What Every Practitioner Should Know About Immigration Law

Thursday, May 1
4:00 pm - 5:00 pm

Presenter: Steve Monks, Monks Law Firm PLLC
Steve Monks

Steve Monks received a BBA, Marketing, U of Houston, 1984 and his JD from the South Texas College of Law, 1987. He was licensed in Texas, 1987 and North Carolina, 2002. He is a CLE presenter and published the following works: How an attorney can assist you as a litigation coach, NC Single Parent Times, Negotiations 101, NC Single Parent Times. Mr. Monks is a member of the North Carolina Bar Association, North Carolina Advocates for Justice and he provides pro bono consultations and representation for El Centro Hispano, a North Carolina Latino social service agency; Steve speaks Spanish. His practice areas include immigration, criminal defense/traffic ticket defense and family law. The Monks Law Firm, PLLC, has three offices in North Carolina and also assists clients with simple wills and estate issues, debt collection and defense, personal injury and we help people secure social security disability benefits.
Immigration 101

What every practitioner should know about Immigration Law.

This presentation will provide a general overview of immigration law. This will include a historical background, present law and the law’s common applications and intersections with other areas of law.

Steve Monks, Esq.
Source Of Law

Constitution

◦ Article I: Congress - Commerce and Naturalization clauses - Plenary Power
◦ 5th Amendment – Due Process/No Discrimination based on Alienage
◦ 14th Amendment – Birth in US Territory/Citizenship

Applicable Statutes

◦ 8 USC or aka Immigration Nationality Act “INA” 1101 - 1537
◦ Other Federal Statutes – Criminal/Fraud Issues

Regulations

◦ All Agencies have own regulations
◦ DHS 8 CFR; DOS 22 CFR and FAM

Case Law

◦ Board of Immigration Appeals
◦ Administrative Appeals Office
◦ Service Center Adjudications/INS Commissioner Decisions
◦ Federal Circuits/Supreme Court

Policy Memos/ Liaison Minutes
Brief History of Immigration Law

1776 – 1875 Open Door Policy
1875 – 1917 1st Round of Restrictions

- Chinese Exclusion Act 1882 (Repealed 1943)
- Immigration Act of 1882 – first general immigration law
- Immigration Act of 1891 – Bureau of Immigration
- All acts implemented excluded certain people

1917–1951 Quota System Established

- Example: Quota Act of 1921 – 3% of each nationality

1952 Birth of the Immigration Nationality Act (INA)
1965– 1985 – minor amendments
1986 IRCA – US employers verifying workforce and first legalization law
1990 – last major law to affect visa categories
1996 – Punitive Amendments AEDPA/IIRIRA
1997 – NACARA and Legalization
2001 – present – DHS Authorization/REAL ID/
Agencies Involved

United States: US Department of Homeland Security
- US Citizenship & Immigration Services (USCIS) (formerly known as INS)
- US Customs and Border Patrol (CBP)
- US Immigration Customs Enforcement (ICE)
- Administrative Appeals Office (AAO)

United States: US Department of Justice
- Executive Office for Immigration Review (EOIR)
- Board of Immigration Appeals (BIA)

Abroad: US Department of State
- US Consulates/Embassies Abroad
- National Visa Center

United States Department of Labor
Alien

- Immigrant: A person presumed to stay in the United States permanently
- Non-Immigrant: A person not presumed to stay in the United States

Presumption: everyone presumed to be an immigrant unless prove otherwise

Lawful Status/Legal Status

Illegal

Unlawful Presence

Admission/Admissibility

Visa versus Status
Eligibility for a Visa/Status
Temporary Visas
- Alphabet Soup
  - Professional Works (Hs, Ls, TNs)
  - Seasonal Workers (H-2s)
  - Fiancés, spouses of USC (Ks)
  - Visitors, Students (B, F, J)
- Limited in Duration and Scope of Activity
- Cannot overstay or violate status
- Most Obtained directly at US Embassy

