN98]

Applications for T visas are made on Form I-914, Application for T Nonimmigrant Status, concurrently with an application for family members. A personal narrative is required that includes details relating to

- the circumstances of entry into the United States;
- the purpose for which the individual was brought to the United States;
- the mechanism by which the individual was recruited for or became involved in the trafficking event;
- the dates of these events;
- the actor(s) responsible for having caused the events to occur;
- the length of time during which the individual was detained by the traffickers;
- how and when the individual escaped, was rescued, or became separated from the traffickers;

• what the individual has been doing since his or her separation from the traffickers;

• what harm or mistreatment is feared if the individual were to be removed from the United States; and

• why the individual fears that he or she would be mistreated or harmed.

The applicant must also indicate whether during the previous 10 years he or she has engaged in prostitution or has procured anyone for prostitution, or intends to engage in such activities in the future, and must explain how such activities were related to having been trafficked, if at all. The application further requires that the individual attach documents to support his or her claim.

Data suggest that T visas are not easily obtained. Statistics from the Office of Refugee Resettlement indicates a total of 601 applications for T visas were received in FY 2003; of these, only 297 were approved. [FN99] This is not at all surprising in view of the requirements for both significant details relating to the trafficking and documentary evidence to support the applicant's credibility.

The circumstances of how a client came to be trafficked are clearly critical to the preparation of a successful application. Consequently, an understanding of the factors that surrounded the trafficking may be important. Although some of the factors enumerated below may not be relevant to Teresa's particular situation, it is important to be aware of them. Critical factors include:

(1) The historical context, such as the formation of cross-border families due to political divisions between nations (e.g. U.S-Mexico, Pakistan-India) and frequent cross-border traffic for commercial reasons. [FN100] In Teresa's case, important historical features of her situation include the fall of the communist government, the diminution of government control throughout the country, and the increase in organized crime.

(2) The geographical context, such as the occurrence of natural disasters that could lead to increased poverty, separation of families, and search for employment.

(3) The socioeconomic context, which could include a high prevalence of poverty leading to search for employment outside of country, sale of children by families, a high prevalence of female-headed households, low levels of education limiting economic opportunities, [FN101] and difficulty accessing the labor market in the country of origin. [FN102] These factors, in particular, are critical to the preparation of Teresa's application. The poor social and economic conditions in her country may have served as the initial impetus for her search for employment elsewhere.

(4) The cultural context, such as cultural norms that promote early and arranged marriage of girls, the vulnerability of women to abuse/sale by relatives due to dissatisfaction with bridal dowry, [FN103] the stigma and ostracism of women who have been deserted or divorced by their husbands, mores dictating female dependency on men, desire of migrant men abroad for sex workers with common cultural and linguistic background, [FN104] and the sexual harassment of and demand for sexual favors in the workplace making payment for sex a desirable alternative. [FN105] Successful preparation of Teresa's case requires that the immigration attorney establish sufficient rapport with Teresa so that she is comfortable discussing the details of her family dynamics, the overall social situation, and the reception that she would receive both within her family and the larger society if her experiences were to become known to others. An understanding of the context in which Teresa made her decision

to respond to the Internet advertisement--or in which the decision was made for her--is critical. [FN106]

(5) The political context, exemplified by the collapse of the former Soviet Union with resulting economic hardships and dislocation, [FN107] as well as the corruption of law enforcement personnel which facilitates trafficking, a lack of shelter and support for women in distress, [FN108] the illegality of prostitution, and the probable prosecution and/or deportation of trafficking victims for legal and/or immigration violations. [FN109] Here, again, historical factors that characterize Teresa's situation are relevant in the political context.

