ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

David Aubrey's "Message from the Chair" expresses his appreciation for the important work done by the International and Immigration Law Section Council during this past year.

The International and Immigration Law Section recently held an Immigration Law Update webinar. Juliet E. Boyd of Boyd & Kummer, LLC in Chicago served as program coordinator and moderator of the panel, which was composed of Cindy G. Buys, Interim Dean and Professor of Law at Southern Illinois University School of Law and former chair of the International and Immigration Law Section Council; Scott D. Pollock, founder and principal attorney at Scott D. Pollock & Associates, P.C. in Chicago and also a former chair of the Section Council; and Tejas N. Shah of

Continued on next page

Message From the Chair

BY DAVID W. AUBREY

As the new year begins, I want to highlight some of the work accomplished by the International and Immigration Law Section Council this past year. In particular, I want to acknowledge members of our section for their significant contributions to the Illinois State Bar Association, our section, and our readers.

First, Cindy Buys and Patrick Kinnally have invested a great deal of time working to address a gap in Illinois law between legislative intent and judicial practice regarding the requirement that judges admonish criminal defendants on potential immigration consequences to pleading guilty to a crime. Under this new law, which was signed by Governor Pritzker and became effective in the new year, foreign defendants will have up to two years to request a guilty plea entered without judicial admonition of potential immigration consequences be vacated. This remedy should ensure the judiciary is cognizant of this admonition. Again, I want to commend Cindy and Patrick for advancing human rights through this legislation.

Second, four members of the Section Council recently presented a CLE with the ISBA on *Recent developments with Immigration Law and Practice for 2019-2020*. This seminar was led by Cindy Buys, Juliet Boyd, Tejas Shah and Scott Pollock. The presenters covered a comprehensive survey of the changes to immigration law which have been rapidly sought by the Trump administration. 2019 was a year with a dizzying pace of change in the immigration field – from local agency office procedures, to sweeping policy changes, to Supreme Court opinions – and 2020 does not show any signs of slowing in pace. Be sure to watch this CLE on the ISBA website if you missed it. Recognition of the hard work by these presenters is deserved and this seminar will be an effective tool for practitioners of immigration law.■

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Editor's Comments

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Barnes and Thornburg in Chicago and also a former chair of the Section Council.

In this issue of *The Globe* Scott Pollock provided, "Recent Developments With Immigration Law and Practice 2019-2020 Summary" from his material for the CLE program. This issue also includes Cindy Buys' "Immigration Cases to Watch on the Supreme Court's Docket 2019-20."

We have presented in issues of *The Globe* short biographies on current and past members of the Section Council to introduce the readers to the members who do the work of providing material for *The Globe*, organizing and presenting the CLE programs, drafting and commenting on legislation, and participating in other activities of the Section. Included in this issue is the biography of Scott D. Pollock, a former chair of the Section Council and a participant in the recent CLE panel.

For over ten years, Floridan S. Jörg, partner in the Zurich office of Bratschi, Ltd., has provided us articles concerning Swiss laws and regulations. He has introduced us to Mirco Ceregato, partner and member of the Board of Directors of Bratschi, Ltd. He serves as co-head of the Compliance and Investigation and Litigation and Debt Collection Divisions and is located in St. Gallen. We have included in this issue his article "Execution of U.S. Pre-Trial Discovery Orders in Switzerland."

As always, thank you to all of our authors and contributors.■

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Recent Developments With Immigration Law and Practice 2019-2020

BY SCOTT D. POLLOCK

Overview

2019 has been a non-stop year of dizzying activity and changes in the immigration field, from local agency office procedures, to sweeping policy changes, to Supreme Court involvement, that shows no signs of letting up. As of the deadline for these materials on November 21, 2019, Law 360 reports that the Trump administration plans to enact new policies before year's end that will make it harder for immigrants to qualify for asylum and corporations to hire and retain foreign born employees. Its latest biannual unified regulatory agenda, released last Wednesday is, according to one observer "a restrictionist wish list." Anticipated changes include proposals to change the definitions of "specialized knowledge", "employment" and "employer-employee relationship" and "specialty occupation" that will affect high-level L-1 and H-1B workers; changes to, or possible elimination of Optional Practical Training (OPT) for F-1 students; possible new restrictions on federal regional centers authorized to accept EB-5 job-creation investors; and additional restrictions on asylum applicants, including eliminating their ability to support themselves in the U.S. while waiting on decisions on their applications, at least for a year after they

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submit their application.