Permanent Visas “Green Visas”
- Allow people to work and live in the US indefinitely
  - LPR – Legal Permanent Resident
  - Immediate Relatives
  - Preference System – Regulates by country
Visas Require Multiple Agencies to Work Together

**Double Check System**
- Obtain a Visa at US Embassy Consulate (USDOS)
- Screened at Border (USDHS – CBP)
- Once in, ICE (Enforcement) and if Necessary DOJ (court)

**Triple Check System**
- Obtain Approval of Petition from USCIS in US
- Obtain a Visa at the US Embassy
- Screened at Border
- Once in, ICE and if necessary DOJ
Permanent Residence "Green Card"

- Lottery
- U or T Status Applicants
- Special Immigrant Juveniles
- Employer
- Family
- Asylum
- VAWA
- Relative of Deceased Petitioner
Sponsored Based Green Cards

Family Based
- Immediate Relatives: Spouses, parents and children of USC's
  - No Cap
- Preference Relatives
  - 1st: Unmarried Sons/Daughters of USC's
  - 2nd A: Spouses and children of LPRs
  - 2nd B: unmarried adult children of LPRs
  - 3rd: Married Sons/Daughters of USC's
  - 4th: Brothers/Sisters of USC's

Employer Based
- Advanced Professionals and Skilled/Unskilled Workers
- Religious Workers
Who is a “Spouse”?

Marriage Qualify/May Qualify
- Statuary Marriage & Common Law Marriage
- Transsexual Partners (Post Operative)
- Same Sex Marriage
- Proxy Marriage
- Voidable Marriage
- Widowed Spouse?

Marriage Does NOT Qualify
- Fraudulent Marriage
- Bigamous Marriage
Qualifying Marriage

1. Validity of marriage based on “law of the place”
   Matter of Lovo, 23 I&N Dec. 746 (BIA 2005)


Rules to prevent marriage fraud (IMFRA)

- Example: If married less than 2 years prior to the adjudication of green card, residence
Impact of Divorce on those Whose Status Obtained Through Spouse

A marriage based petition cannot be denied solely because the marriage is on-the-rocks or the couple is no longer living together


Was the marriage *bona fide* at its inception?

Was the marriage entered into solely for immigration benefits?

Once there is a dissolution, petition can no longer be approved.
Summary: Timeline of Divorce Impact

- NIV may terminate status
- Applying for PR through Spouse
  - INELIGIBLE
- Observe PR through Spouse
  - Subject to Condition
  - MORE DIFFICULT
- Obtained PR through Spouse
  - Not subject to conditions
  - GENERALLY OK
- Obtain PR through Spouse – Subject to Condition
- Applying for US Citizenship
  - GENERALLY OK
- Obtained US Citizenship
  - OK
Who is a “Child?”

Statutorily defined as unmarried under the age of 21 at INA §101(b)

**Step:** Qualifies so long as stepparent relationship created (marriage) before the child’s 18th birthday

**Out of Wedlock:** Child can obtain benefits through natural father or mother now but b–f relationship required for father

**Legitimated:** Child born out of wedlock considered legitimated when certain events take place.

- Child must be under 18 at time of legitimation
- Normal method: natural parents marry
- Must look to laws of legitimation where child resides/domiciled or where father resides/domiciled

**Adopted and Orphaned:** age of 16 is key
IR versus Preference

Delay in Reunification

- Immediate Relative category is not numerically limited and therefore a visa is immediately available

- Preference categories have a limit – and as such, significant backlogs for many categories

Maintaining Lawful Status

Derivatives

- IR – no derivatives can come with.
- Preferences – derivatives can apply – this may be beneficial in some instances
On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

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<th>Family-Sponsored</th>
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*NOTE: For April, F2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 15APR12. F2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15APR12 and earlier than 08SEP13. (All F2A numbers provided for MEXICO are exempt from the per-country limit; there are no F2A numbers for MEXICO subject to per-country limit.)