Although the application indicates that individuals must present their passports and should attach documentation to support their claim, research conducted outside of the U.S. suggests that many trafficked victims, such as Teresa, would likely not have access to their passports or other documentation. [FN110] A waiver of the passport requirement may, however, be available. [FN111]

Teresa's ability to provide a coherent and complete account of her circumstances that addresses both the exploitative nature of her situation and the underlying context that preceded it may be more limited than if she were an adult. To some extent, this may be a function of her age and her associated developmental level, as it was with Reynaldo. It may also be a function of the trauma that she suffered as a result of the sexual exploitation that she endured. The experience of having been trafficked has been found to be associated with a wide range of mental health symptoms, such as relentless anxiety, insecurity, suicide attempts, depression, and cognitive impairment, including confusion, disorientation, memory defects, and loss of concentration. [FN112] The cognitive memory of many victims of sexual trafficking may not be sufficiently intact as to be able to provide a chronological, coherent, and/or consistent account of their ordeal. The recounting of the events surrounding the trafficking to a law enforcement officer, to the attorney, and/or in the process of preparing the application for a T visa may result in the re-traumatization of the trafficked individual and the exacerbation of his or her symptoms. [FN113] Accordingly, the World Health Organization has advised (emphasis added):

> One must do the utmost to ascertain a woman's psychological state and the effects that an interview may have. *Very often women*, particularly those who have escaped recently, *are in a state of emotional crisis. It is not appropriate to interview a woman who is in this state. It is critical that a woman is in full control of her faculties when the interview is requested, and that during the interview she has control over the interview situation.* [FN114]

An attorney handling a case like Teresa's should be aware of the individual's mental and emotional state during the course of their interview with the client, and help the client to explain why some details may be lacking or seemingly inconsistent. Additionally, some individuals who have been trafficked may not perceive themselves as either having been trafficked or as victims. [FN115] Some, like Teresa, may view their situation as the result of their own poor decisionmaking. Consequently, it is important that neither the attorneys nor the investigators approach the client with preconceived ideas about her experiences or her reactions to her experiences. The World Health Organization has observed that although expressions of understanding and concern are appropriate, expressions of pity or sympathy may be both inappropriate and unwelcome. [FN116]

As indicated above, Teresa must also demonstrate that she would suffer extreme hardship if she were removed to her Eastern European country of origin. Factors relevant to this determination include:

• Teresa's age and personal experience;

• the existence of a physical or mental illness that can only be treated in the United States;

• the nature and extent of the physical and psychological injury that Teresa suffers as a result of the trafficking;

• the impact of a lack of access to the United States' civil and criminal justice system;

• the likelihood that Teresa would face punishment in her own country as a function of its laws, social customs, and practices;

• the likelihood that Teresa would be revictimized;

• the likelihood that the trafficker(s) would punish Teresa; and

• Teresa's safety or lack thereof if she were returned to her home country based on the existence of civil unrest or armed conflict there.

The depth of Teresa's knowledge with respect to any of these factors may depend upon her level of sophistication with these issues, as well as her ability to communicate what she does know in a manner that is understandable to the adults around her. Again, the extent to which she is able to present a coherent framework in response to these issues depends on her cognitive development and emotional and mental state.

U Visa Application

Teresa's developmental level and emotional and mental state are equally relevant in the context of a “U”visa application, which represents another possible course of action. A U visa, which also allows an individual to remain in the United States only temporarily, is potentially available to up to 10,000 persons. Eligibility for a U visa requires that

(1) the applicant has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity involving one or more of the enumerated criminal activities, or similar activities, in violation of local, state, or federal law; and

(2) the applicant possess information concerning the criminal activity or, if it is an alien child under the age of 16, the parent, guardian, or next friend possesses information concerning the criminal activity; in addition,

(3) the applicant, or his or her parent, guardian, or next friend if under the age of 16, has been helpful or is being helpful or is likely to be helpful to any of a variety of law enforcement agencies investigating or prosecuting the criminal activity; and

(4) the criminal activity violated U.S. laws or occurred in the U.S. or U.S. territories or possessions. [FN117]

Enumerated crimes include:

• rape

• torture

• trafficking

• incest

• domestic violence

• sexual assault

• prostitution

• female genital mutilation

• being held hostage

• peonage

• involuntary servitude

• slave trade

• kidnapping

• abduction

• false imprisonment

• blackmail

• extortion

• manslaughter

• murder

• felonious assault

• witness tampering

• obstruction of justice

• perjury

• attempt, conspiracy, or solicitation to commit any of these crimes. [FN118]