Encapsulating the Trump administration's approach to immigration, Stuart Anderson, executive director of the National Foundation for American Policy and former Immigration and Naturalization Service employee, said "Can you name any regulation the administration has put in place that has made it easier for any foreign individual to do anything in the United States?"

Focus on Restricting Asylum Seekers

Asylum Cooperative Agreements

11/19/19-UNHCR issues statement that new U.S. policy to enter into agreements with Guatemala, Honduras, and El Salvador for return of asylum seekers is "at variance with international law that could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers." Source: UNHCR USA press release

Migrant Protection Protocols (MPP) or Remain in Mexico

Policy requiring asylum seekers to await interviews from Mexico rather than being detained in the U.S. As of October, 42,000 asylum seekers were stranded in Mexico, many of whom have been unable to pursue claims for asylum.

Asylum Ban 1.0- Denying asylum to persons arriving at other than a port of entry

Enjoined by court in *East Bay sanctuary Covenant v. Trump,* but on May 7, 2019, the 9th Circuit limited the injunction to applicants in the 9th Circuit.

"Asylum Ban 2.0" barring asylum for virtually all non-Mexicans arriving at the southern border if they cannot show they applied for, and were denied asylum in a 3rd country they passed through. On 9/11/19, the Supreme Court said the administration may enforce this rule while litigation in lower courts proceeds.

11/19 Asylum work authorization changes- proposal to increase the bar on employment authorization to asylum applicants from current 6 months to 12 months, and to eliminate any time frame on when USCIS may issue an EAD.

Credible/Reasonable Fear standards and procedures will likely be redefined and restricted in an upcoming proposed regulation. This will no doubt screen out the vast majority of persons arriving in the U.S. and requesting protection from return to their countries.

Reduction in Number of Refugees Allowed Into the Country

18,000 announced in September for FY20, the lowest number authorized in U.S. history.

9/26/19 executive order-permitting States and localities to refuse consent to have refugees settle there. Seeking to overturn 7th Circuit decision in *Exodus Refugee Immigration, Inc. v. Pence,* after then Indiana Gov. Mike Pence refused to allow Syrian refugees into Indiana due to the threat they pose to the safety of residents of Indiana. *** But that's the equivalent of his saying (not that he does say) that he wants to forbid black people to settle in Indiana not because their black but because he's afraid of them, and since race is therefore not his motive he isn't discriminating. But that of course would be racial discrimination, just as his targeting Syrian refugees is discrimination on the basis of nationality." (J. Richard Posner)

Attorney General Certifying Asylum Decisions to Himself

Matter of A-B-, redefining "particular social group" to severely restrict asylum for victims of domestic violence and gang brutality.

Matter of L-E-A, also redefining PSG to exclude most claims based on family membership unless demonstrating the family is socially distinct/visible/prominent.

Reports at southern border is Asylum Officers are rejecting nationality based claims for people harmed in Mexico on account of being non-Mexicans.

The 3rd country asylum ban, together with restrictions on what kinds of claims of protection qualify as persons in a particular social group (PSG) ensure that most claims are being denied during initial screening and asylum seekers are denied hearings on their claims.

Congressional response by Democrats: Refugee Protection Act of 2019 introduced by Sen. Leahy and Rep. Lofgren cosponsored by over 2 dozen members of Congress. This would reverse *Matter of A-B-,* end the Asylum Ban 2.0, allow persons found subject to MPP to reopen their cases; eliminate "metering" at the border that restricts the number of asylum seekers from requesting asylum each day; prohibit criminal prosecution of asylum seekers and prohibit punitive detention; and guarantee access to counsel for asylum-seeking children.

DACA Termination

11/12/19 Supreme Court heard oral argument in 3 consolidated cases in which lower courts ruled the termination violated the APA. Decision anticipated by June 2020.

Temporary Protected Status (TPS) termination- *Ramos v. Nielsen* (N.D. CA) blocked rescission of TPS on 10/3/18 for Sudan, Nicaragua, Haiti and El Salvador while litigation remained pending. On 11/1/19, a Federal Register notice automatically extended TPS through 1/4/21.

Initiatives to Limit Legal Immigration in Addition to Illegal Immigration

Public charge inadmissibility rule- 8/14/19- would penalize prospective immigrants who used certain government programs, even non-cash assistance, for 12 months of a 36 month period, or whom DHS or DOS officials deem are "likely to become a public charge in the future."