5. Section 203(b) of the INA prescribes preference classes for allotment of
Bad News...What if Petitioner Dies?

General Rule: Beneficiary is ineligible for the benefit as the death of the sponsor automatically terminates the relationship

Widowers

Other Qualifying Relatives

Humanitarian Parole
Self Petitioned Based Green Cards

Family Related

- VAWA (Violence Against Women Act) Applicants
- SIJ (Special Immigrant Juveniles)
- and Other Relatives Where Petitioner/Sponsor Dies

Skill Based/Wealthy

- Lottery Winners
- Internationally Renowned People
- Millionaires

U (Crime Victim) and T (Trafficking Victim) Visa Holders
Basic Processing of Visas/Green Cards
Standard Two-Steps

First Step: Petition Filed in the US by the Petitioner – Burden to Prove the Relationship/Eligibility

Second Step:

- Default: Process Immigrant Visa at FN’s Home Country Embassy (US Dept of State)

OR

- If eligible, Process Adjustment of Status Application in the United States (US Dept of Homeland Security/USCIS)

General Burden is same: Applicant to Show Admissible (Regardless the Venue)
Ensuring Proper Category and Timing

Use of “Priority Date”

Retention or Termination of Priority Date when Events occur

- Marriage/Divorce
- Children aging past 21
- Petitioner naturalizing
- Example: 2B unmarried son/daughter of an LPR and marriage occurs

Chargeability – based on place of birth but exceptions
Admissibility
Grounds of Admissibility (212(a)(2))

Health

Finances – if family based (exceptions apply)

Crimes/Terrorism

Immigration Violations – E.g. Unlawful Presence

Other
Crimes or Admissions of a crime

- Crime of ‘Moral Turpitude” – conviction or admission
  - Inherently base depraved and intrinsically wrong
  - Generally intent based crimes, some reckless based – fraud big

- Any drug conviction anywhere unless 30 grams or less of marijuana (then a waiver available)

- Multiple criminal convictions – convicted of 2 or more offenses regardless if in a single trial where aggregate sentence to prison was 5 years or more

- Drug Traffickers – “reason to believe” and also includes family if financially benefited and “should have known”

- Money Laundering – “reason to believe”

CMT – Exceptions Petty Offense: max penalty possible 1 year or less imprisonment and if conviction not sentenced to term greater than 6 months
Criminal Issues Continued

Analysis for Admissibility

- Admission or Conviction?

- Definition of Conviction: alien guilty/pled guilty or nolo contendere or admitted facts and imposition of a penalty –

- What flies in criminal court does not usually work in immigration law – penalty can be costs; not just sentence. Deferral of adjudication?

- Exceptions?

  - Conviction vacated for a legal defect? (not vacated for immigration purposes) Padilla case helps here….

  - Juvenile Crimes

CMT – Categorical and Modified Categorical Approach (Silvio–Trevino 24 I&N Dec. 687 (AG 2008) –look to the statute first; if not resolved look to record of conviction; if not resolved “any additional evidence”
Popular Grounds of Admission (continued)

3/10 year unlawful presence bars

- >180 days but less than 1 year: 3 years
- 365 days plus: 10 years
- Lots of rules about when unlawful presence tolls
- This is

Permanent bar – not really permanent – 10 years from exit date until can do anything

Misrepresentation/Fraud/ False Claim to US Citizenship
Financial Grounds and the Affidavit of Support

Required for all Family–Sponsored Petitions (not VAWA or SIJ, or T/U applicants)

Why is it necessary? INA 212(a)(4) Public charge. To ensure that if foreign national obtain means–tested benefits, reimbursement takes place

What is it? Legal contract between Sponsor of the foreign relative and the US federal govt
Issues with Affidavit of Support

Enforceable Contract

Sponsor agrees to maintain the foreign national at 125% of the poverty guidelines if the foreign national ever takes means-tested benefits.

The government *or private entities* may sue.

How does it terminate?

