

Maneuvering Immigration Pitfalls in Family Court: What Family Law Attorneys Should Know in Cases with Noncitizen Parties

by
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Introduction

Why should a family law attorney care about immigration law? If the attorney overlooks potential immigration implications, she might obtain an expeditious divorce settlement for her noncitizen client, which inadvertently gets him deported. Or she might walk into a divorce hearing for her U.S. citizen client without realizing her client previously signed a contract for her husband's immigration process, which requires her to support him financially and may be enforced in a divorce proceeding. A basic understanding of the intersections between family and immigration law can help prevent, or at least prepare for, these disasters.

A family law attorney may be in a position to recognize that his client qualifies for immigration status, which will help her to stay in the United States so that she can assert her rights in her family law matter. For example, the client might be a domestic violence survivor who is hesitant to leave her spouse for fear of deportation, but qualifies for permanent residency ("green card" status) under the Violence Against Women Act. Or, the attorney might be the guardian *ad litem* for an undocumented child whose future appears limited without legal status, but who qualifies for permanent residency as a Special Immigrant Juvenile because he was neglected, abused or abandoned by a parent. The attorney would be in a position to notify the client of these possibilities and refer that client to an immigration practitioner who can explore possible options.

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It is not necessary for a family law attorney to become an expert in immigration law, just as an immigration lawyer does not need to become an expert in family law. Nonetheless, law is multidisciplinary and, to provide competent representation, a family law attorney should determine whether the client is a U.S. citizen and, if not, whether there might be immigration implications in the case. Family law attorneys who do not practice immigration law should make sure their clients consult with an immigration lawyer before finalizing a strategy in the family law case to ensure successful resolution in both the family and immigration matters.

This article presents some important information that family law attorneys should know when representing clients in cases involving noncitizen parties.² Part I discusses language and cultural issues that might arise during representation and provides some suggested best practices to overcome challenges that can affect communication and the attorney-client relationship. Part II gives an overview of some immigration basics including the government agencies involved in immigration cases, applicable statutes and regulations, and different types of immigration status and documentation.

Part III focuses on marriage and divorce with a discussion on foreign documents, assessing the legality of foreign marriages and divorces, how a noncitizen obtains legal status through marriage, and complications that can arise when a divorce occurs. This section also discusses the affidavit of support, a legally binding contract that a petitioning relative must sign when she applies for a family member to become a legal permanent resident (“green card” holder). This contract might later be enforced against a spouse in a divorce proceeding or in federal court.

Part IV presents challenges that can arise in a domestic violence situation where the survivor is a noncitizen, and describes some immigration remedies that might allow the survivor to remain in the United States. Part V focuses on children’s issues including child abduction and consent requirements for obtaining children’s passports and traveling abroad. This section also ex-

² This article only provides a brief overview of the areas of immigration law that intersect with family law. See SARAH B. IGNATIUS & ELISABETH S. STICKNEY, *IMMIGRATION LAW AND THE FAMILY* (2012), for an in-depth discussion on family-based immigration law.

plains how nonpayment of child support might affect a noncitizen's immigration status, special immigration statuses for children, and issues relating to the adoption of foreign-born children.

Finally, Part VI provides a brief overview of the ways a noncitizen might either be deported from the United States or prevented from entering the country upon return from travel abroad, focusing on removal grounds that may arise in a family law matter. The article concludes by encouraging family law attorneys to remain knowledgeable about potential immigration implications in family law matters, and to work in coordination with immigration practitioners to ensure that the client's interests are best served.

I. Language and Cultural Issues

When representing a foreign-born client, an attorney should consider some important language and cultural issues, some of which will need to be addressed in advance of the initial client meeting. Failing to recognize and respond to these concerns will affect attorney-client trust and communication, and can have an adverse impact on representation as well as the ultimate outcome of the case.

A. Using Interpreters

If a client is not a native English speaker, he may need an interpreter even if he appears to be fluent in English during basic conversations. For complicated discussions about matters that may have a significant impact on a client's life, it is important to make sure that the client comprehends the content of the conversation. He may nod his head or say yes in response to questions, to be polite, but may not understand the details of what he is being told. It is a good idea to ask a client, before the first meeting, whether he will need an interpreter and whether he plans to bring one with him. Any entity receiving federal financial assistance is required by law to provide interpreters under Title VI of the Civil Rights Act of 1964.³

Ideally, a professional interpreter should be used for client meetings. Interpreting is a learned skill and requires accuracy

³ 42 U.S.C. § 2000(d)(1)-(7) (2012).

and unbiased word-for-word interpretation. Someone who is bilingual may not be an appropriate interpreter. However, a professional interpreter is often cost prohibitive, particularly when representing an indigent client. If using a nonprofessional interpreter, the attorney should explain the role of the interpreter and should intervene if he is not interpreting correctly.

At the beginning of a meeting, the attorney should introduce himself to the interpreter and explain the purpose of the meeting. It is important to speak directly to the client, and not the interpreter, and to speak clearly and in short segments. The interpreter should be encouraged to ask for clarifications when needed, and must interpret everything word-for-word using the first person when relaying what the client says. If the client asks a question, the interpreter must interpret that question to the attorney instead of answering the question or engaging in a conversation with the client. If the client and interpreter are having side conversations, the attorney must redirect the conversation.

Often a client will bring a friend or family member to interpret. A child should never be used as an interpreter. Friends and family will often try to speak for the client, because they may know at least part of the client's story, and it will be important to make sure they are interpreting accurately without inputting their own explanations or answers. The client may feel uncomfortable sharing private information that she has not previously told a family member. In cases where a client seems not to be forthcoming, it is a good idea to get a new interpreter.

If selecting an interpreter from the local community, the client should be told who the interpreter is prior to coming in for the appointment, to make sure the client is comfortable with the interpreter. There are many internal dynamics in immigrant communities and the client may not trust that the interpreter will keep things confidential, or may perceive a bias if the interpreter is from a different ethnic group. Even if the interpreter maintains confidentiality, there may be a perception that he will share the client's story with others in the community.

Accurate interpretation, in a trusting environment, is essential for attorney-client communication. Misunderstandings can have a devastating effect on a case, and the attorney will not be able to adequately represent the client's interests if communication is compromised.

B. Cultural Challenges

The U.S. legal system seems foreign to many citizens, and is even more so for clients from another country. Beyond the complexity of the laws, a client may come from a country where the legal system is corrupt and lawyers are seen as part of the system and not to be trusted. It is important for an attorney to explain to her client that she does not work for the court or the government and that communications between attorney and client are confidential and privileged. It may take some time, over several meetings with the client, to develop trust.

A client may come from a country where matters are normally handled outside of the court system. She may be living in a community of individuals from her home country, where the culture and traditions from that country are followed. For example, some refugee communities handle family matters internally, as a community, with elders making decisions on how things will be resolved. Some cultures do not recognize problems like domestic violence or child abuse, and it may be difficult to convince a client to assert her rights in U.S. courts when her family and community are pressuring her to put up with the abuse and keep the family together.⁴

Complications can also arise when representing a client who is undocumented or in temporary status. Particularly if the adverse party has legal status, an imbalance of power and the fear of deportation may prevent the client from participating fully in her case. She may be afraid to go into court, fearful that immigration officers will be at the hearing and that she might be detained or deported. These fears are not unfounded. Immigration courts are federal and separate from the state court system, and there are no requirements for court officials to report people to immigration authorities. However, nothing prevents an individual from notifying immigration authorities of his own volition. Ensuring that local court officials and judges are educated on immigration issues can help to prevent these problems, so that cases may proceed with active participation from all parties.

