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US IMMIGRATION & NATIONALITY LAW

THE ROLE OF THE IMMIGRATION LAWYER IN ADVISING UNDOCUMENTED IMMIGRANTS

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By Cyrus Mehta

Immigration lawyers commonly encounter a client who is undocumented and asks about options to obtain status. If in the event there are no options, the next question is whether there are any options that might arise in the future. In the course of counseling the client who is not in status, can the attorney recommend that this person remain in the U.S. in this unlawful status until a benefit "may" accrue in the near or distant future? Even if the attorney may not directly advise the client to remain in the U.S. in violation of the law, would an attorney advising the client of a potential future immigration law be implicitly encouraging the client to remain in violation of the law, and also be implicating any ethical obligations?

This situation indeed is one of the great paradoxes in immigration practice, since an individual who is in undocumented status need not expect to remain eternally undocumented. A classic example is one who is "grandfathered" under § 245(i) of the INA. So long as an immigrant visa petition or labor certification was filed on behalf of this person on or before April 30, 2001 that was "approvable as filed," and if the principal applicant, for whom the labor certification was filed was physically present in the U.S. on December 21, 2000 (in cases where the labor certification or petition was filed after January 14, 1998), this individual can ultimately adjust status in the U.S. when she is eligible to do so.

In the meantime, while this individual is waiting to become eligible for adjustment of status, he or she continues to remain unlawfully in the U.S. and may also be placed in removal despite having an approved petition, but unable

to adjust status until the priority date becomes current. We encounter yet another paradox when such a person who is potentially eligible under § 245(i) is issued a Notice to Appear and is placed in removal proceedings. The Board of Immigration Appeals has held that it may be an abuse of discretion for an Immigration Judge to deny a continuance to a respondent who has a prima facie approvable visa petition, in both the family and employment context, and is also potentially eligible for adjustment of status. See e.g. Matter of *Hashmi*, 24 I&N Dec. 785 (BIA 2009); *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009).

Indeed, being documented or undocumented is part of the same continuum. A thoroughly undocumented person, when placed in removal proceedings, can seek cancellation of removal under stringent criteria pursuant to INA §240A(b), such as by being physically present in the U.S. on a continuous basis for not less than 10 years, by demonstrating good moral character during this period, by not being convicted of certain offenses and by demonstrating "exceptional and extremely unusual hardship to the alien's spouse, parent, or child," who is a citizen or a permanent resident. Similarly, the undocumented person can also apply for asylum within one year of his or her arrival in the US, and can do so even later, if exceptional or extraordinary circumstances are demonstrated. Conversely, a documented person, such as one in H-1B status can according to the government also technically be considered not in status, during the pendency of an extension request, although this position has been successfully challenged.

Such a person whose visa has long since expired could also possibly get wrapped up in a romantic encounter with a U.S. citizen, marry, and dramatically convert from undocumented to permanent resident within a few months. At times, Congress bestows such permanent residency, as we have already seen, through section 245(i) or the LIFE Act, or a person can obtain Temporary Protected Status (TPS), if a calamity were to befall his or her country such as the recent TPS program and its extension for Haitians after the devastating earthquake on January 12, 2010. Millions of undocumented immigrants, including children, who have fallen out of status or entered without any status, are waiting for Congress to pass legislation that could legalize their status. Immigration lawyers also advocate on their behalf, and help them draft petitions and accompany them to the offices of elected representatives.

The following extract from the U.S. Supreme Court's decision in *Plyer v. Doe*, 457 U.S. 202 (1982), which held that undocumented children could not be deprived

of a public education, is worth noting:

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in the country, or even become a citizen.

Against this backdrop, the immigration lawyer must be mindful of certain limitations. On the one hand, a lawyer is under a duty to act zealously. According to Rule 1.3 of the ABA Model Rules of Professional Conduct, "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment 1 to Rule 1.3 provides, "A lawyer should …take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." On the other hand, a lawyer can only zealously represent his or her client within the bounds of the law. Under Model Rule 1.2(d), "A 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 the client to make a good faith effort to determine the validity, scope, meaning or application of the law."

The key issue is whether counseling a client to remain in the U.S., even indirectly (such as by advising of future immigration benefits), is potentially in violation of Model Rule 1.2(d) or its analog under state bar ethics rules.

While practitioners must ascertain the precise language of the analog of Model Rule 1.2(d) in their own states, one can argue that overstaying a visa is neither "criminal" nor "fraudulent" conduct. Even while an entry without inspection (EWI) might be a misdemeanor under INA §275, it is no longer a continuing criminal violation to remain in the U.S. after the EWI. Although being unlawfully present in the U.S. may be an infraction under civil immigration statutes, it is not criminal or fraudulent, and given the paradoxical situation where an undocumented noncitizen can eternally hope to gain legal status, a lawyer ought not to be sanctioned under Model Rule 1.2(d) or its state analog with respect to advising individuals who are not in status in the U.S.

Of course, the most prudent approach is to refrain from expressly advising or encouraging a client to remain in the U.S. in violation of the law; and instead,

present both the adverse consequences and potential benefits to the client if he or she chooses to remain in the United States in violation of the law. In fact, adopting such an approach becomes imperative when remaining in the U.S., in certain circumstances, does constitute criminal conduct. For instance, failure to depart after a removal order within 90 days under INA §243 renders such conduct a criminal felony. Even here there is an exception at INA §243(a)(2), which provides: "It is not in violation of paragraph (1) to take any proper steps 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." Moreover, there are provisions that allow a person who received a final removal order many years ago to reopen if the government consents to such 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).

The latest Immigration and Customs Enforcement Memo on prosecutorial discretion by John Morton, June 17, 2011, instructing officials to exercise prosecutorial discretion in a number of situations also behooves the immigration attorney to zealously advise his or her clients of all options notwithstanding INA §243. The ICE Memo instructs that an individual who is removable, but is on low enforcement priority, can ask ICE for supervised release (and can then request employment authorization), deferred action or can seek to reopen with the government's consent the removal order if there is relief available.

What about a state law that makes it criminal for an unauthorized immigrant to remain in the state? We can argue at this point that the major provisions of the laws of Arizona, Georgia and Indiana have been enjoined as being unconstitutional. Many of these state laws could snare people who may not technically be registered under federal law, but may be allowed to remain in the US by the federal government and even be given employment authorization such as battered spouses who have filed self-petitions under the Violence Against Women Act, U visa applicants (victims of certain crimes) or TPS applicants. Moreover, while a state may seek to banish the so called individual from its territory, under the federal immigration system, he or she must first be placed in proceedings. While in proceedings, this individual can then potentially apply for relief such as cancellation of removal, and can get employment authorization even while continuing to remain unlawfully present. The author commends readers to David Isaacson's A PRELIMINARY LOOK AT

SOME OF THE CONSTITUTIONAL AND PRACTICAL PROBLEMS WITH ALABAMA'S NEW IMMIGRATION LAW in order to fully understand the contradictions between a state's immigration law and the federal immigration law.

In closing, Comment 9 to Model Rule 1.2(d) is a golden nugget, which summarizes the delicate balance that the attorney ought to strike when representing a client who may be undocumented but who has potential relief in the future:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

(This blog include extracts from How To Walk The Ethical Line – Being Less Stressed Out, by Cyrus D. Mehta, Sam Myers, and Kathleen Campbell Walker, AILA's Immigration Practice Pointers (2011-12 Edition)).