New forms debacle. The rule, due to take effect Monday October 15, required use of revised forms that were not made available until only days before (the prior Wednesday). Rule temporarily restrained by courts in NY, CA, WA, IL, and MD as violating the APA and INA's own terms defining public charge.

10/4/19 Presidential proclamation -requiring intending immigrants and nonimmigrants seeking extension to show they will have acceptable insurance, anticipated to reduce legal immigration numbers by 2/3. Sought to use the same INA 212(f) authority invoked for the travel bans to restrict entry to groups deemed by the President as detrimental to U.S. interests, in this case immigrants threatening the U.S. health care system. Enjoined by a number of district courts around the U.S. before it could take effect as violating the INA and APA.

DHS Fee Increases

Announced Nov. 2019 with an effective date of 12/2/19. Weighted average increase of 21%. Citizenship applications 83% increase from $ 640 to $ 1,170. New $ 50 fee to apply for asylum, which will make the U.S. one of four countries in the world to charge to apply for asylum.

Appeal from a USCIS decision from $ 675 to $ 705; Adjustment of Status from $ 1,140 to $ 1,610; application to remove conditions on resident status from $595 to $760

Elimination of fee waivers for N-400, I-90, I-765, I-485, and I-751.

Travel (Muslim) Bans

After Supreme Court upheld Travel Ban 3.0, cases are percolating over failure by State Department to adjudicate waivers.

Restrictive Agency Practices

H-1B visas- many lawsuits filed to challenge record high numbers of denials. An April 2019 analysis of USCIS data by the National Foundation for American Policy shows denial rates rose from 6% in 2015 to a 10 year high of 32% in the first quarter of 2019. This includes 18% of all H-1B extension requests which, in 2015, had a 3% denial rate. The report cites President Trump's "Buy American Hire American" executive order from April 2017 as responsible for rescinding prior guidance to adjudicators to defer to prior findings, and set goals to reduce illegal immigration, detect and prevent fraud, and increase employment of U.S. workers and their wages.

ITServe Alliance v. USCIS consolidates several cases challenging cases where USCIS denied or approved petitions with short validity periods.

Virtually all liaison functions with DHS entities have ceased

Attorneys and applicants must use USCIS call-center ("1-800-USE-LESS")- obtaining InfoPass appointments to speak with a USCIS officer is discretionary and more difficult.

Lawsuits Filed

A.I.L.L. v. Sessions seeks damages on behalf of thousands of traumatized children and parents in the aftermath of AG Sessions' disastrous "zero-tolerance" policy that separated children from parents by deciding to bring misdemeanor charges for entry without inspection in all cases.

Make the Road New York v. McAleenan successfully challenged a proposed expansion of expedited removal procedures to persons suspected of being unlawfully present anywhere in the U.S., who cannot establish to the satisfaction of a DHS officer that they have been present in the U.S. for 2+ years.

East Bay v. Barr (lawsuit on asylum regulation that Supreme Court said could stay in place while litigation proceeded in the lower courts, thus upholding implementation of MPP or Remain in Mexico in an order without opinion, and over dissent from Justice Sotomayor joined by Justice Ginsburg).

Processing Delays at USCIS

According to a Law360 article and the National Foundation for American policy analysis of USCIS data from April 2019, average wait times for employment based adjustments of status grew this fiscal year to 12.2 months compared to 11 months for the previous year and 8.1 months in 2017. Also, non-premium processed nonimmigrant petitions wait an average of 5.4 months this fiscal year, up from 3.4 months last year and 4 months in 2017.

State and Local Immigration Enforcement

Kansas v. Garcia, 10/16/19 Supreme court heard arguments on case where Supreme Court of Kansas held employees can't be prosecuted for identity theft based on I-9 fraud of persons who lack employment authorization. Decision expected by June 2020.

Sanctuary cities non-cooperation with DHS law enforcement upheld by 9th Circuit 4/18/19. Several courts, including courts in the 7th Circuit, also have held the administration cannot withhold law enforcement grant funds to localities based on non-cooperation policies.

The Wall

Congress appropriated $ 1.8 billion, but the Administration sought to divert military funds for construction of border fencing. On 10/11/19, a court in El Paso ruled this was a violation of appropriation laws.