⁴ See Yali Lincroft, Jena Resner, Ming Leung & Alice Bussiere, *Underserved. Underserved. Immigrant and Refugee Families in the Child Welfare System*, THE ANNIE E. CASEY FOUNDATION (2006), <http://www.aecf.org/upload/publicationfiles/ir3622.pdf>.

II. Immigration 101

Before addressing the intersections between immigration and family law, it is helpful to have an understanding of some immigration basics including: the government agencies involved in immigration cases, applicable sources of law, and types of immigration status and documentation.⁵

A. Government Agencies

Many people are familiar with the Immigration and Naturalization Service (INS), the agency that used to handle immigration matters, now referred to as “Legacy INS.” INS was dissolved by the Homeland Security Act of 2002, which created the Department of Homeland Security (DHS). DHS is comprised of numerous components including three that handle Legacy INS functions.

The three DHS immigration components include: U.S. Citizenship & Immigration Services (USCIS), which processes applications for immigration benefits including employment authorization, permanent residency and citizenship; Immigration and Customs Enforcement (ICE), which enforces the immigration laws through investigations, detention and removal; and Customs and Border Protection (CBP), which is responsible for handling border issues including processing individuals at the U.S. borders and airports. USCIS, ICE, and CBP handle immigration functions within the United States. The Department of State handles cases for individuals who are outside the United States applying for visas through U.S. embassies abroad for admission to the country.

Finally, the Immigration Courts are administrative courts that process individuals in removal (deportation) proceedings. Those courts are under the Executive Office for Immigration Re-

⁵ Please note that at the time this article is going to press, the Senate has passed a comprehensive immigration reform bill, S744 *The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013*. Democrats in the House have proposed a bill modeled after the Senate legislation, H.R. 15 *The Border Security, Economic Opportunity, and Immigration Modernization Act of 2013*. At this point, it is uncertain whether House leadership will allow an immigration bill to come to a vote. If comprehensive immigration reform passes, it will significantly change our immigration laws, including some of the information in this section.

view (EOIR), which is part of the Department of Justice. The Board of Immigration Appeals (BIA) is the appellate level court for the EOIR and sits in Falls Church, Virginia. Most appeals are decided without oral argument. In some cases, BIA decisions may be appealed to the Federal Courts of Appeal.

B. *Sources of Immigration Law*

The statutes governing immigration law are found in the Immigration and Nationality Act (INA), contained in Title 8 of the United States Code. DHS regulations related to immigration matters are located at Title 8 of the Code of Federal Regulations and Title 22 of the Code of Federal Regulations deals with the Department of State regulations. Beyond the statutory and regulatory sources, many important interpretations and procedures are found in sub-regulatory guidance, including policy memoranda and advisories. Adjudicators will apply the rules set forth in that guidance when assessing a case. It is essential that a practitioner representing someone in an immigration matter has access to the most recent sub-regulatory guidance; he cannot rely solely upon the statutes, regulations, and case law.

Each agency has its own set of regulations and sub-regulatory guidance for statutory interpretations and implementation procedures. The Department of State might interpret the requirements for a particular immigration status differently than USCIS, so that someone applying at a U.S. Consulate abroad will be held to a different standard than someone applying for the same status from within the United States. USCIS, ICE, and CBP may also have different interpretations and approaches for a particular law.

C. *Immigration Status*

Assessing a client's immigration status is not always straightforward. The first thing to determine is whether the client is a U.S. Citizen (USC); simply asking him whether he is a citizen may not elicit a correct answer. The best practice is to ask where the client was born and if he was born in the United States, then he is a citizen regardless of his parents' citizenship.⁶ If he was

⁶ 8 U.S.C. § 1401(a) (2012).

not born in the United States, then further questioning is necessary.

It is more complicated to verify whether a child born outside the United States is a citizen, even if he has a USC parent.⁷ An individual might acquire citizenship at birth, or he might derive citizenship when a parent naturalizes. To assess whether someone acquired citizenship at birth, it is necessary to look at the law that was in effect at the time of his birth, and to see whether he met all of the requirements at that time. To determine whether a client derived citizenship through a parent, it is also necessary to know what law applies and whether he met all of the requirements within the specified time period. The law currently in effect for citizenship acquired at birth can be found at 8 U.S.C. § 1401 and the law currently in effect for derived citizenship at 8 U.S.C. § 1431.

Individuals who are not citizens are referred to by many in the immigration bar as “noncitizens.” Although the INA refers to noncitizens as “aliens,” most practitioners find this terminology offensive, conjuring images of extraterrestrials rather than fellow human beings. Noncitizens fall into two categories, “nonimmigrants” and “immigrants.”

Nonimmigrants are those people who are in the United States on temporary visas, which are classified by letter from “A” to “V,” at 8 U.S.C. § 1101(a)(15). These visa categories include: visitors (B2), students (F1), exchange visitors (J1), temporary agricultural or seasonal workers (H2A and H2B), professional workers (H1B), diplomats and government workers (A and G), amongst others. In most cases, nonimmigrants are given an authorized period of stay and must provide evidence of their intent and ability to depart at the end of that time.⁸ In some cases, it is possible to change or extend nonimmigrant status once in the United States.⁹ If a nonimmigrant overstays her visa or fails to follow the visa requirements, then she is no longer in legal status and is subject to removal.¹⁰ An individual who violates her visa will have limited means for regaining legal status.

⁷ See DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK (2012-2013 ed.), for a more in-depth discussion on citizenship.

⁸ 8 C.F.R. § 214.1(a)(3)(ii) (2013).

⁹ 8 C.F.R. §§ 214.1(c), 248.1-3 (2013).

¹⁰ 8 U.S.C. § 1227(a)(1)(C) (2012).

The term “immigrant” is defined under the INA as “every alien except an alien who is within one of the . . . classes of non-immigrant aliens,” in other words, all noncitizens except those with a nonimmigrant visa “A” through “V.”¹¹ The most common immigrant category is legal permanent residents (LPRs), or “green card” holders; green card is a colloquial term for permanent resident and does not appear in the INA. An LPR is permitted to live and work indefinitely in the United States, unless she does something that renders herself deportable under 8 U.S.C. § 1227(a), such as becoming involved in criminal activity.¹² She can travel in and out of the country so long as she does not spend too much time out of the United States or engage in certain illegal activity.¹³

There are limited ways to obtain permanent residency, and the most common is through family relationships. USCIs may petition for spouses, children, and siblings, while LPRs may only petition for spouses and unmarried children.¹⁴ Spouses and unmarried minor children of USCIs are considered “immediate relatives” and are not subject to a waiting period, but all other family-based categories have lengthy waiting periods to immigrate because there are limits to the number of those visas available each year.¹⁵ The current waiting periods range from two years and four months (for spouses and minor children of LPRs) to over twenty-three and a half years (for siblings of USCIs from the Philippines).¹⁶

Refugees and asylees are two other categories of immigrants. They may remain in the United States indefinitely and, after one year, may apply for LPR status. Both refugees and asylees must demonstrate that they are unable to return to their country of origin due to a well-founded fear of persecution on account of race, religion, nationality, or membership in a particular social group, or political opinion.¹⁷ Refugees flee from their

¹¹ 8 U.S.C. § 1101(a)(15) (2012).

¹² See *infra* Part VI.

¹³ 8 U.S.C. § 1101(a)(13)(C) (2012).

¹⁴ 8 U.S.C. §§ 1151(b), 1153(a) (2012).

¹⁵ *Id.*

¹⁶ See *Visa Bulletin*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/visa/bulletin/bulletin_1360.html, for a monthly visa bulletin with the current priority dates for each preference category.

