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US IMMIGRATION & NATIONALITY LAW

PROVIDING COMPETENT REPRESENTATION TO UNDOCUMENTED NONCITIZENS DESPITE THE CRIMINAL ENCOURAGEMENT PROVISION

Posted on March 14, 2023 by Cyrus Mehta

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Our previous blog discussed *United States v. Helaman Hansen*, a case in which the Supreme Court granted certiorari on December 9, 2022. Oral argument in the case is set for March 27, 2023. *Hansen* questions whether INA §274(a)(1)(A)(iv), or the "encouragement provision", which prohibits individuals from "encourag or induc an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law" is unconstitutionally overbroad. Helaman Hansen ran an organization called Americans Helping America Chamber of Commerce ("AHA") that purported to help undocumented immigrants become U.S. citizens through adult adoption. In reality, this is not possible, and Hansen was convicted for having violated INA §274(a)(1)(A)(iv) because he encouraged or induced individuals who participated in his program to overstay their visas on two occasions.

Hansen first moved to dismiss his convictions based on a violation of INA §274(a)(1)(A)(iv), arguing that this provision is facially overbroad, void for vagueness, and unconstitutional as applied to him, but the district court denied his motion. He then appealed to the Ninth Circuit, arguing in relevant part that INA §274(a)(1)(A)(iv) is facially overbroad under the First Amendment. The Ninth Circuit agreed, holding that the encouragement provision prohibits a broad range of protected speech. One could violate 8 U.S.C. § 1324(a)(1)(A)(iv) merely by "knowingly telling an undocumented immigrant 'I encourage you to reside in the United States'", the court reasoned. The government is seeking review of the Ninth Circuit's decision at the Supreme Court. The government's brief

focuses on the argument that INA §274(a)(1)(A)(iv) is not facially overbroad because the terms "encourage" and "induce" in the encouragement provision are terms of art borrowed from criminal law that refer to specific and egregious conduct, namely facilitation and solicitation. The government further argues that the statutory history and context of the encouragement provision indicate that it is aimed at punishing facilitation and solicitation, rather than a broader range of conduct. The government also asserts that fear of prosecution under the encouragement provision are unlikely to chill legitimate advice to undocumented immigrations because the fraud counts Hansen was charged with require that the offense be "done for the purpose of commercial advantage or private financial gain", a criterion that would not be met in many scenarios.

AILA and numerous other immigration organizations filed an amicus brief that points out the troubling implications that the encouragement provision could have for immigration lawyers:

> *Elliptical counseling is particularly ill-suited to the immigration context, which is high-stakes and complex. Clients in this area need straightforward advice about what to do. And it would be especially strange to fault attorneys for advising noncitizen clients about remaining in the United States in violation of civil immigration laws, when those laws themselves condition numerous benefits on physical presence in the United States.*

The brief cites our previous blog on *Hansen* as evidence that "The immigration bar has taken note of the government's arguments about the Encouragement Provision, and is actively discussing when and how immigration practitioners should self-censor to avoid criminal liability". Amici also point out that while the "financial gain" requirement contained in the provisions that Hansen was charged under might exempt well-intended advice given to a noncitizen by a priest or social worker, it "leaves large quantities of immigration advice within the statute's reach" as private lawyers, and sometimes even those who work for a nonprofit organization, often charge at least a nominal fee for their services. Given the complexity of immigration law, the idea that lawyers could be deterred from providing advice to clients for fear of being punished under the encouragement provision is particularly troubling. Many immigration benefits

are only available to noncitizens who are physically present in the United States, so an immigration lawyer could competently and ethically advise an undocumented client to remain in the U.S. for a variety of reasons. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court recognized the importance of encouraging "full and frank communication between attorneys and their clients and thereby promot broader public interests in the observance of law and administration of justice". The most severe consequence for a violation of immigration law is deportation, which is a severe and potentially life-altering punishment. For this reason, it is of the utmost importance that immigration lawyers be able to freely advice their clients.

In our previous blog, we suggested that a best practice for immigration lawyers in light of *Hansen* is to refrain from expressly advising or encouraging clients to remain in the U.S. in violation of the law, and instead outline both the adverse consequences and potential benefits of this course of action. Moreover, ABA Model Rule 1.2(d), which has analogs in many state rules of professional responsibility, states that " lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." ABA Model Rule 1.2(d) may thus provide some refuge for lawyers who competently counsel undocumented clients. Given the strikingly broad sweep of INA §274(a)(1)(A)(iv), it is unclear how much protection it would provide to a lawyer who was prosecuted under the encouragement provision.

First, encouraging an undocumented client to stay in the US may be a violation of a civil statute, rather than constitute criminal or fraudulent conduct. The analog of Rule 1.2(d) in the New York Rules of Professional Conduct states: " lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." Although the New York version of Rule 1.2(d) prohibits a lawyer from counseling or assisting a client in conduct that is "illegal," we question whether advising an undocumented person to remain in the US in order to seek a benefit under INA constitutes conduct that is illegal. We also recognize that a noncitizen who has been ordered removed and who fails to depart within 90 days can incur criminal liability under INA § 243(a). However, INA § 243(a)(2) provides an

exception from criminal liability if willfully remaining in the US is for the "purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody." A noncitizen who received a final removal order may move to reopen, even many years later, if the government consents to reopening and there is available relief against deportation. *See* 8 C.F.R. § 1003.2(c)(3)(iii); 8 C.F.R. § 1003.23(b)(4)(iv).

Further, a lawyer who hedges his advice in conditional probabilities may be at risk of failing to provide competent representation. Even the government's brief assures that lawyers will not be prosecuted if they advise their clients that they are unlikely to be removed. This is in contrast to a lawyer strongly recommending that the undocumented client remain in the US in the hope of seeking a benefit in the future, and the government's brief does not provide any assurance that such advice would insulate the lawyer from prosecution under INA §274(a)(1)(A)(iv). The government offers the example of a lawyer advising a client in removal proceedings who has been released on bond to stay in the US but that is different from advising an undocumented client whose US citizen child will turn 21 in two years to remain in the US, which is when the parent would qualify for adjustment of status.

Some clients may be unable to interpret opaque advice from their lawyers, and a lawyer may not provide adequate representation in this scenario unless she gives the client a clearer recommendation. ABA Model Rule 1.1 and some state analogs caution that "a lawyer shall provide competent representation", the "shall" language leaving little room for error. Additionally, as noted above, it may be necessary for an immigration lawyer to frankly advise an undocumented client to stay in the US in order to apply for a benefit like adjustment of status, a T visa, or DACA, which would be unavailable to the client if she left the country. It is difficult to imagine how a lawyer could provide competent representation to her client without outlining the immigration benefits that the client may be eligible for and advising him how to obtain them by remaining in the US. INA §274(a)(1)(A)(iv) would chill the ability of the lawyer to provide such advice and thus inhibit competent representation. Operating within the contours of Rule 1.2(d) might impede rather than facilitate competent representation in the immigration context, although until the Supreme Court provides more clarity, immigration lawyers will need to operate within the framework of Rule 1.2(d).

Regardless of the outcome in *US v. Hansen*, a lawyer ought not to be sanctioned under either INA §274(a)(1)(A)(iv) or Rule 1.2(d) who advises an undocumented client to remain in the US if the lawyer is doing so as part of competent representation.

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