Other Immigration Developments

Flores settlement- the Administration published a final regulation dealing with the detention of immigrant children. The rule would expand the amount of time children can be held in detention from 20 to 60 days. The federal court overseeing compliance of the *Flores* settlement blocked it in late September 2019, ruling that it violated the settlement's fundamental tenets.

Impacts on International Education

Numbers are down for international students, many of whom are opting to avoid the U.S. for more welcoming places in Europe and Canada. According to 11/19/19 CNN article "The US Economy is losing billions of dollars because foreign students aren't enrolling," the decline has cost the economy $ 11.8 billion and more than 65,000 jobs, according to NAFSA estimates. The State Department's Open Doors report shows a first time ever three-year decline in new enrollments.

July 2019 announcement of intention to target immigrants with final deportation orders-President Trump publicly vowed to deport millions in the U.S. and ordered ICE to start mass arrests. The real list had 2,100 families on it, and ICE actually arrested 18 persons.

I-9 audits rose in FY 18 to 5,981 from 1,360 the previous year. Worksite raids have increased.

11/21/19- EB-5 job creation minimum investment levels rose from $ 500,000 to $ 900,000 for low employment areas, and $ 1 million to $ 1.8 million in other areas.

Immigration Court backlogs are at all-time highs. Wait times for cases in the Chicago immigration court can be up to 4 or more years. The Justice Department is expected to issue an interim rule in December that aims to speed up case processing and eliminate remands from the Board of Immigration Appeals to immigration judges. In October, the DOJ issued guidance and stringent case decision timeframes of 8-11 months for cases at the BIA.

Moves by DOJ to decertify the Immigration Judge's union- DOJ has argued that IJ's are "policy makers" who are exempt from union eligibility. The head of the IJ union has said: "The administration cares nothing but for numbers…."

Immigrant detention and Private Prisons will continue to be a hot topic. The average number of immigrants detained is set to increase from more than 44,000 last year to up to 60,000 in the near future. ICE has contracts with CoreCivic totaling $ 280 million and with GEO Group for $ 475 million. There have been several lawsuits filed and are under consideration in which these and other private prison companies have required detainees to work for less than the federal minimum wage, reportedly as low as less than $ 2.00 per day. These immigration prisons also are self-perpetuating job creation centers for distressed communities, offering salaries of up to $ 60,000. Source: *Migrating to Prison*, a new book by law professor and scholar Cesar Cuauhtemoc Garcia Hernandez. As quoted in the book from a former mayor of Raymondville Texas: "We need everyone to be employed. We need those prisoners."

Civil Liberties at the Border and Ports of Entry

Border privacy issues

Alasad v. McAleenan, (November 12, 2019) federal district court in Boston rejected CBP and ICE asserted authority to seize travelers' electronic devices without demonstrating individualized suspicion of illegal contraband. The number of electronic device searches by CBP last year was more than 33,000, almost 4 times the number from 3 years prior. One plaintiff Zainab Merchant had a border agent rifle through privileged attorney-client communications. In another related incident a Harvard freshman was sent back to his country and reprimanded for friends' social media postings expressing views critical of the U.S. government. Source: NYT 11/12/19 "U.S. Judge Rules Suspicionless Searches of Travelers' Digital Devices Unconstitutional; Electronic Frontier Foundation, www.eff.org.

Significant 7th Circuit Immigration Cases

Ortiz-Santiago v. Barr, Court refused to find, post-Pereira, that IJ lacks jurisdiction but, under case processing rules, a defective NTA may result in dismissal of removal proceedings where the defect resulted in prejudice to the respondent.

Najera-Rodriguez v. Barr, Court ruled that a conviction under Illinois law for possession of cocaine was categorically not a "controlled substance offense" under federal law because the Illinois statute was broader than the federal CSA and not divisible.

Odei and Spirit of Grace Outreach v. DHS, Court ruled that it had no jurisdiction to review CBP's inadmissibility determination for a Christian minister, because of the bar on reviewing expedited removal orders (even though the minister was not ordered removed but allowed to withdraw his application for admission), and the Religious Freedom Restoration Act (RFRA) did not create an exception to allow for judicial review.