¹⁷ 8 U.S.C. § 1101(a)(42) (2012).

home countries to refugee camps and, once they are determined to meet the requirements, they might be selected for resettlement in the United States or another country based on our international treaty obligations.¹⁸ Asylees arrive in the United States in another status, such as visitors, students, or by entering with a false visa or without inspection, and then they apply for asylum, proving that they meet the requirements for protection, once in the United States. If they are not approved, they can be removed back to their home country.

In addition to refugees and asylees, there are other humanitarian-based statuses. The Victims of Trafficking and Violence Prevention Act of 2000 created special “U” visas for certain crime victims, and “T” visas for victims of sex or labor trafficking. These visas require cooperation with law enforcement and are temporary, but can lead to permanent resident status. Temporary Protected Status (TPS), another humanitarian status, is available to individuals who are nationals of countries that have been designated by DHS due to natural disaster or civil war. Individuals from those countries, who were in the United States at the time of designation and meet other requirements, may apply for temporary status and work authorization.

Other individuals may be in a less defined immigration status. For example, they may have pending applications, be in the process of changing nonimmigrant status from one visa type to another, or have deferred action, where DHS has decided to exercise prosecutorial discretion and not enforce removal against an individual.

Still other people may be undocumented because they entered the United States without a visa, or failed to maintain status once in the United States, sometimes due to no fault of their own. For example, a temporary worker may have come to work at a farm and was told by his employer, once he arrived, that there was no work for him. Or someone may have arrived as a college student and become sick and unable to maintain a full course-load. Some individuals who are undocumented might actually qualify for legal status, but lack knowledge of their eligibility or access to legal assistance.

¹⁸ The United States is a party to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

D. *Immigration Documents*

It is often difficult to determine an individual's immigration status by looking at his documents. In some cases, a client will have a document that clearly shows his status, such as an employment authorization card, an LPR card, a naturalization certificate, a stamp in his passport or an I-94 admission card with his status stamped on it. However, in many cases, the client's status will be less clear. If it is not his most recent immigration document, it may show a past status that has expired or changed. Evidence of immigration status can also include documents such as a filing receipt, an immigration court hearing notice, an ICE order of supervision, or a copy of a filed application for which USCIS has not yet sent a receipt.

It is best to make copies of any immigration documents, and have an immigration practitioner review the documents to assess the client's status. An attorney should never contact Immigration officials to determine her client's status, because the client may be subject to removal if she is no longer in status, and she could be detained and or deported of she comes into contact with Immigration authorities.

III. Marriage and Divorce

A. *Documentary Issues*

Obtaining primary documents from a client's home country can often be a challenge. In some countries, documents such as birth, death, and marriage certificates are not available. The documents may never have existed, or they may have been destroyed during war and are no longer available. For information on documents available in a particular country, refer to the U.S. Department of State Foreign Affairs Manual.¹⁹ This is the source that immigration agencies use in determining whether a primary document is required.²⁰ When a primary document is not available in an immigration case, secondary evidence such as baptismal or census records, and affidavits, may be used.²¹

¹⁹ See *Reciprocity by Country*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/visa/fees/fees_3272.html, for country documentation.

²⁰ 8 C.F.R. § 204.1(f)(1) (2013).

²¹ 8 C.F.R. § 204.1(g)(2) (2013).

B. *Determining the Legality of a Foreign Marriage*

In some cases, it is difficult to establish whether a foreign marriage or divorce is legal. If a client is seeking representation in a divorce matter but her foreign marriage was not actually legal, she will not need to get a divorce because she is not legally married. The validity of a marriage or divorce for family law purposes will depend on the law of that state.

Immigration law is federal and recognizes the validity of any marriage that was legal in the jurisdiction where it occurred, unless the marriage is considered to be against public policy, such as incestuous or polygamous marriages.²² A religious marriage, which is common in many Muslim countries, is considered valid only if the marriage was legal under the laws of the country in which it took place.²³ Proxy marriages are not recognized as legal by immigration authorities, unless the parties have consummated the marriage.²⁴

Following the Supreme Court's ruling in *United States v. Windsor*, same-sex married couples now have equal rights to petition for their spouses under the immigration laws.²⁵ Previously, a same-sex partner was prohibited from petitioning for his spouse to obtain LPR status. Immigration law is federal and was controlled by the Defense of Marriage Act (DOMA), which recognized only a marriage between a male and a female; section three of DOMA excluded legally married same-sex couples from any federal law or program in which marriage was a factor.²⁶ In *United States v. Windsor*, the Supreme Court struck down DOMA, finding it unconstitutional.²⁷ Immediately following the ruling, the Administration directed that federal agencies swiftly implement the decision and its implications for federal benefits. The Department of Homeland Security and the Department of State both issued guidance indicating that they will now treat a petition filed by a same-sex spouse the same as they would

²² Matter of H., 9 I. & N. Dec. 640 (BIA 1962).

²³ Matter of Ceballos, 16 I. & N. Dec. 765 (BIA 1979).

²⁴ 8 U.S.C. § 1101(a)(35) (2012).

²⁵ *United States v. Windsor*, 133 S.Ct. 2675 (2013).

²⁶ 1 U.S.C. § 7.

²⁷ *Windsor*, 133 S.Ct. at 2680.

treat a petition filed by an opposite-sex spouse.²⁸ The Board of Immigration Appeals followed suit, remanding a case to the immigration court where the visa petition had previously been denied under DOMA because the petitioner was a same sex spouse.²⁹

C. How a Noncitizen Obtains Legal Status Through Marriage to a U.S. Citizen or Legal Permanent Resident

Many people are surprised to learn that a noncitizen does not automatically obtain legal status when she marries a USC, and in fact, she can still get deported even if they have children together. Those married to USCs or LPRs may apply for permanent residency based on marriage. Spouses of LPRs must wait a number of years to immigrate, since a limited number of people in that category are permitted each year.

As explained further below, the family-based immigration process typically begins with the USC or LPR relative filing a petition for the noncitizen spouse. Some individuals are barred from petitioning for family members under the Adam Walsh Child Protection and Safety Act of 2006, if they have a conviction that qualifies as a “specified offense against a minor,” unless DHS determines there is no risk to the beneficiary.³⁰ When a USC or LPR files a visa petition for her family member, immigration authorities will conduct a check in the Interagency Border Inspection System (IBIS) database, and if a designated

²⁸ Statement from Secretary of Homeland Security Janet Napolitano on July 1, 2013, “Same-Sex Marriages,” available on AILA InfoNet, 13080745 (posted Aug. 7, 2013); State Dept. Cable, Unclassified 00112850 (Aug. 2013) (Next Steps for DOMA: Guidance for Posts), available on AILA InfoNet, 13080252, (posted on Aug. 2, 2013).

²⁹ Matter of Zeleniak, 26 I&N Dec. 158 (BIA 2013).

³⁰ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 594 (July 27, 2006); 8 U.S.C. § 1154 (a)(1)(A)(viii). Subtitle A § 111(7) of the Act defines a “specified offense against a minor” as an offense involving kidnapping (unless committed by a parent or guardian), false imprisonment (unless committed by a parent or guardian), solicitation to engage in sexual conduct, use in a sexual performance, solicitation to practice prostitution, video voyeurism as described in section 1801 of title 18, United States Code, possession, production, or distribution of child pornography, criminal sexual conduct involving a minor or the use of the Internet to facilitate or attempt such conduct, or any other conduct that by its nature is a sex offense against a minor.

conviction appears for her, then she is issued a letter requesting evidence of police and court disposition documents and she is scheduled for fingerprinting. She is given the opportunity to present evidence to establish that she poses no risk to her family member. The DHS adjudicator will then consider all known factors in determining whether the intended beneficiary of the visa petition will be placed at risk of harm from the petitioning relative if the visa petition is approved and the family member is admitted for permanent residency.³¹

There are two steps in the process of obtaining permanent residency through marriage. The first step is the visa petition process, where the USC or LPR, referred to as the “petitioner,” files a visa petition for a spouse, proving that the marriage is legal and *bona fide* and not entered into for the sole purpose of circumventing the immigration laws.³² If both spouses are in the United States, they will usually have an interview with USCIS, where they will often be separated and asked questions to establish the *bona fides* of the marriage.