If it is necessary to avoid extreme hardship to the spouse, child, or, in the case of an alien child, the parent of the alien described above, U status may also be granted upon certification of a listed government official that an investigation would be harmed without the assistance of the parent, spouse, child or, if a child, the parent of the alien. [FN119] A U visa holder may be eligible for adjustment of status after three years of continuous presence

on humanitarian, family unity, or public interest grounds. [FN120]

In addition to the requisite forms, Teresa would be required to provide:

• a declaration;

• a certification from law enforcement that she “has been, is being or is likely to be helpful” in investigating or prosecuting one of the enumerated crimes; [FN121]

• any additional available documentation that supports the claims that she made in her declaration; [FN122]

• information related to any grounds of inadmissibility and the basis for eligibility for a waiver; [FN123] and

• applications for any derivatives that she would wish to include. [FN124]

Teresa's declaration must contain information that explains how she is the victim of one of the enumerated crimes; how she possesses information about that crime; [FN125] how she suffered substantial mental or physical abuse as a result of the crime; [FN126] and how she is helping, was helping, or may help law enforcement in the investigation or prosecution of the crime. [FN127] The description of the harm that Teresa suffered should address the factors noted in the relevant regulations: the nature of her injury; the severity of the perpetrator's conduct; the severity of the harm that she suffered; the duration of the infliction of the harm; the existence of any permanent or serious harm to her appearance, her health, and physical or mental soundness; and whether the harm has aggravated any pre-existing condition that she might have had. [FN128]

A psychological evaluation of Teresa's mental and emotional state may be critical to augment the content of her declaration. That evaluation should address not only the substantive content of Teresa's experiences and any psychological or emotional harm that she may suffer in both the short-term and the long-term, but should also explain the psychological and developmental reasons underlying any inconsistencies or incoherent aspects in her account of her situation. It is important, however, to recall the ethical issues that accompany the decision to seek an evaluation for this purpose: the possibility that Teresa will suffer retraumatization due to the need to revisit her experiences with the mental health professional; the extent to which confidential information from Teresa may be disclosed to the mental health professional; the availability of a qualified interpreter; and the extent to which any fee may be charged by the attorney for research related to the identification of a suitable mental health professional and/or interpreter. [FN129] In discussing both the short-term and longer-term strategies with Teresa, it is important that the attorney consider Teresa's views about her own situation and her decision to return to her home country or seek longer-term presence in the United States. Additionally, the attorney should recognize that Teresa's choices may fluctuate over time as her own understanding of her situation shifts.

REYNALDO AND TERESA IN REMOVAL PROCEEDINGS

Considering a Guardian Ad Litem

Both Reynaldo and Teresa are presumed to have capacity to enter into an attorney-client relationship and to make decisions despite their ages [FN130] and absent indications to the contrary. Nevertheless, the nature of their experiences should put the attorney on alert “to cognitive, emotional, or behavioral signs such as memory

loss, communication problems, lack of mental flexibility, calculation problems," or other difficulties. [FN131] Additionally, the attorney should (1) compare the client's understanding with each element of capacity that may be relevant to the legal issue at hand; and (2) consider the nature of the decision to be made, such as its irreversibility and seriousness, Reynaldo's and Teresa's level of functioning, and whether he or she is able to articulate the reasons underlying his or her decision. Even if they were to experience difficulty describing the circumstances of their respective situations and their reasons for deciding as they did, the attorney should maintain "a normal client-lawyer relationship" to the extent possible. [FN132]

To the extent that either Reynaldo or Teresa are unable to make decisions or communicate them to others, the attorney remains obligated to provide principled representation of the child's legal interests, rather than relying on their own subjective judgment of the child's best interests. [FN133] Should the attorney find that, either because of Reynaldo's/Teresa's developmental age or the effects of his/her traumatic experiences, the child is unable to participate in the preparation of the case, the attorney should continue to treat the child with respect [FN134] and utilize strategies to enhance his or her ability to participate. [FN135]