Northern District of Illinois

Cook County and ICIRR v. McAleenan (October 14, 2019) (J. Feinerman) enjoining the public charge rule.■

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Immigration Cases to Watch on the U.S. Supreme Court's Docket 2019-20

BY CINDY G. BUYS

Barton v. Barr (Granted April 22, 2019; Argued Nov. 4, 2019)

Andre Martello Barton came to the U.S. from Jamaica as a teenager in 1989 and became a lawful permanent resident (LPR) in 1992. He was convicted in 1996 of assault and possession of a firearm in an incident where a friend fired a gun at a house from a car Barton was driving. In 2008, he was twice convicted of drug possession. DHS sought to deport Barton because of his criminal convictions. Barton applied for a cancellation of removal under 8 U.S.C. § 1229b(a) which requires that he establish, inter alia, he had been a resident of the United States for at least seven years after being admitted to the country. This requirement is subject to the "stop-time rule" of 8 U.S.C. § 1229b(d)(1) which stops the accrual of time in residence status due to the commission of certain crimes during those seven years that make the LPR either "inadmissible" or "removable". The Immigration Judge (IJ) denied Barton's application, holding that he was inadmissible due to his 1996 criminal convictions, which engaged the stop-time rule and prevented him from reaching the seven-year mark. Barton argued that he could not be "inadmissible" because he had already been admitted to the U.S. in LPR status. However, both the Board of Immigration Appeals (BIA) and the Eleventh Circuit Court of Appeals affirmed the IJ's decision. There is currently a split in the federal circuits with respect to this issue. Accordingly, the Supreme Court will now decide whether an LPR who is not seeking admission to the United States can be rendered "inadmissible" for the purposes of the stop-time rule.

Department of Homeland Security v. Thuraissigiam (Granted October 19, 2019)

Respondent is a native and citizen of Sri Lanka and a Tamil, an ethnic minority group in Sri Lanka. He was apprehended illegally crossing the southern U.S. border

and was placed into expedited removal proceedings. Respondent indicated a fear of persecution if returned to Sri Lanka, but an asylum officer determined that Respondent did not establish a credible fear of persecution and referred him for removal. Respondent filed a petition for writ of habeas corpus in federal district court alleging that the expedited removal order violated his statutory, regulatory, and constitutional rights. He alleged several procedural flaws with the expedited removal process that prevented him from effectively claiming asylum. The District Court dismissed the petition for lack of subject matter jurisdiction under 8 U.S.C. 1252(e)(2) and rejected Respondent's argument that the expedited removal process effectively suspends the writ of habeas corpus in violation of the U.S. Constitution's Suspension Clause. The Ninth Circuit Court of Appeals reversed the District Court. In doing so, the Ninth Circuit relied on the U.S. Supreme Court's decision in Boumediene v. Bush, one of Guantanamo Bay detainee cases, in holding that a noncitizen in detention could avail himself of the writ of habeas corpus in federal district court. The Supreme Court will now decide whether 8 U.S.C. § 1252(e)(2) as applied to Respondent violates the Suspension Clause.

Department of Homeland Security v. Regents of the University of California (Granted June 28, 2019) and ***Trump v. NAACP*** (Argued November 12, 2019)

In 2012, the Department of Homeland Security (DHS) announced the program known as the Deferred Action for Childhood Arrivals (DACA) which provided thousands of undocumented young people who were brought in this country as children temporary relief from removal and granted them authorization to work legally and other benefits. On September 4, 2017, then Attorney General Sessions announced that DACA was unconstitutional and lacks statutory authority. The next day, the acting Secretary of Homeland Security issued a memo which rescinded DACA. Respondents are challenging the decision to terminate DACA as a violation of the Administrative Procedure Act and DACA recipients' due process and equal protection rights. In these consolidated cases, the Supreme Court will decide whether DHS's decision to wind down DACA is judicially reviewable and whether the rescission was lawfully carried out.

Kansas v. Garcia (Granted March 18, 2019; Argued October 16, 2019)

Mr. Garcia was pulled over speeding. The police officer conducted a records check which showed that Mr. Garcia was undocumented. This finding led the police to examine Mr. Garcia's employment records, which showed that he had used a false social security number on a federal I-9 form and related state documents to secure employment. The state then prosecuted Mr. Garcia for identify theft. The Immigration Reform and Control Act (IRCA) requires employees to present identification to prove legal eligibility to work and imposes penalties on employers who hire unauthorized workers. This federal law preempts many state laws prohibiting unauthorized employment. IRCA also contains a provision, section §1324a(b)(5), that prohibits the use of I-9 information for other state law enforcement purposes. The Kansas Supreme Court held that this section of IRCA preempts Kansas from using the false information on the I-9 Form to prosecute respondents for identity theft even though the false social security numbers also appeared on other documents. The Supreme Court is to decide whether IRCA expressly preempts states from using information provided on a federal form in a prosecution of a person when the same information also appears in a non-IRCA document or whether IRCA impliedly preempts Kansas' prosecution of the respondents.