The second step in the process is for the noncitizen spouse, referred to as the “beneficiary,” to apply for LPR status. During this process, immigration authorities are looking to see if the beneficiary is subject to any of the “grounds of inadmissibility” that would prevent her from becoming an LPR, even with an approved visa petition.³³

If she is in the United States, a beneficiary can sometimes apply for permanent residency through a process called “adjustment of status,” where she files her application with USCIS and

³¹ See Memorandum, Michael Aytes, Associate Director, Domestic Operations, USCIS, July 28, 2006, 70/1-P, “Adam Walsh Child Protection and Safety Act of 2006.”; See also Memorandum, Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, September 24, 2008, HQ 70/1-P, “Transmittal of SOP for Adjudication of Family-Based Petitions under the Adam Walsh Child Protection and Safety Act of 2006, available on AILA InfoNet Doc. No. 10041530.

³² Matter of McKee, 17 I. & N. Dec. 332 (BIA 1980).

³³ The grounds of inadmissibility are found at 8 U.S.C. § 1182(a) and include: certain health-related grounds, criminal convictions, prior immigration violations, visa fraud (for example, entering on a nonimmigrant visitor visa when planning to marry), likelihood of becoming a public charge, smuggling, and voting or claiming to be a U.S. Citizen. In some cases, a waiver may be available. See *infra* Section VI.

is scheduled for an interview at the local USCIS office. If she is not eligible for adjustment of status, or is outside the United States, then the visa petition is forwarded to the Department of State for processing through the U.S. Consulate in the beneficiary's home country.

If a couple has been married for less than two years at the time of approval, the beneficiary is granted conditional resident status.³⁴ This will give her the full rights of an LPR, and she may live and work in the United States and travel in and out of the country. However, her conditional resident status expires after two years, and she must file an application to make her status permanent within the ninety-day period before her status expires.³⁵ If she gets divorced, this will complicate her case, and she will need to consult with an immigration attorney to file a special waiver application.³⁶

D. *The Affidavit of Support: A Contract for Support that Survives Divorce*

The family immigration process requires the petitioner to sign a contract, ensuring that the beneficiary will not need public benefits to support herself once she becomes an LPR. There has been a growing trend for this contract, called an "affidavit of support," to be enforced in divorce proceedings or in federal court, since the contract survives a separation or divorce.

An applicant for family-based permanent residency must prove that she is not likely to become a public charge, or she will be found inadmissible and thus ineligible for LPR status.³⁷ To overcome this ground of inadmissibility, the petitioning relative must sign a legally binding affidavit of support and must establish that he earns sufficient income to support his household, including the beneficiary relative, at 125% of the poverty level (\$18,913

³⁴ 8 U.S.C. § 1186a.

³⁵ 8 U.S.C. § 1186a(c)(1).

³⁶ *See infra*, Section E.

³⁷ 8 C.F.R. § 213a.2(a). There are certain exceptions for individuals who have already worked or can be credited with 40 qualifying quarters of coverage, those or who will automatically become U.S. Citizens upon the grant of permanent residency under the Child Citizenship Act, or those who obtained permanent residency under the Violence Against Women Act. 8 C.F.R. § 213a.2(a)(2)(ii).

for a family of two, under the 2012 Income Guidelines).³⁸ If the petitioner's income is insufficient, an additional affidavit of support must be signed by either a related "household member" or a "joint sponsor," who will then be held jointly and severally liable.³⁹ This is a significant barrier for low-income applicants, who are unlikely to meet the minimum income requirements and may not have friends or family who are wealthy enough and willing to incur this significant liability.

The affidavit of support is a contract between the sponsor and the U.S. government.⁴⁰ It can be enforced by any federal, state, or local government agency or private entity that provides any means-tested public benefits to the sponsored immigrant after he becomes an LPR, or by the sponsored immigrant himself.⁴¹ The contract survives divorce and can only be terminated in specific limited circumstances.

Affidavit of Support enforcement obligations begin at the time the immigrant's application for permanent residency is granted.⁴² The obligations terminate only when the sponsored immigrant either (1) becomes a U.S. Citizen; (2) has worked, or can be credited with, 40 qualifying quarters of work; (3) loses permanent resident status; (4) is placed in removal proceedings and granted permanent residency on some other basis as a defense to deportation; or (5) dies.⁴³ The sponsor's affidavit of support obligations also end when the sponsor dies.⁴⁴ Termination of the affidavit of support does not relieve the sponsor of reimbursing any benefits the sponsored immigrant received while the contract was still in effect.⁴⁵ There is a designated procedure that a government benefits agency must follow to seek reimbursement.⁴⁶

³⁸ 8 C.F.R. § 213a.2(c)(2)(ii)(C).

³⁹ 8 C.F.R. § 213a.2(c)(2)(i)(C)(1); 8 C.F.R. § 213a.2(c)(2)(iii)(C).

⁴⁰ 8 C.F.R. § 213a.2(d).

⁴¹ *Id.*

⁴² 8 C.F.R. § 213a.2(e)(1).

⁴³ 8 C.F.R. § 213a.2(e)(2)(i).

⁴⁴ 8 C.F.R. § 213a.2(e)(2)(ii).

⁴⁵ 8 C.F.R. § 213a.2(e)(3).

⁴⁶ 8 C.F.R. § 213a.4.

There is a growing trend towards enforcement of the affidavit of support in divorce proceedings and in federal court.⁴⁷ Some courts have held that the I-864 obligations can be enforced by the sponsored immigrant against the sponsor for maintenance at 125% of the poverty level.⁴⁸ Despite the affidavit of support's purpose of ensuring that noncitizens will not need to rely upon public benefits, some courts have held that the receipt of public benefits is not a prerequisite to enforcement.⁴⁹ One court held that a judicial order to make payments under an affidavit of support was a non-dischargeable domestic support obligation and thus exempted from discharge under the Bankruptcy Code.⁵⁰

In calculating the amount of obligation under an affidavit of support, some courts have looked at the annual household income of the sponsored immigrant since the date the affidavit of support went into effect. During the years in which the household income was less than 125% of the poverty level, the sponsor has been ordered to pay the difference, subtracting any payments the sponsor already made to the sponsored immigrant. Sponsors have been ordered to continue maintenance payments so long as the sponsored immigrant's income is less than 125% of poverty level, until the affidavit of support obligations have terminated under 8 C.F.R. § 213a.2(e)(2)(ii).⁵¹ Some courts have held that there is no duty on the part of the sponsored immigrant to mitigate, by seeking employment, even when the Department of Justice submitted an *amicus* brief arguing the alternative.⁵² Other courts have suggested that it is an affirmative defense.⁵³

⁴⁷ For a detailed discussion on affidavit of support enforcement, see Elise A. Fialkowski & Wendy Castor Hess, *Form I-864, Affidavit of Support: Practical Guidance Regarding Demonstrating 'Ability to Support' and Update Regarding I-864 Enforcement*, 2012 AILA Immigration Practice Pointers (2012).

⁴⁸ See *Nasir v. Shah*, Civil Action No. 2: 10-cv-01003, 2012 U.S. Dist. LEXIS 135207 (S.D. Ohio Sept. 21, 2012); *Younis v. Farooqi*, 597 F. Supp. 2d 552 (D. Md. 2009); *Stump v. Stump (In re Affidavit of Support)*, No. 1: 04-CV-253-TS, 2005 U.S. Dist. LEXIS 26022 (N.D. Ind. Oct. 25, 2005).