Should it appear that Reynaldo or Teresa lacks capacity to participate in the preparation of his or her case and/or to provide consent, the attorney may wish to consider the need to have a guardian ad litem appointed for the child. As noted in Part I of this series, the Model Rules of Professional Conduct explicitly recognize this possibility:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. [FN136]

The appointment of a guardian ad litem would necessitate an action in state court. Depending upon the child's particular circumstances and the provisions of state law, such an action may be within the jurisdiction of probate court [FN137] or may rest with a court of general jurisdiction. [FN138]

Removal, Capacity, and Competence

Recall once again the distinction between capacity and competence and its application to the situations involving Reynaldo and Teresa. Although each experienced limitations of capacity due to their developmental levels and the effects of their traumatic experiences, neither was incompetent; i.e., neither had been found through a judicial or other legal proceeding to lack the ability to care for him- or herself properly. In contrast to the lack of protections afforded to an individual lacking in capacity, statute provides that an alien who is found to be incompetent is entitled to additional procedural safeguards in order to ensure his or her due process right to a fundamentally fair hearing. [FN139] Regulations enumerate these additional rights:

• to permit an attorney, legal representative, legal guardian, friend, or near relative who was served with a copy of the notice to appear on behalf of the individual if the individual is unable to be present at the hearing due to mental incompetency; [FN140] and

• to permit the custodian of the individual to appear in the event that one of the above-mentioned persons "cannot be reasonably found or fails or refuses to appear." [FN141]

Regulations further provide that:

> The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues. [FN142]

Courts have, accordingly, held that a competency hearing is required in the immigration context only for the purpose of determining whether an unrepresented alien demonstrates sufficient evidence of incompetence to require that an attorney or guardian represent his or her interests at the proceedings. [FN143] Further, a finding of incompetence will not preclude removal. [FN144] In removal proceedings involving a represented alien, at least one court has held that the obligation to raise the issue of competency with the immigration court ethically resides with the attorney providing representation [FN145] and that the failure of the immigration court to conduct a competency hearing in such circumstances does not constitute a violation of due process. [FN146]

These holdings raise several unanswered questions:

• To what extent is the immigration judge responsible to assess a respondent's competence in the absence of legal representation?

• Are the additional protections afforded to incompetent respondents under current regulations sufficient to ensure procedural due process?

• Under what circumstances, if any, may the individual's incompetence itself, if established, provide a sufficient basis for relief from removal?

It is beyond the scope of this *Briefing* to examine fully the constitutional issues that underlie these questions, but they are examined here on a very preliminary basis.

The Immigration Judge and Determinations of Incompetence

Consider the circumstances underlying the case of *Mohamed v. TeBrake*. [FN147] The unrepresented respondent testified in a highly disjointed and inconsistent manner via tele-video from the Minnesota state hospital for the criminally insane that he had suffered from mental illness since adolescence and was being treated for schizophrenia. [FN148] A witness, presumably a friend, further testified that the respondent was considered in Somalia to be mentally ill and to engage in bizarre behavior. [FN149] Although the interpreter failed to translate properly “schizophrenia” into English from the language in which it was voiced, and although the immigration judge noted that the respondent had been “hearing voices” since the age of 15, the judge failed to assess the respondent's competency. [FN150] On later appeal to the Eighth Circuit Court of Appeals, the Court found that, at the time of the respondent's initial hearings, during which he was not represented by counsel but may have been accompanied by a friend on at least one occasion,

> Mohamed answered the charges against him, testified in support of his claim for withholding of removal, and arranged for two witnesses to appear on his behalf. The transcripts show an individual who is aware of the nature and object of the proceedings and who vigorously resists removal. [FN151]

Assuming, *arguendo*, that the regulations are sufficient to ensure due process in such circumstances, it appears to this writer that the immigration judge, at a minimum, failed to comport with the regulatory requirements. There is no indication that the immigration judge made a specific finding of competence or the basis for such an assumption, even absent a full-fledged hearing on the issue. The underlying facts suggest that the immigration judge lacked an understanding of and appreciation for the effects of schizophrenia, such as the fluctuating ability of the affected individual to organize his or her thoughts and to perceive objectively/rationally events and sensations. [FN152] Further, there is no indication that the judge sought to determine either the nature of the relationship between the respondent and the individuals who appeared to testify on his behalf or the extent of their knowledge regarding his mental status.