Nasrallah v. Barr (Granted Oct. 2019; Scheduled for argument in March 2020)

Nasrallah is a citizen of Lebanon who became a lawful permanent resident of the U.S. in 2006 at age 18. In 2011, he pled guilty to two counts of receiving stolen property in interstate commerce. The government sought to deport him based on his convictions. The Immigration Judge determined that one of his convictions constituted a crime involving moral turpitude (CIMT) under 8 U.S.C. § 1227a(2)(A)(1) and a particularly serious crime. The IJ believed the crime to be particularly serious because of (1) the large value of the stolen merchandise (almost $250,000 worth of cigarettes meant for resale); (2) Nasrallah's knowledge that the cigarettes were stolen through violent thefts of hijacked trucks; and (3) the common link between illicit cigarette sales and organized crime and terrorist groups. The IJ noted, however, that there was no evidence that Nasrallah participated in the thefts or was linked to organized crime or terrorism. The IJ also determined that Nasrallah had established a clear probability that he would be persecuted and tortured if returned to Lebanon because of his Druze religion and Western ties, so the IJ granted him deferral of removal under the Convention Against Torture. On appeal, the Board of Immigration Appeals held that the IJ erred in granting Nasrallah a deferral because of insufficient evidence of persecution and ordered his removal. Nasrallah appealed to the U.S. Court of Appeals for the Eleventh Circuit, arguing that the IJ acted with prejudicial bias because of the implied link to organized crime and terrorism; that the BIA erred in finding his crime to be a CIMT as well as a particularly serious crime because property crimes are generally not considered "particularly serious"; and in overturning his deferral of removal. The Eleventh Circuit denied the appeal on the ground that the court lacks jurisdiction to reweigh factors that are part of a discretionary determination pursuant to 8 U.S.C. § 1252(a)(2). It also held that a determination regarding likelihood of future persecution is a finding of fact that cannot be reviewed on appeal. The Supreme Court will decide whether federal courts have jurisdiction to review factual findings underlying an agency's denial of withholding and (deferral) of removal relief.

United States v. Sineneng-Smith (Granted October 4, 2019; scheduled for argument in February 2020)

Evelyn Sineneng-Smith operated an immigration consulting business in California. Many of her clients were Philippinos who came to the U.S. without documentation. Sineneng-Smith entered

into retainer agreements with her clients in which she promised to help them obtain permanent residence through Labor Certification. The Labor Certification process she was referring to expired in 2001, but she continued to enter into the retainer agreements despite knowing her clients were not able to apply for the expired program. A jury found Sineneng-Smith guilty of violating 8 U.S.C. § 1324(a)(1) which makes it a crime to "encourage or induce" an alien to reside in the country knowing and in reckless disregard of the fact that such residence is in violation of the law. On appeal, Sineneng-Smith argued that the law is impermissibly vague under the Fifth Amendment to the U.S. Constitution and violates the First Amendment. The Ninth Circuit agreed with her, reversed her convictions, vacated her sentence, and remanded the case for resentencing. The Ninth Circuit found that the statute restricts a substantial amount of protected speech under the First Amendment. It held that no reasonable reading of the statute can exclude speech. It potentially criminalizes a child saying to a parent, "I encourage you to stay here." In response to the government's argument that the statute is an important tool for combatting alien smuggling, the Ninth Circuit stated that other parts of the statute would allow the prosecution of the illegal activity without burdening speech. The government appealed the Ninth Circuit's decision. The issue presented to the Supreme Court is whether the federal law criminalizing the act of encouraging or inducing illegal immigration for commercial advantage or private financial gain is unconstitutional.■

Cindy G. Buys, interim dean and professor of law, Southern Illinois University School of Law. Dean Buys is a member of the International and Immigration Law Section Council and the vice chair of the Women and the Law Committee of the ISBA.

Meet the Section Council

BY SCOTT D. POLLOCK

The International and Immigration Law Section Council brings to the ISBA a wide range of experiences and interests. Following is an introduction to past Section Council chair:

Scott D. Pollock has practiced U.S. immigration law since 1985. His firm, Scott D. Pollock & Associates, P.C., is nationally recognized and rated AV (very high to preeminent) by Martindale Hubbell. He is a frequent speaker and author and he has contributed many articles to the ISBA's international and immigration newsletter *The Globe*. Scott was the 2013-14 Chair for ISBA's International and Immigration Law Section Council, and served on the I&I section council from 2002-2015.

