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US IMMIGRATION & NATIONALITY LAW

REAPPRAISAL OF THE ENCOURAGEMENT PROVISION AS INTERPRETED IN UNITED STATES V. HANSEN UNDER TRUMP'S IMMIGRATION POLICIES

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In June 2023, the Supreme Court issued its decision in *United States v. Helaman Hansen*, a case that posed the question whether the federal criminal prohibition on encouraging or inducing unlawful immigration for commercial advantage or private financial gain in violation of INA §274(a)(1)(A)(iv) and INA §274(a)(1)(B)(i) is unconstitutionally overbroad. As discussed in our first blog on the *Hansen* case, 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. Hansen falsely advised these individuals that many undocumented immigrants had successfully become U.S. citizens through his program. In reality, it is not possible to obtain U.S. citizenship through adult adoption. Hansen was convicted of several counts of fraud in California, and was found to have 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. He first moved to dismiss the two fraud counts that were based on a violation of INA §274(a)(1)(A)(iv) on the ground that this provision is facially overbroad, void for vagueness, and unconstitutional as applied to him, but the district court denied his motion.

Hansen 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 government argued that subsection (iv) was limited to speech integral to criminal conduct, specifically solicitation and aiding and abetting. The Ninth Circuit disagreed, holding that the provision prohibits a broad range of protected speech. One could violate INA §274(a)(1)(A)(iv) merely by "knowingly

telling an undocumented immigrant 'I encourage you to reside in the United States'", the court reasoned. The court held INA §274(a)(1)(A)(iv) is unconstitutionally overbroad, and reversed Hansen's convictions under this provision. The government is seeking review of the Ninth Circuit's decision at the Supreme Court, arguing in part that it has historically construed the "encourage" or "induce" language of INA §274(a)(1)(A)(iv) very narrowly to prosecute those who engaged in serious criminal conduct.

The same First Amendment overbreadth argument at issue in *Hansen* was addressed two years ago in *United States v. Evelyn Sineneng-Smith*. We discussed this case at length in our original blog post on *Hansen*, excerpts of which are reproduced here. *United States v. Evelyn Sineneng-Smith* involved an unauthorized practitioner who operated an immigration consulting firm in San Jose, California. Sineneng-Smith represented mostly natives of the Philippines who were unlawfully employed in the home health care industry and who sought to adjust their status to permanent residence through the filing of a labor certification by an employer. These clients were not eligible to apply for adjustment of status in the United States under INA § 245(i) which expired on April 30, 2001 and they also did not appear to be grandfathered under this provision. Although Sineneng-Smith knew that her clients were not eligible under 245(i), she continued to sign retainer agreements with them and tell them that they could apply for green cards in the United States. At least two of the clients testified that they would have left the country if they were advised that they were not eligible to apply for permanent residence.

Sineneng-Smith was convicted by a jury on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain, in violation of INA §274(a)(1)(A)(iv) and INA §274(a)(1)(B)(i). She was also convicted on two counts of mail fraud in violation of 18 U.S.C. §1341. The Ninth Circuit reversed her convictions under INA §274(a)(1)(A)(iv) and INA §274(a)(1)(B)(i) on the ground that "encourage" and "induce" under their plain meaning restrict vast swaths of protected expression in violation of the First Amendment despite the government countering that the statute only prohibits conduct and a narrow band of unprotected free speech. The court provided several examples of seemingly innocuous conduct that could constitute a criminal violation of the provision, including one that is especially troubling for immigration lawyers - an attorney telling her client that she should remain in the country while contesting removal, because, for example, non-citizens within

the United States have greater due process rights than those outside the United States, and because as a practical matter, the government may not physically remove her until removal proceedings have been completed. The Supreme Court ultimately dismissed the case on other grounds, particularly for having departed from the party presentation principle.

The Supreme Court ultimately upheld Hansen's conviction, noting that, in order to challenge a law as overbroad, " law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep". The Court also rejected the idea that the encouragement provision is unconstitutionally overbroad. Justice Amy Coney Barrett, writing for the majority, acknowledged that the terms "encourage or induce" can have a broad meaning. However, the Court held that their usage in the encouragement provision is in the "specialized, criminal-law sense—that is, as incorporating common law liability for solicitation and facilitation", which also corresponds to the widespread understanding of these terms when the law was passed by Congress in 1885, and later modified in 1917. The Court also rejected Hansen's argument that statutory revisions eliminating words like "assist" and "solicit" render the provision overbroad, stating: "Hansen believes these changes dramatically broadened the scope of clause (iv)'s prohibition on encouragement, but accepting that argument would require the Court to assume that Congress took a circuitous route to convey a sweeping — and constitutionally dubious — message. The better understanding is that Congress simply streamlined the previous statutory language".