Sufficiency of the Regulations

A review of the language of the relevant regulations and the manner in which they have been interpreted and applied suggests that they are inadequate to ensure a fundamentally fair hearing. [FN153] The test for determination of competence in the context of a criminal case is whether the individual possesses the ability to comprehend the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. [FN154] The parameters of procedural due process in the context of any specific matter depend on consideration of the specific circumstances, including "the public and private interests at stake and the risk of an erroneous deprivation." [FN155] Even where a violation occurs, the individual must establish that he or she suffered prejudice as a result. [FN156] Although removal is not a criminal process, the private interests at stake are clearly enormous. Indeed, it has been stated that "deportation is a drastic penalty equivalent to banishment or exile." [FN157]

It can be further argued that the regulations are impermissibly vague. The regulations provide that "[w]hen, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues." [FN158] As stated, significant ambiguity exists: what are "the issues" for which a hearing is mandated? The substantive issues relating to the charges that form the basis for the removal proceedings? The issues relating to the respondent's competence?

Incompetence as a Basis for Relief

Although one court appears to have been dismissive of incompetency as the basis for relief from removal, [FN159] various scholars have argued that individuals with mental illness or disability constitute a "particular social group" within the meaning of the asylum provisions [FN160] and on the basis of international law, [FN161] and at least one immigration court has awarded a grant of asylum on the basis of a mental disability. [FN162] Although some individuals with diagnoses of mental illness or mental disability may be permanently or temporarily incompetent, neither mental disability nor mental illness are coextensive with legal incompetence.

In cases where mental disability is coextensive with incompetence, membership in a particular social group may be established based on the existence of a shared immutable characteristic [FN163] and/or the sharing of similar background, habits, and social status. [FN164] Historically, many cultures and legal systems of many countries have socially stigmatized and socially, legally, and economically marginalized individuals with mental illness. [FN165] The establishment of persecution of mentally disabled persons as a group should consider the following potentially relevant factors:

• the incidence of physical and/or sexual abuse, [FN166]

• the incidence of beatings and murder, [FN167]

• laws and practices related to forced sterilization, [FN168]

• starvation, [FN169]

• involuntary confinement, [FN170]

• forced labor, [FN171]

• involuntary participation in scientific/medical experiments, and

• forced isolation. [FN172]

It will be important to demonstrate that any of the foregoing conditions exist in government-operated or -funded institutions and/or are effectuated by community members with government knowledge and government inability and/or unwillingness to rectify the conditions.

JOHN AND HIS I-130 PETITION

John's dilemma arises as a result of his traumatic brain injury that was caused by a motor vehicle accident. It is now difficult for him to communicate his thoughts and it is unclear how much he understands of what is said to him. The validity of his I-130 petition for his current wife is in doubt because of his several previous marriages, each of which provided the basis for his former wives' adjustment of status and each of which ended in divorce proceedings.

Although the attorney may be inclined to rely on John's current spouse for assistance in this matter, this is not advisable for several reasons. First, the attorney cannot know from the outset what information will be uncovered in the process of trying to understand the underlying nature of John's previous marriages and petitions for those wives, and the extent to which John would want such information to remain confidential from his current wife. Second, it is possible that, at some time during this process, John's interests and those of his current wife may become adverse. Although the attorney may have warned John of this possibility at the outset, prior to his traumatic brain injury, the risk of such a scenario may have increased and John's current interests may have shifted from what they were initially. Indeed, John may now be facing the prospect of criminal charges relating to immigration fraud.