His clients include universities, religious organizations, financial, manufacturing, health care and high tech companies, and individuals. He is fluent in Spanish and enjoys variety and challenges. His firm's mission is to provide personal and effective legal service, to master complex U.S. immigration laws and procedures, and to identify strategies and achieve the goals of its clients, while contributing to the progressive advancement of the profession and immigration law. Scott has been selected for years on the "Leading Illinois Attorney" and "Illinois Super Lawyer" lists, as among the top 5 percent of immigration lawyers by his colleagues. In 2009, he received the Joseph Minsky Beacon of Light Award for mentoring in the field of immigration law by the Chicago Chapter of the American Immigration Lawyers Association (AILA).

Scott is an active AILA member. A frequent speaker and author, he was AILA's Chicago Chapter chair, a member of its Amicus, Students and Scholars, Business Immigration Litigation, Consumer Protection and Nebraska Service Center Liaison committees, national chair of its Consumer Protection/Authorized Representation Task Force, and served on numerous local chapter committees, including chairperson of its Asylum Office and Immigration Judge Liaison committees. He is a past-chair of the Chicago Bar Association's Immigration and Nationality Law Committee, and is a longtime member of the National Immigration Project of the National Lawyers Guild, Inc. He is a member of NAFSA- Association of International Educators and World Chicago (previously the International Visitors Center of Chicago). He served for five years on the board of the Interfaith Refugee and Immigration Ministries (IRIM) in Chicago, is on the board of its successor organization Refugee One, and has been a consulting attorney for the Hebrew Immigrant Aid Society's naturalization assistance project in Chicago. He also presently serves as a legal advisor to the Consulate of Mexico in Chicago and advises other consulates and consular officials on U.S. immigration matters.

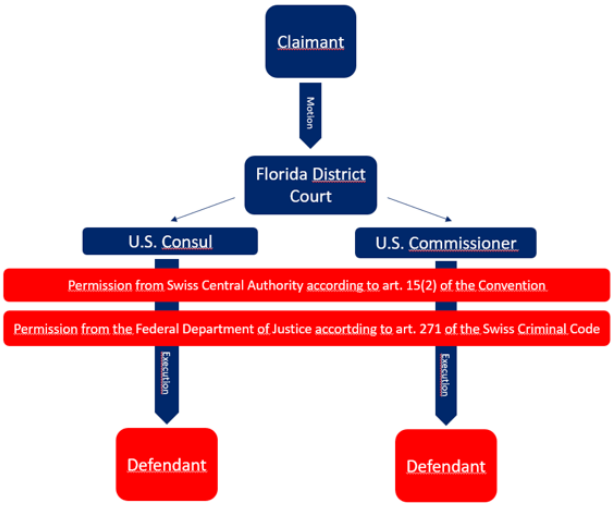
Scott's active legal practice includes all areas of immigration law and procedure, including immigrant and nonimmigrant visas, political asylum, deportation/ removal defense, waivers of inadmissibility, employment authorization and employer compliance/sanctions, appeals and federal litigation. His cases include *Rubman v. USCIS,* 800 F.3d 381 (7th Cir.2015) (reversing district court's order granting summary judgment to the defendants and ordering USCIS to conduct search for documents under FOIA); *Morales-Morales v. Ashcroft,* 384 F.3d 418 (7th Cir. 2004) (reversing denial of cancellation of removal and finding repeated departures and reentries did not interrupt the petitioner's continuous residence); *Kamal v. Gonzales,* 547 F. Supp. 2d 869 (N.D. IL 2008) (ordering the USCIS to adjudicate an adjustment of status application); *Kholyasvsky v. Schlecht et al.*, 479 F. Supp. 2d 897 (E.D. WI 2007) (granting EAJA fees and holding that a "catalyst theory" still applies to immigration habeas actions); and *Bace v. Ashcroft,* 352 F.3d 1133 (7th Cir. 2003) (finding eligibility for political asylum based on past persecution).■