⁴⁹ *Id.*

⁵⁰ *Hrachova v. Cook*, No. 5:09-cv-95-Oc-GRJ, 2009 U.S. Dist. LEXIS 102067, 2009 WL 3674851 (M.D. Fla. Nov. 3, 2009).

⁵¹ *Nasir v. Shah*, 2012 U.S. Dist. LEXIS 135207; *Younis v. Farooqi*, 597 F. Supp. 2d 552; *Stump v. Stump* 2005 U.S. Dist. LEXIS 26022.

⁵² *Liu v. Mund*, 686 F.3d 418 (6th Cir. 2012).

⁵³ *Love v. Love*, 23 A.3d 1268 (Pa. Super. Ct. 2011).

The potential liability implicated by an affidavit of support can be significant. Practitioners should address these issues early on with their clients and, if advising the client before marriage, they might explore whether affidavit of support liability can be offset in a prenuptial agreement.

Advocates should note the disconnect between the affidavit of support's purpose, of ensuring that an immigrant will not become a public charge, and its effect, of usurping normal support calculations used in family court. In jurisdictions with no precedent, practitioners might challenge the enforcement of an affidavit of support in divorce proceedings, arguing that enforcement should be limited to cases in which the noncitizen has received public benefits and that Congressional intent is not furthered by permitting the noncitizen to force his spouse to support him, with no duty to mitigate by seeking employment.

E. What Happens to the Noncitizen's Immigration Status When She Gets Divorced?

In some cases, an individual's status might be tied to his marriage. Before obtaining a divorce for a noncitizen client, a family law attorney should consult with an immigration practitioner to make sure the client's status will not be affected. In many cases, the timing of the divorce could have a significant impact on the client's ability to maintain legal status in the United States, and avoid deportation.

A client may have received his status directly from his marriage if his spouse petitioned for him to become an LPR. Or, he might have obtained status in the United States as a derivative to his spouse's status, for example as the spouse of a student on an F-1 visa. It may be difficult to tell, from the client's documents, whether his status is derived from his spouse; in some cases a client may not even know himself. Even if a client's immigration status is connected to his marriage, divorce will not always affect his status.

1. Those Married to U.S. Citizens

Someone who is an LPR through marriage to a USC might lose his status if he gets divorced during the first two years of his residency. Conversely, divorce has no affect on someone who was married for longer than two years at the time he became an

LPR. Those married for less than two years at the time their LPR applications are approved are granted conditional resident status, which expires after two years. To remove the condition and make this status permanent, a conditional resident must either file an application jointly with his spouse at the end of the two-year conditional residency or he must qualify for a waiver through which he may apply on his own. When representing a conditional resident in a divorce matter, a family law attorney must be aware of her client's immigration status and the status expiration date.⁵⁴ The timing of the divorce must be coordinated with his immigration process, or he will lose status and will be subject to deportation.

When a couple is still together at the end of the two-year period, the conditional resident and her USC spouse must jointly file an application to remove the conditions on residency. This application must be filed during the ninety-day period before her status expires. To support the application, the couple needs to submit evidence of their marital relationship, such as birth certificates for any children, joint financial documents, joint tax returns, jointly owned property, and bills in both names. Once the application is approved, the condition will be removed and she will have LPR status. After that, divorce will no longer affect her status.

A client can file the application jointly with her spouse even if they are separated, as long as there is no final divorce. An immigration officer is not permitted to consider the viability of the marriage; the relevant issue is whether the couple initially entered the marriage in good faith.⁵⁵ However, the separation will be considered as evidence that the marriage might not be *bona fide*, and the client will need to provide evidence to establish otherwise. The citizen spouse must be willing to join in the application including attending an interview. Immigration

⁵⁴ If the client has conditional residency, his permanent resident card will list category "CR1" and the expiration date will be two years after the date listed under "resident since." Note that sometimes USCIS makes an error on the card and may issue it with the wrong category and expiration date. If the client was actually married for more than two years at the time her application was approved, she is not a conditional resident and her permanent resident card should list category "IR1" and should have an expiration date which is ten years after the "resident since" date.

⁵⁵ Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).

processing can be lengthy, and in some cases the parties may be waiting more than a year before the application is adjudicated and cannot divorce during that time period without adversely affecting the application.

There are three circumstances in which a conditional resident can remove the conditions on her residency without filing jointly with her spouse. She must file a “waiver” application, requesting a waiver of the joint filing requirement. A waiver application can be filed as soon as an applicant qualifies, whether before or after her conditional residency expires, and she does not have to file during the ninety-day period before her card expires.

The most common waiver category is the “good faith waiver.” To qualify the applicant must have a final divorce judgment and must prove, by clear and convincing evidence, that she entered the marriage in good faith. This is a higher standard of proof than the normal jointly-filed application. This application cannot be submitted until there is a final divorce, yet conditional status may be terminated in the interval, after the divorce is final and before the filing of the waiver application. Coordination with the client’s immigration lawyer is essential, to make sure the waiver application is prepared and ready to be filed as soon as possible after the divorce decree is available.

A second waiver ground is “extreme hardship,” where the applicant must show that she will suffer an extreme hardship if she is forced to return to her home country. She must show that this hardship is based on circumstances that have changed since the time she became a conditional resident. Changed circumstances might include: birth of a child in the United States who would be without one parent if the client must leave the country, recent illness that cannot be treated in the home country, or changed circumstances in the home country, such as war or natural disaster.

A third waiver ground is “domestic violence.” If the applicant can establish that she was subjected to battery or extreme cruelty by her USC spouse she can self-petition to remove the condition on her residency.

The waiver applications require substantial evidentiary proof, including a detailed affidavit from the applicant, and it is likely that she will be interviewed by USCIS. Someone filing a

waiver application should have an attorney representing her, while a jointly-filed application with no complications can often be completed *pro se*.

2. *Others Who May be Affected by Divorce*

Those people in the United States as “derivatives” of their spouses will sometimes lose their status when they get divorced. Certain immigration statuses permit derivative spouses and children under the age of twenty-one to accompany the principal status holder. Many nonimmigrant visas permit the admission of derivatives, and they would be affected by divorce. If an H1B professional worker gets a divorce, his wife on an H4 derivative visa is no longer permitted to remain in the United States.

Someone who is granted asylum in the United States is allowed to include derivatives on her application, and those derivatives will be granted asylum as well. One year after obtaining asylum status asylees, including derivatives, may apply for permanent residency. If a couple divorces before the derivative spouse obtains permanent residency, he will no longer be eligible to apply based on his derivative asylum status. He must then file his own application for asylum, proving that he meets all of the requirements for asylum, before he can apply for permanent residency. If an attorney is aware of this, the couple might wait to pursue a final divorce judgment until after the derivative spouse has been granted permanent residency. This does not apply to refugees, whose status is not affected by divorce.

When representing a noncitizen client, it is important to explore the potential immigration implications of a divorce, which will depend on the client’s immigration status. If the client’s immigration status is dependent on his marriage, he should consult with an immigration lawyer to explore whether he has other options for legal status.

IV. Domestic Violence

A domestic violence survivor will have additional hurdles, when she is a noncitizen, that might prevent her from following through in a protection order, testifying in a criminal hearing, or proceeding with a divorce, particularly if she lacks permanent legal status. She may in fact be eligible for legal status, which would enable her to work legally and remain in the United States

without the fear of deportation. These options may empower her to leave her abuser and to participate in her other legal matters.