Recall that the Model Rules of Professional Conduct allow the attorney to take protective action on behalf of a client who suffers from diminished capacity:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the ap-

pointment of a guardian ad litem, conservator or guardian. [FN173]

Whether the appointment of a conservator or guardian should be considered in this situation depends upon the nature of the concerns related to the current petition, the extent of John's understanding of the challenges to the petition, the extent to which John can participate in the preparation of the case, and the provisions of relevant state laws. It may be possible, for instance, to request that a conservator or guardian with limited powers be appointed to represent John's interests in the administrative proceedings related to the adjudication of the petition, e.g. producing evidence of the validity of the current marriage and evidence to refute suspicions of fraud related to the previous petitions. Some states may permit such an appointment that is limited in both scope and duration, while others may not. [FN174]

FRANCOISE AND THE NATURALIZATION OATH

As a brief review, Francoise, a French citizen and a lawful permanent resident of the United States, wishes to apply for naturalization. However, now 50 years old, she was recently diagnosed with early onset Alzheimer's disease. There is some concern that, because of the delays in naturalization interviews and the progressive deterioration of her mental status due to the effects of the disease, Francoise may or may not be able to understand the oath at the time of her interview.

In general, naturalization as a United States citizen requires the fulfillment of six conditions: (1) continuous residence in the United States for a prescribed period of time, five years in most cases; [FN175] (2) physical residence in the United States for a specified period of time; [FN176] (3) physical presence in a state or USCIS district for a specified time period prior to filing the application for naturalization; [FN177] (4) good moral character; [FN178] (5) adequate knowledge of English, U.S. history, and U.S. government; [FN179] and (6) understanding and acceptance of the principles of the U.S. Constitution. [FN180] Only the latter two requirements will be discussed here.

Since November 6, 2000, no N-400, Application for Naturalization, may be denied due to the failure of the applicant to understand the oath of renunciation and allegiance. [FN181] There is no specific form to be used to request a waiver of the naturalization oath and, although USCIS prefers to receive the request for the waiver prior to the interview, the request will be accepted at any time during the naturalization process up until the administration of the oath ceremony. [FN182] This is in recognition of the fact that “an applicant may have a disability that, through the passage of time, causes significantly impaired functioning that may have manifested at the time of filing the application for naturalization.” [FN183]

Francoise, for example, may at the time of her examination be able to understand and communicate her understanding of the meaning of the oath, despite the effects of the Alzheimer's disease. In that case, there would be no need to request a waiver of the oath. However, if her mental status should deteriorate during the intervening period of time between the filing of her application and her interview, she would be able to request a waiver at the time of the interview itself. It is also possible that Francoise might need to request a waiver of both the history and government requirements and of the oath requirement, should her short-term memory become so impaired that she is unable to retain any recently learned information, such as that which she might have studied for the naturalization examination. The process for obtaining a waiver of the history, government, and English requirements is quite distinct from that of the waiver of the oath, and is described further below.

Even if Francoise is eligible for a waiver of the oath requirement, it is possible that she might be unable to request it specifically as a result of her mental status. If that situation were to arise, a designated representative could act on her behalf. Because the meaning of "designated representative" is quite specific in this context, the definition is provided here verbatim. A designated representative is

> any individual who either has been recognized by a court of competent jurisdiction over family law matters in the state of the applicant's place of residence or appropriate state agency to exercise legal authority to act on behalf of an applicant in all matters, including filing of applications for benefits, or has a recognized familial relationship with the applicant and primary custodial care and responsibility for the applicant. This rule authorizes designated representatives to act on behalf of applicants with disabilities in every stage of the naturalization proceeding.
>
> The designated representative may be either:
>
> 1. a legal guardian or surrogate appointed by a recognized court with jurisdiction over matters of guardianship or surrogacy or an appropriate state agency with authority to make such appointments in the jurisdiction of the applicant's place of residence in the United States; or
>
> 2. in the absence of a legal guardian or surrogate, a U.S. citizen spouse, parent, adult son or daughter, or adult brother or sister. [FN184]