Execution of U.S. Pre-Trial Discovery Orders in Switzerland

BY MIRCO CEREGATO

The taking of a deposition in Switzerland is subject to Art. 271 of the Swiss Criminal Code. Therefore, in cases where jurisdictional discovery is granted by a U.S. court against a defendant who resides in Switzerland, all involved parties and counsels are at risk of becoming liable to prosecution in Switzerland if the envisaged legal path is not duly followed. In order to prevent the risk of being prosecuted, the means envisaged in the Hague Evidence Convention ("Convention") must be used. The U.S. were a signing party and Switzerland joined the Convention in 1994. The Convention comprises two separate and independent systems for the taking of evidence abroad: Chapter I of the Convention sets out provisions for the taking of evidence by means of Letters of Request; Chapter II provides for the taking of evidence by Consuls and Commissioners. According to Chapter I, the judicial authority which ordered the evidencetaking sends a Letter of Request to the central authority at the requested state. The central authority of the requested state checks on formalities of the request and, if formalities are complied with, it forwards the Letter of Request to the competent judicial authority for execution. As Switzerland is a federalist country with twentysix cantons, Switzerland has not one central authority, but twenty-six. However, it is possible to file the Letter of Request with the Swiss Federal Department of Justice which forwards it to the competent central authority. The chart below in a case of a Florida claimant and a defendant residing in the canton of Zug illustrates this.

According to Art. 23 of the Convention, a contracting state may, at the time of signature, ratification, or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common-law countries. Switzerland has made use of this reservation. However, such reservation is not intended to prohibit common-law style pre-trial discovery. This would be contrary to the purpose of the treaty. According to the Swiss Federal Supreme Court, the effect of Switzerland's Art. 23 declaration is that Switzerland will accept Letters of Request for the production of documents issued during the pre-trial discovery period where the relevance and precision of the request matches the criteria inspired by Swiss,procedural law. The practical problems when executing U.S. pre-trial discovery orders in Switzerland, according to Chapter I of the Convention, are Where documents are requested, the documents must be specifically identified and the relevance of the requested document for the dispute must be clear from the Letter of Request. Where witness examination is requested, the individual interrogatories must be drafted with clarity and the relevance of the questions for the dispute must be substantiated. The form used to take oral testimony for the purpose of pre-trial discovery (deposition) is unknown in Switzerland. Cross-examination must be requested in the Request Letter by way of a special method (Art. 9(2) of the Convention). A Swiss judge must survey the questioning and must intervene when necessary. English is not an official language in Switzerland. Switzerland has no sharp measures of compulsion against a party which does not comply with an order for document production or an order for testimony in a civil procedure. Chapter II of the Convention envisages the use of U.S. Consuls and Commissioners to execute a U.S. pre-trial discovery order abroad instead of using the foreign court. To do so, the claimant must file a respective motion with the competent court in the United States. However, in order to legally execute such a U.S. court order for pre-trial discovery, two Swiss permissions are necessary. Firstly, the central authority must issue a permission according to Art. 15, para 2 of the Convention. And, secondly, the Swiss Federal Department of Justice must issue a permission according to Art. 271 of the Swiss Criminal Code. The following chart illustrates the procedure.



In contrast to the proceeding envisaged by Chapter I of the Convention, the evidence is to be taken not only according to the procedures provided for by the law of the requesting court (i.e. according to U.S. law) but also by U.S. persons familiar with common law style, pre-trial discovery orders. Although Chapter II of the Convention provides for a good solution for overcoming the practical problems outlined when using Chapter I, the defendant remains free to not cooperate at all or to interrupt the taking of evidence at any time (Art. 21, let. c of the Convention). This makes the use of the procedures envisaged in the Convention unattractive for U.S. claimants. Therefore, U.S. counsels often try to execute the evidence-taking against a Swiss resident on U.S. soil or in countries which have no blocking statutes (Switzerland has one with Art. 271 of its Criminal Code). In Société Nationale Industrielle Aérospatiale, et al. vs United States District Court for the Southern District of Iowa, 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987), the U.S. Supreme Court held that the discovery procedures provided by the Convention do not necessarily control discovery with respect to foreign litigants before an American court. When determining whether to require use of the optional Convention procedures, or to permit discovery pursuant to the U.S. Federal Rules, the Supreme Court instructed courts to consider the particular facts of each case, the sovereign interests at issue, and the likelihood that resort to Hague Convention procedures would prove effective. According to this precedent, there may be an avenue to circumvent the use of the Convention when executing a pre-trial discovery order in Switzerland. However, this must be assessed on a case by case basis.■

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