The petitioning spouse in a normal immigration case has a great deal of power, because he must initiate the process by filing a visa petition and he has to sign the affidavit of support before his spouse can become an LPR. In a case involving domestic violence, an abuser will use this power as a means of controlling his partner. He is likely to threaten his wife with deportation and separation from their children if she calls the police or leaves him, and he is likely to have a greater understanding of the language, culture and laws of the United States and will use this to his own advantage. The battered spouse may be out of status because her husband has refused to file the visa petition; she would be ineligible to work or receive public benefits and would be subject to deportation if she encounters immigration authorities. The threat of deportation, especially when there are children involved and she lacks the means to support herself and her children, will likely prevent a noncitizen survivor from leaving an abusive marriage.

The Violence Against Women Act of 1994 (VAWA) created a path for battered spouses, and for children of abusive USCs and LPRs, to self-petition in order to obtain permanent residency. This eliminated the need for the abusive spouse to file the petition or the affidavit of support. VAWA has been expanded over the years, and now includes additional provisions for abused parents of USCs and LPRs.

To qualify under VAWA, a battered spouse must show that she was subjected to battery or extreme cruelty, which can include emotional abuse, by her USC or LPR spouse in the United States. She must also show that she entered the marriage in good faith and not solely for the purpose of evading the immigration laws, and that she has good moral character.⁵⁶ Establishing good moral character can be challenging in cases where the abusive spouse has, in retaliation or threat, called DHHS to claim that his wife was neglecting the children or obtained a cross order for protection from abuse.

⁵⁶ 8 U.S.C. § 1154(a)(1)(A)(iii)-(vii); 8 U.S.C. § 1154(a)(1)(B)(ii)-(iii).

U visas are another immigration remedy for victims of certain crimes, including domestic violence.⁵⁷ A domestic violence survivor, who is not married to her abuser or whose abuser is not a USC or LPR, does not qualify for VAWA but may qualify for a U visa which can lead to permanent residency. She must be willing to participate in the investigation or prosecution, although a conviction is not required.

A family law practitioner may find her client reluctant to follow through with a divorce, protection order, or any legal matter involving her husband, if the client has no other means to obtain legal status. If she has a path towards permanent legal status, which will enable her to work, live, and travel in the United States, then she will be better able to participate in her other legal matters.

V. Children

A. *Child Custody Issues: Restrictions on Obtaining Children's Passports and Traveling Abroad Without the Other Parent*

When drafting child custody provisions for a case involving a foreign-born parent, it is important to consider issues related to travel and passports that might later arise. Disputes can occur when one parent wishes to travel outside of the United States with a child, and the other parent objects. This is more likely to occur if one parent is foreign-born. It is a federal crime in the United States, under the International Parental Kidnapping Crime Act, for one parent to take a child outside of the country against the wishes of the other parent. There are restrictions on obtaining passports for minor children, based on U.S. treaty obligations.

The United States has ratified The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, an international convention aimed at preventing cross-border parental child abduction and wrongful retentions. According to the Department of State, "countries that are party to the Convention have agreed that a child who was living in one Convention country, and who has been removed to or retained in

⁵⁷ 8 U.S.C. § 1101(a)(15)(U).

another Convention country in violation of the left-behind parent's custodial rights, shall be promptly returned."⁵⁸ Once the child is returned, issues of custody are determined in the jurisdiction where the child is residing.⁵⁹

Many states have enacted the Uniform Child Abduction Prevention Act (UCAPA), which includes provisions that allow courts to impose measures aimed at preventing child abduction before and after the court has entered a custody decree.⁶⁰ The UCAPA is a model law that was drafted by the National Conference of Commissioners on Uniform State Laws, as an effort to complement and strengthen the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is in effect in 48 states.⁶¹ In states where the UCAPA is in effect, a custodial or noncustodial parent may file a petition to protect a child, even when no custody order is in place, if there is a credible risk of abduction.⁶² The UCAPA provides a list of risk factors to be ap-

⁵⁸ U.S. Department of State Office of Children's Issues, International Parental Abduction, *The Hague Convention on the Civil Aspects of International Child Abduction: Legal Analysis*, 51 Fed. Reg. 10494, http://travel.state.gov/pdf/Legal_Analysis_of_the_Convention.pdf. A list of the signatory countries can be found on the State Department website at http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html.

⁵⁹ *Id.* See also Jeffrey L. Edleson, et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases*, NIJ #2006-WG-BX-0006, Nov. 2010, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/232624.pdf> (a recent National Institute of Justice study addressing the implications for those fleeing abuse in other countries who seek protection in the United States but then face international child abduction procedures under the Hague Convention).

⁶⁰ To find if a state has enacted the UCAPA, refer to the Uniform Law Commission website at <http://www.uniformlaws.org/Act.aspx?title=Child%20Abduction%20Prevention>.

⁶¹ Merle Weiner & Darren Mitchell, *The Uniform Child Abduction Prevention Act: Understanding the Basics*, 13 SYNERGY (Nat'l Council of Juv. & Fam. Ct. Judges, Reno, Nev.), no. 2, Summer 2009 at 2.

⁶² *Id.* at 3.

plied in these cases.⁶³ It also contains provisions that a judge might include in an order.⁶⁴

Since the United States does not have exit controls at its borders, it is difficult to prevent a child's international travel once he has been issued a passport. The Department of State advises parents to include a clause in a child custody order, prohibiting the child from traveling abroad without the permission of the other parent or the court.⁶⁵ If the child is at risk of being taken to a country that is a signatory to The Hague Abduction Convention, the Department of State suggests including the terms of the Convention that apply if there is an abduction or wrongful retention. Although there is no government mechanism at the airports to determine a parent's authority to travel with a child, some airlines will require evidence of consent from the other parent to board their plane.⁶⁶

For a child under the age of sixteen to obtain a U.S. passport, both of his parents, or legal guardians, must sign the passport application. There are exceptions when one parent has evidence of sole custody of the child or has the consent of the

⁶³ Section 7 of the UCAPA provides a list of the risk factors to be considered including threats to abduct the child, domestic violence, stalking and child abuse or neglect, or if the parent "is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally" or "has had an application for United States citizenship denied," and others. Those representing noncitizens should consider the dangerous implications this might have for undocumented parents and should make sure that the court considers factors relevant to the risk of abduction beyond mere immigration status.

⁶⁴ Section 8 of the UCAPA lists provisions that a judge might include in the order, such as restrictions on travel with the child, surrendering of passports or providing itinerary for travel. The judge can also place limits on visitation and custody including supervised custody, or the posting of a bond. Under section 8 (e), to prevent imminent abduction, a court may issue a warrant to take physical custody of the child.

⁶⁵ *Guarding Against International Child Abduction*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/prevention/prevention_560.html# (last visited July 25, 2013).

⁶⁶ *TSA Contact Center Frequently Asked Questions*, TRANSPORTATION SAFETY ADMINISTRATION, <http://www.tsa.gov> (last visited July 25, 2013). TSA advises, "[t]here is no involvement by TSA in determining custody authorization of adults traveling with children. However, airlines have specific requirements for minors flying unescorted. For more information, we suggest contacting your airline."

other parent, or where an adult is acting in place of the parents and has the consent of both parents. There are also exceptions for exigent circumstances involving the health or welfare of the child or when the Secretary of State determines that issuance of a passport is warranted by special family circumstances.⁶⁷ If one parent is concerned that the other parent may attempt to take a child outside the country, he can enter the child's name into the Children's Passport Issuance Alert Program. He would then be notified if any passport application is received for that child. Once a passport has been issued the Department of State will not revoke it, but an individual can request that a court hold onto the document.⁶⁸ It should be noted that a child might also have a passport issued from another country, if the child is a noncitizen or is a USC with dual nationality.