The individual acting in the capacity of a designated representative must provide documentation establishing the underlying relationship, e.g., a marriage certificate to evidence a spousal relationship, a court order to evidence legal guardianship, etc. Only one individual may serve as the designated representative throughout the naturalization process. [FN185]

Either Francoise or her designated representative would be required to submit a written evaluation from a physician, osteopathic doctor, or a clinical psychologist who is licensed to practice in the United States. The evaluation must be completed by the physician who has had the longest relationship with Francoise or is most familiar with her history. In addition, the evaluation must:

• explain the nature of the condition or disability in lay terms;

• state why Francoise is unable to understand or communicate her understanding of the oath because of the disability;

• indicate the likelihood that Francoise will be able in the near future to communicate or demonstrate an understanding of the oath; and

• include the signature and state license number of the medical professional completing the evaluation and the authorization to practice in the United States. [FN186]

Although instructions relating to applications for and adjudication of the oath waiver specify that psychologists may prepare the evaluation, there is clearly some ambiguity within the instructions, since details relating to the content of the requisite evaluation specify that it must be completed by a physician.

A waiver of the history, government, and English requirements is potentially available to individuals who may lack capacity where that incapacity coexists with a mental impairment, assuming that all other requisite elements for the waiver are present. It is important to note that the requirements for a waiver of the English, his-

tory, and government components of the naturalization process are quite distinct from the prerequisites for a waiver of the naturalization oath. Accordingly, if Francoise were no longer able to communicate adequately in English or to have knowledge or display knowledge of U.S. government and history, a waiver of these requirements may be available if she is able to provide documentation indicating that:

> (1) she is unable to demonstrate an understanding of English or a knowledge of U.S. history and government;
>
> (2) this inability is due to a medically determinable physical or mental impairment or a combination of impairments; and
>
> (3) the impairment has lasted or is expected to last for a minimum period of 12 months. [FN187]

A "medically determinable" impairment refers to one that:

• results from anatomical, physiological, or psychological abnormalities;

• can be diagnosed with medically acceptable clinical or laboratory diagnostic techniques; and

• results in functioning that is so impaired that the individual is unable to demonstrate an understanding of English and/or a knowledge of U.S. history and government. [FN188]

The disability may not be attributable to the direct effect of the illegal use of drugs. [FN189]

A waiver of the English and/or history and government requirements is filed on Form N-648. The adjudicator will review the form to verify that the professional completing the form:

• has the requisite qualifications to allow him or her to make the disability assessment;

• has attested to the nature, origin, and extent of the medical condition;

• has explained how the medical condition affects the individual's ability to demonstrate English proficiency and/or knowledge of United States history and government;

• has indicated how he or she diagnosed the anatomical, physiological, or psychological impairment;

• has enumerated the tests and methods that were utilized to make the diagnosis and the conclusions that were drawn from them. [FN190]

The N-648 application can be filed together with the N-400 or later, at the time of the interview. However, the submission of late or multiple Form N-648s "may raise credible doubts about the veracity of the medical certificates or justify additional scrutiny...." [FN191]

CONCLUSION

Numerous challenges are inherent in situations in which the client has diminished mental capacity; these challenges exist for both the attorney and the client. It is critical that in working with clients in these situations, the attorney consult with his or her client to the maximum extent possible and work to protect the client's interests. This may be effectuated directly through the handling of the immigration matter, and/or more tangen-

tially through the identification of resources and services that may be necessary to prevent harm to the client. In contemplating both the short- and longer-term strategies for managing the immigration matter, it is critical that the attorney consider the nature of the client's incapacity (e.g., temporary or permanent, stable, or progressive, etc.) and the manner in which the incapacity may help or hinder the attainment of the client's goals in the context of the immigration matter at issue.