The Court found that the encouragement provision "does not have the scope Hansen claims, so it does not produce the horribles he parades". "To the extent that clause (iv) reaches any speech", the Court determined, "it stretches no further than speech integral to unlawful conduct". The majority opinion went on to state the "clause (iv) criminalizes speech that solicits or facilitates a criminal violation, like crossing the border unlawfully or remaining in the country while subject to a removal order." Even if the encouragement provision does not apply as broadly as Hansen argued, even these applications could be problematic for immigration lawyers and advocates. Lawyers might advise their clients that they could apply for asylum or related relief, if they enter the United States at the border, for example, or that they can attempt to reopen a removal order if they remain in the United States.

In her dissent, joined by Justice Sonya Sotomayor, Justice Ketanji Brown Jackson

argued that the Court's decision was an attempt to retroactively interpret as constitutional a provision is facially overbroad, stating: "If this Court is willing to redline Congress's work to save it from unconstitutionality, it 'sharply diminish Congress's incentive to draft a narrowly tailored law in the first place". Justice Jackson also referenced the Ninth Circuit's holding in *Hansen v. United States* that the provision was overbroad in her dissent.

Although not considered by the Supreme Court in its decision, the previous Ninth Circuit case, illustrates how easily an immigration lawyer could violate INA §274(a)(1)(A)(iv) by discussing even general immigration policies and consequences with undocumented clients. In *United States v. Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012), the government prosecuted a U.S. Customs and Border Patrol supervisor under this provision for "advis cleaning lady generally about immigration law practices and consequences." 857 F. Supp. 2d at 193. As Judge Bumatay points out in his dissent of the Ninth Circuit's decision denying an en banc hearing, the conduct at issue in *Henderson* may be more egregious than it first appears – the CBP supervisor knowingly engaged an undocumented employee and "coach the employee on how to evade immigration authorities while residing in the country". Still, the Ninth Circuit majority in *Hansen* cited the example of Henderson being prosecuted for advising her cleaning lady about immigration law practices and consequences, and thus "makes plain the ability of subsection (iv) to chill speech."

A new Department of Education Final Rule that excludes organizations who have a "substantial illegal purpose" from qualifying as employers under the "public service loan forgiveness (PSLF)" program represents another effort by the Trump administration to target immigration lawyers and advocates. The final rule was published in response to a March 2025 Executive Order that directs the Secretary of Education to propose revisions to 34 C.F.R. 685.219, Public Service Loan Forgiveness Program to ensure that "individuals employed by organizations whose activities have a substantial illegal purpose shall not be eligible for public service loan forgiveness". Among the "activities that have a substantial illegal purpose" enumerated in the executive order and final rule is "aiding or abetting violations of 8 U.S.C. 1325 or other Federal immigration laws". A group of non-profit organizations including the American Immigration Council have already filed a lawsuit challenging the rule, arguing that it "will make it more difficult for employers in certain fields, such as advocacy on behalf of immigrants, to recruit and train employees, and will chill politically

disfavored but legal activities by PSLF employers…The Rule is contrary to the PSLF statute, exceeds the Department's regulatory authority, and violates the constitutional rights of nonprofits whose employees are statutorily eligible for PSLF."

In our first blog on the *Hansen* case, we advised that practitioners can 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 to clients. Immigration lawyers should also keep in mind that 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." While it may be unlikely that an immigration lawyer advising an undocumented client to remain in the United States in order to become eligible for an immigration benefit down the road would be prosecuted under INA §274(a)(1)(A)(iv), but presenting the general consequences and benefits of remaining in the U.S. in violation of the law, as well as staying within the confines of ABA Model Rule 1.2(d), can offer practitioners some guidelines for avoiding potential liability.

AILA and numerous other immigration organizations filed an amicus brief to the Supreme Court in *Hansen v. United States* that pointed 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.

As we noted previously in a second blog that discusses the ethical issues raised by *Hansen*, a lawyer who hedges their advice in conditional probabilities may be at risk of failing to provide competent representation. Even the government's brief in *United States v. Hansen* assured 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 or the Supreme Court in its final decision did not provide any assurance that such advice would insulate the lawyer from prosecution under INA §274(a)(1)(A)(iv). The government offered the example of a lawyer advising a client in removal proceedings who has been released on bond to stay in the US but that was 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 their client without outlining the immigration benefits that the client may be eligible for and advising them how to obtain them by remaining in the US. INA §274(a)(1)(A)(iv) continues to 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. The Supreme Court in in *United States v. Hansen* did not provide more clarity, and the government's assurance that they would not prosecute lawyers was under the Biden administration would likely not hold under the Trump administration whose objective is to remove as many noncitizens from the US under the pretext that the US has been subjected to an alien invasion. The White House Memo encouraging the prosecution and sanctioning of immigration lawyers because they allegedly coach their clients to "circumvent immigration policies enacted to protect our national security and deceive the immigration authorities and courts into granting them undeserved relief" further diminishes the assurances that the government provided in *United States v. Hansen*. Immigration lawyers will need to continue to carefully operate within the framework of ABA Model

Rule 1.2(d) even if it curbs their ability to provide competent representation to clients.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).