B. *Child Support Issues in Immigration Cases*

Noncitizen clients who fail to comply with child support orders may have complications with their immigration cases. When an individual files an application that requires an exercise of discretion by immigration officials or a showing of good moral character, he will need to show that he is supporting his children. For example, an application for citizenship requires an applicant to show good moral character during the statutory time period, in most cases five years. Someone who has not complied with a child support order will usually be unable to establish that he has good moral character, and his application will be denied.⁶⁹ In cases where children do not live with a parent, or where there is a divorce order, an immigration official will often want evidence that the parent is supporting the child before granting an application for citizenship. This evidence could include a letter from the other parent, receipts for payment of child support, or a letter from the Department of Health and Human Services verifying compliance with child support payments.

⁶⁷ *Guarding Against International Child Abduction*, *supra* note 6.

⁶⁸ *Id.*

⁶⁹ 8 C.F.R. § 316.10(b)(3)(i) (2013).

C. *Special Immigration Statuses for Children.*

A family lawyer representing children, or acting as a guardian *ad litem*, may encounter child clients who lack permanent legal status. There are special categories of status specifically for children. Recognizing these options might allow the child to remain in the United States without the risk of deportation. Gaining protection in a dependency hearing will be meaningless if the child is forced to leave the country.

1. *Child Abuse Victims and Child Victims of Crimes*

As discussed in Section IV above, the Violence Against Women Act (VAWA) includes provisions for children to self-petition to obtain permanent residency when they have been abused by a USC or LPR parent. Battered children go through the same application process as a battered spouse. A child may also qualify for a U visa if he was the victim of a qualifying crime.⁷⁰ Children under the age of sixteen are exempt from the requirement that they cooperate in the criminal case in order to obtain a U visa.⁷¹

2. *Special Immigrant Juvenile Status*

Some undocumented children, who are in dependency or other juvenile proceedings, can obtain permanent residency through Special Immigrant Juvenile Status (“SIJS”). A family law attorney representing a child in a dependency hearing would need to ensure that specific language is included in the order, so that the child can later qualify for SIJS.

To qualify for SIJS, a child must either be declared dependent on a juvenile court, be legally committed to, or placed under the custody of, an agency or department of a state, or be placed under the custody of an individual or entity appointed by a state or juvenile court.⁷² A juvenile court, for purposes of SIJS, is defined as, “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.”⁷³ This is broad and includes depen-

⁷⁰ See *supra*, note 56.

⁷¹ 8 C.F.R. § 214.14(b)(3) (2013).

⁷² 8 U.S.C. § 1101(a)(27)(J)(i) (2013).

⁷³ 8 C.F.R. § 204.11(a) (2013).

dency, guardianship/probate or delinquency proceedings. The name given to the court by a state is irrelevant.⁷⁴

The judge must make a finding that reunification with one or both parents is not viable due to abuse, neglect or abandonment and that it is not in the child's best interest to be returned to his home country.⁷⁵ Although the child only needs to be under the age of twenty-one to qualify for SIJS, state laws normally require a child to be under the age of eighteen to come under the jurisdiction of a juvenile court.⁷⁶ The law is still unclear on whether the child must remain under the jurisdiction of the juvenile court until the SIJS application is approved. So it is best to err on the side of caution, and make sure that the client's applications for SIJS and permanent residency have been approved before he turns eighteen.

In 2009, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 made changes to SIJS, expanding eligibility to include those children who are placed in the custody of an individual through a guardianship order. The prior requirement of proving eligibility for long term foster care is no longer required, and it is now sufficient to show that reunification with one parent is not viable instead of having to prove that for both parents.⁷⁷

Once the juvenile court judge has signed the order, the client must file applications for SIJS and permanent residency with USCIS. Additional issues, such as inadmissibility, may complicate the case, so it is important to have a practitioner familiar with immigration issues involved in the immigration process. A SIJS case will require the coordinated work of a family and immigration law attorney to ensure that the juvenile court judge makes the correct findings, that the applicant meets all of the requirements for his immigration application, and that he files his application and supporting documentation correctly and on time.

⁷⁴ ANGIE JUNCK, ET AL, SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH 3-4 (3rd Ed. 2010).

⁷⁵ 8 U.S.C. § 1101(a)(27)(J)(ii) (2013).

⁷⁶ JUNCK, *supra* note 68, at 4-23.

⁷⁷ Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS (March 24, 2009), HQOPS 70/8.5, "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions," available at AILA InfoNet Doc. No. 09041670.

This is especially important when the child is close to turning eighteen, because he might lose eligibility.

3. *Deferred Action for Childhood Arrivals (“Dreamers”)*

On June 15, 2012, President Barack Obama announced a new policy of the Administration to stop deporting qualifying young people, often referred to as “Dreamers,” who meet certain requirements. This program is called Deferred Action for Childhood Arrivals (DACA). It allows qualified individuals to apply for “deferred action,” which is not an immigration status but rather an agreement by immigration authorities not to remove someone from the United States.

To qualify for DACA, an applicant must show that on June 15, 2012, he was present in the United States, under the age of 31, and was not in lawful immigration status; that he entered the United States before he turned 16 and by June 15, 2007; and that he has resided in the United States since that time. Those with certain criminal convictions or who are found to be a public safety or security threat do not qualify. Each case is adjudicated individually and there is no guarantee that the program will be extended at the end of two years. This announcement was made in response to Congress’s failure to pass the “DREAM Act,” which would provide a path towards legal permanent residency for qualifying young people.⁷⁸ The comprehensive immigration reform bill S.744 that passed in the Senate, and H.R.15 that has been proposed in the House both include a special path to permanent residency and citizenship for young people.

D. *Adoption*

The legality of a foreign adoption, or the ability of an undocumented child to become a citizen through adoptive parents, may become relevant in a family law matter. This section will not go into the details of international adoption, which is a specialized field, but will provide some basics on how adoption is defined under the immigration laws and the ways a child can obtain legal status through adoption.

⁷⁸ For more information on this policy and any updates, refer to notifications provided on the USCIS website at www.uscis.gov.

1. *The Validity and Documentation of Adoptions*

While state law determines how an adoption will be treated under family law, immigration law has its own set of definitions. Although adoption is not defined under the INA, the Board of Immigration Appeals has created a three-pronged test, restated in USCIS policy, to determine whether an adoption is legitimate for immigration purposes.⁷⁹ An adoption is valid only if it: (1) creates a legal permanent parent-child relationship between a child and someone who is not already the child's legal parent; (2) terminates the legal parent-child relationship with the prior legal parent; and (3) accomplishes those requirements according to the laws of the country or the place granting adoption.⁸⁰

It does not matter what the legal process is called in the country where it occurred, so long as it meets the three-pronged test for adoption.⁸¹ The name of the official act may be different in some countries. While adoption is a judicial process in the United States, it may be administrative in other countries. For example, in South Korea, adoption is accomplished by adding the adopted child to the Family Registry.⁸²

In some countries, there is no legal means for an adoption to occur. Countries that follow traditional Islamic law do not recognize the practice of adoption, and relationships through claimed adoptions in those countries are not valid for immigration purposes.⁸³ In multi-ethnic or multi-religious countries, separate laws may apply to different individuals. For example, an adoption that meets the three-pronged test for immigration purposes may be available to a Jewish child but not to a Muslim child.⁸⁴ A customary adoption may be considered valid for immigration

⁷⁹ Matter of Palelei, 16 I. & N. Dec. 716 (BIA 1979).

⁸⁰ See Policy Memorandum from the U.S. Citizenship & Immigration Services (July 9, 2012), PM-602-0070, "Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes; Updates to Adjudicator's Field Manual (AFM) Chapters 21.4, 21.5, 21.6, 21.10 and 71.1; AFM Update AD12-10," Available on AILA InfoNet Doc. No. 12071944.