[FN1]. Sana Loue, "Elder Abuse and Neglect in Medicine and Law: The Need for Reform," 22 J. Leg. Med. 159 (2001); Steven Bisbing, Joseph McMenamin, & R. Granville, "Competency, Capacity, and Immunity," in Legal Medicine, 3d ed. (ACLM Textbook Committee ed. 1995).

[FN2]. *See* Model Rules of Professional Conduct R. 1.0(e) (2007) [Model Rules]. *See also* Jacqueline Nolan-Haley, "Agents and Informed Consent," in The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator 505, 506 (Andrea Kupfer Schneider & Christopher Honeyman eds. 2006).

[FN3]. *See generally* Sana Loue & Earl Pike, Case Studies In Ethics and HIV Research 224 (2007).

[FN4]. P.L. 110-457 (Dec. 23, 2008).

[FN5]. Jacqueline Bhabha & Susan Schmidt, Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the United States 117 (2006).

[FN6]. Executive Office for Immigration Review, United States Department of Justice, "Factsheet: Unaccompanied Alien Children in Immigration Proceedings" (rev. April 22, 2008). See also the Homeland Security Act of 2002 § ?462(g), P.L. 107-396, § ?462(g), 116 Stat. 2135.

[FN7]. Bhabha & Schmidt, *supra* note 5, at 18.

[FN8]. *Id*. at 38. Children's affirmative applications for asylum constitute only approximately 1% of all affirmative asylum applications. On average, only 39% of such applications are successful. *Id.* at 145.

[FN9]. *See* Physicians for Human Rights, From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers 189 (June 2003).

[FN10]. Bhabha & Schmidt, *supra* note 5, at 23.

[FN11]. *Id*. at 114.

[FN12]. Daniel J. Siegel, The Developing Mind: Toward a Neurobiology of Interpersonal Experience 10 (1999).

[FN13]. *See* Antoine Bechara, Hanna Damasio, Daniel Tranel, & Steven W. Anderson, "Dissociation of Working Memory From Decision Making Within the Human Prefrontal Cortex," 18 J. Neurosci. 428 (1998).

[FN14]. *See* Facundo Manes, Barbara Sahakian, Luke Clark, Robert Rogers, Nagui Antoun, Mike Aitken, & Trevor Robbins, "Decision-Making Processes Following Damage to the Prefrontal Cortex," 125 Brain 624 (2002).

[FN15]. *See* Daniel D. Langleben, L. Schroeder, J. Maldjian, Ruben Gur, S. McDonald, J. Ragland, Charles P. O'Brien, & Anna R. Childress, "Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study," 15 Neuroimage 727 (2002).

[FN16]. *See* Jorge Moll, Paul J. Eslinger, & Ricardo de Oliveira-Souza, "Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI results in Normal Subjects," 59 Arq. Neuropsiquiatr. 657 (2001); Steven W. Anderson, Antoine Bechara, Hanna Damasio, Daniel Tranel, & Antonio R. Damasio, "Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex," 2 Nature Neurosci. 1032 (1999).

[FN17]. Elizabeth R. Sowell, Bradley S. Peterson, Paul M. Thompson, Suzanne E. Welcome, & Amy L. Henkenius, "Mapping Cortical Change Across the Human Life Span," 6 Nature Neuroscience 309 (2003).

[FN18]. Abigail A. Baird et al., "Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents," 38 J. Am. Acad. Child & Adolescent Psychiatry 1, 1 (1999); Elkhonon Goldberg, The Executive Brain: Frontal Lobes and the Civilized Mind 34 (2001). *See also* William D.S. Killgore & Deborah Yurgelun-Todd, "Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces," 21 Neuroimage 1215 (2004).

[FN19]. *See* Nitin Gogtay et al., "Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood," 101 Proceedings Nat'l Acad. Sci. 8174, 8174 (2004).

[FN20]. *See id*. at 8175; B.J. Casey, Jay N. Giedd, & Kathleen M. Thomas, "Structural and Functional Brain Development and Its Relation to Cognitive Development," 54 Biological Psychol. 241, 243 (2000).

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[FN22]. Laurence Steinberg, Adolescence (7th ed. 2005).

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