- 40 qualifying quarters of Social Security contributions (10 years),
- Until the foreign national obtains Citizenship,
- Until the petitioner or beneficiary dies,
- Survives divorce.
Issues with Affidavit of Support

Been Used to Enforce Spousal Maintenance


– Foreign national spouse sued the U.S. citizen husband after divorce for maintenance at 125% of the federal poverty guidelines under the theory that she was a third party beneficiary to the contract created by the I-864

– The Court held that none of the events that trigger termination of the obligation had occurred and that the husband had a continuing obligation to maintain the wife at 125% of the poverty guidelines

Process of Admission

US Embassy – Standing Abroad (Default approach)

US DHS – Standing in the US

- Adjustment of Status to Permanent Residence
- Extension or Change of Status for Nonimmigrant Visas
- Regardless of where standing, obtaining new status or initial status is a process of “Admission”
Adjustment of Status

Adjustment of Status

- Applicant physically residing in the US

- Must have been inspected and admitted or paroled into the US to be eligible to file (illegal entry not “admitted”)

Must be in “lawful immigration status” prior to filing AOS application under INA 245(c)

Exceptions

- Immediate Relatives – legal entry only, not required to maintain legal status up to filing

- 245(i) – legal entry/lawful status not required and neither is lawful immigration status

- VAWA, SIJ, Us and Ts – same as above

- Refugees and Asylees
Adjustment of Status Continued

In general, must be eligible and otherwise “admissible” as well. INA §245(c)

Eligible Examples

K–1 Adjustments

J–1 Subject to 2–year Foreign Residence Reqmt

Admissibility Rules Apply (but for exceptions)
Deportable or “Removable”
Grounds INA 237(a)(2)

Not Exactly the Same as Admission Grounds

Failure to Maintain Status or Inadmissible

Conviction of CMT within 5 years of entry after date of admission and convicted for a sentence where potential of sentence is 1 year or longer

Multiple Criminal Convictions – 2 or more CMT convictions not arising out of single event

Aggravated Felony – conviction after admission

Conviction for drugs unless 30 grams or less of marijuana

Domestic violence conviction including child neglect

False claims to USC
Agencies Involved

US ICE – Immigration Custom Enforcement

US DOJ – Immigration Court (EOIR)

USCIS – US Citizenship & Immigration Services

US CBP – Customs and Border Patrol
Basic Process/Terminology

ICE Holds

Issuance of Notice To Appear (NTA)

NTA filed with EOIR

Master Calendar/Merits Hearing

Appellate Review (BIA)

Expeditied Removal
Defenses

Options for Green Cards including Family
Cancellation of Removal (for LPRs and non LPRs)
Asylum/Convention Against Torture/Withholding of Removal
TPS
Other Legalization Programs
Prosecutorial Discretion
Deferred Action
Voluntary Departure
At Border: Only Asylum or Humanitarian Parole
Undocumented Persons
Facts of Undocumented

Came predominantly in mid to late 1990s up through 2004. Estimated at about 11 million in the US to date (about 2–3 million children/young adults)

Pew Hispanic: Number of immigrants per year arriving from 2000–2004 was 1.3 million – 53% of those were undocumented

Predominantly driven by economics/NAFTA undermining agriculture community in Mexico

In 2004, undocumented workers held 6.3 million jobs out of 146 million, or 4.3% of all jobs in the US
Eligibility for Status?

Cannot Change or Extend Visa Status Because Never had a visa – penalty is to go home

Cannot apply for Green Card in the US because need to maintain status and have a legal entry or minimum legal entry – penalty is to go home

Once go home – will trigger likely the unlawful presence bars – need a waiver and qualifying relative

What About Kids?
Comprehensive Reform

Overhaul Preference System to allow more high skilled workers in and so families not so backlogged

Create a Temporary Work Visa for Unskilled Workers

Increase caps for Temporary Skilled Workers

Legalize undocumented population and allow for eventual permanent residence/citizenship
  – DREAM Act for children only

Allow US employers to verify their workforce more easily

Increased Border Security