⁸¹ *Id.*

⁸² See Matter of Cho, 16 I. & N. Dec. 188 (BIA 1977).

⁸³ See Matter of Mozeb, 15 I. & N. Dec. 430 (BIA 1975); Matter of Ashree, Ahmed & Ahmed, 14 I. & N. Dec. 305 (BIA 1973).

⁸⁴ See Policy Memorandum from the U.S. Citizenship & Immigration Services (July 9, 2012), PM-602-0070, "Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes; Updates to Adjudi-

purposes, so long as it meets the three-pronged test.⁸⁵ But an adoption entered into for the purpose of evading the immigration laws is not valid.⁸⁶

Information on the law of adoption in foreign countries may be obtained from the Library of Congress, and requests for this information can be made through a local congressional office. The Department of State website has information on adoptions and country-specific information as well as visa reciprocity tables, available at www.state.gov.

2. *Obtaining Permanent Resident Status Based on Adoption*

Even when an adoption is legally valid, the child still may be unable to obtain legal status based on the adoption. There are three ways under the immigration laws for an adopted child to qualify for LPR status through an adoptive parent, and there is a separate provision for stepchildren, who must show that their biological parent married the petitioning stepparent before they turned eighteen.⁸⁷

One way an adopted child can qualify for LPR status is through adoption by a USC or LPR parent before the age of sixteen, if he was in the legal and physical custody of the adoptive parent for at least two years prior to filing his application.⁸⁸ Once the child has been adopted, he may not later file a petition for his biological parents to immigrate to the United States.⁸⁹

A second immigration provision allows an adopted child to obtain LPR status through an orphan petition, filed by an adoptive USC parent or parents. This is the process used in most international adoptions, where the parents do not know the child before the adoption process. The child must be an orphan because of the death or disappearance of, abandonment or deser-

cator's Field Manual (AFM) Chapters 21.4, 21.5, 21.6, 21.10 and 71.1; AFM Update AD12-10," available at AILA InfoNet Doc. No. 12071944.

⁸⁵ Matter of Lee, 16 I. & N. Dec. 511 (BIA 1978).

⁸⁶ Matter of Cuello, 20 I. & N. Dec. 94 (BIA 1989).

⁸⁷ 8 U.S.C. § 1101(b)(1)(B) (2013).

⁸⁸ 8 U.S.C. § 1101(b)(1)(E) (2013). A child under the age of eighteen may also qualify if he is immigrating with a sibling who is under the age of sixteen.

⁸⁹ *Id.*

tion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption. The child must be under the age of sixteen when the petition is filed.⁹⁰ The benefits of an orphan petition are that the adopted child does not need to have been in the physical or legal custody of the adoptive parent, and the child can sometimes be brought to the United States before the adoption occurs. The disadvantage is that the process is more complicated and requires a home study, including an income assessment, to demonstrate that the adopting family is capable of caring for the child.⁹¹ In addition, LPRs cannot avail themselves of this process.

A third process is for adoptive children who are habitually residing in a country that has ratified The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.⁹² The United States is a party to this treaty, which was implemented with the Intercountry Adoption Act of 2000. Based on these treaty obligations, when an adoptive child is a habitual resident in a Convention country the adoption must follow special requirements, laid out in the Convention, before an adopted child can obtain legal status based on that adoption. The Convention went into effect on April 1, 2008, and any adoption that occurred after that date is subject to its provisions.⁹³

VI. Removability: How a Client Can be Deported or Denied Admission Upon Return to the United States.

A family law attorney does not need to have a comprehensive understanding of removability, but it is useful to have general knowledge of the ways in which someone can be denied admission or deported from the United States, particularly those grounds that might arise in the context of a family law matter.

“Removal” is the process for either denying an individual admission into the United States or deporting that person from

⁹⁰ 8 U.S.C. § 1101(b)(1)(F) (2013).

⁹¹ SARAH B. IGNATIUS & ELISABETH S. STICKNEY, *IMMIGRATION LAW AND THE FAMILY* 607 (2012 ed.).

⁹² 8 U.S.C. § 1101(b)(1)(G) (2013).

⁹³ IGNATIUS & STICKNEY, *supra* note 85, at 641-43.

the country. Someone who is considered an “applicant for admission,” which includes an individual who is applying for admission (entry) at the border, who entered without admission, or who is applying for LPR status, is subject to the “grounds of inadmissibility,” under 8 U.S.C. § 1182(a). Someone who has already been admitted to the United States (i.e., inspected by an immigration officer and allowed entry) is subject to the “grounds of deportability,” under 8 U.S.C. § 1227(a).⁹⁴ Either person can be placed in removal proceedings before an Immigration Judge, who will determine whether that person will be removed. If that individual qualifies for a defense to removal, she can apply in removal proceedings.

The grounds of inadmissibility include health-related bars, certain criminal conduct, fraud, immigration violations, national security reasons, likelihood of becoming a public charge, child abduction, smuggling, making false claims to U.S. citizenship, and voting illegally. The grounds of deportability include certain immigration violations such as smuggling, marriage fraud, and failure to maintain status; certain criminal convictions; security related grounds; making false claims to U.S. citizenship; and unlawful voting.⁹⁵

Common criminal grounds of removal include domestic violence, child abuse, and violation of a protection order, as well as drug-related offenses, crimes involving moral turpitude (which is a very broad category and is defined by case law, not statute), and crimes of violence.⁹⁶ The immigration consequences of criminal conduct is a complex area of law, and any noncitizen who is charged with a criminal offense should consult with an immigration lawyer to make sure a conviction would not render him removable.⁹⁷

When a client is in removal proceedings, a family law attorney should consult with the client’s immigration lawyer to under-

⁹⁴ “Admission” is defined in the INA under 8 U.S.C. § 1101(a)(13)(A): “The terms “admission and “admitted” mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”

⁹⁵ 8 U.S.C. § 1182(a) (2013); 8 U.S.C. § 1227(a) (2013).

⁹⁶ 8 U.S.C. § 1227(a)(2) (2013).

⁹⁷ For an in-depth discussion on the immigration consequences of criminal conduct, see Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Crimes* (Summer 2012 Ed.).

stand the client's immigration status and the posture of his removal case. A child custody order might be ineffectual if the client is deported from the country. In some cases, the facts relevant in a family law matter might be important in the removal case. For example, someone who is applying for relief in removal proceedings might be required to provide evidence that his children will suffer hardship if he is deported. A family court order showing joint custody and support will be helpful in that case. Communication between the family law and immigration attorney will be important to ensure that the results of one case don't have an unintended effect on the outcome of the other.

VII. Conclusion

This article is meant to provide a basic overview of language, cultural, and legal issues that might arise in a family law matter when there is a noncitizen party, and to identify areas in which immigration and family law intersect. Although a family law attorney does not need to fully comprehend the immigration laws, it is important that she recognize when immigration issues are relevant in a family law matter and that she consult with an immigration practitioner when necessary, so that both matters are resolved in the best possible way for the client.

A local immigration lawyer can be found through the American Immigration Lawyers Association at <http://www.ailalawyer.com/>. Free or low fee immigration legal service providers can be found on the Department of Justice website at <http://www.justice.gov/eoir/probono/states.htm>.

For a more in-depth discussion on family-based immigration law, see Sarah B. Ignatius & Elisabeth S. Stickney, *Immigration Law and the Family* (2012 ed.). Online resources include: the Immigrant Legal Resource Center at www.ilrc.org; the American Immigration Lawyers Association at www.aila.org; and the USCIS website at www.uscis.gov.