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VOICE

THE INAUGURAL ISSUE

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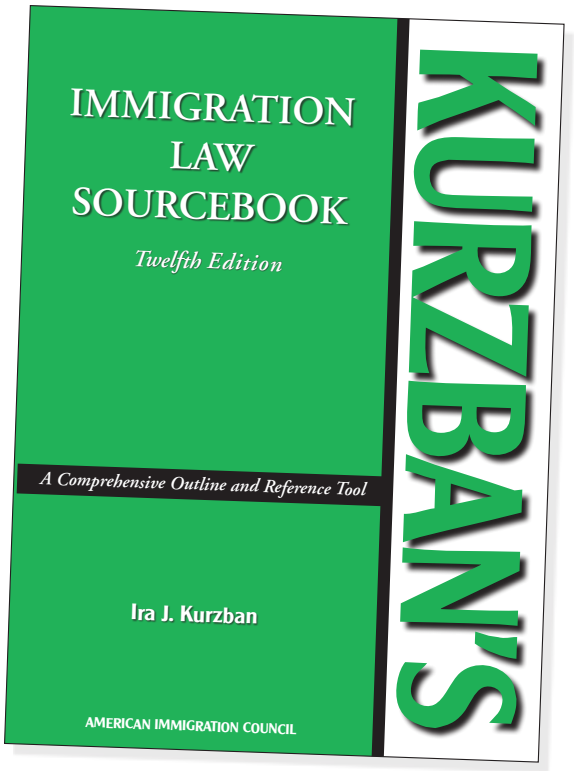
waiting for an immigration system that WORKS

Where the HEART Act *is*

IMMIGRATING AS A SAME-SEX COUPLE

JUNE 2010
VOL. 1 ISSUE 1

The Devil's in the Details



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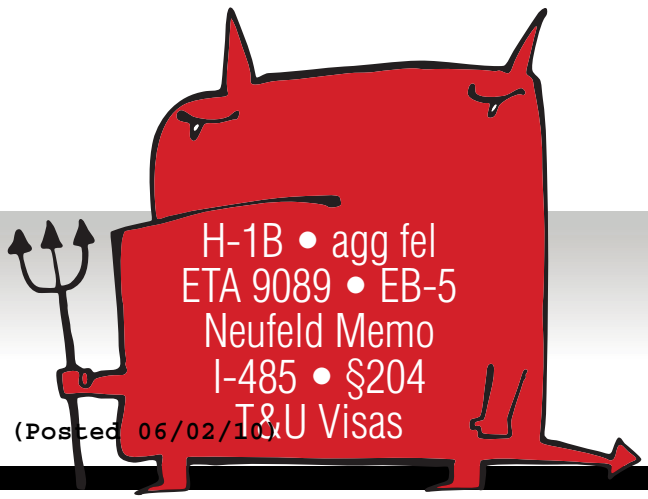

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DEPARTMENTS

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COVER STORY

Living in Arizona, I'm disappointed that we came up with the law. We need to find a way to get these immigrants their citizenship, that's the first thing ... The second thing ... [f]ine and penalize the people they're working for, because most of those immigrants here are busting their hump, doing a great job, and to go after them every couple years because you want to raise hell doing something to get re-elected, that's disrespectful and disgusting."

—**Charles Barkley**, sports commentator, former NBA basketball star

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VOICE

MANAGING EDITOR
Tatia L. Gordon-Troy

EDITOR-IN-CHIEF
Crystal Williams

GRAPHIC DESIGNERS
Bradley Amburn
Robert Bequeaith

CONTRIBUTORS
Steven Brotherton, Loren Crippin, Tatia Gordon-Troy, Rómulo Guevara, Ben Johnson, Paula Jones, David Leopold, Jenny Levy, Danielle Polen, Scott Titshaw

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Welcome to VOICE

It is only befitting to debut AILA's inaugural issue with a focus on **VOICES**—opinions expressed by people from around the country about what's become the hottest topic of conversation for most, if not all, media outlets lately. You guessed it—immigration. And how did this happen, you ask? Well, it's all because of U.S. Senator John "Complete the Danged Fence" McCain's state of Arizona, which decided to pass the toughest anti-immigration law in this country. Some say it will lead to racial profiling, some say it won't. I'll let you decide for yourselves, for only time will tell. But AILA took the initial step—a bold one I might add—by pulling its Fall CLE conference out of Arizona once it became clear that the bill would become law. Since then, there's been a flurry of activity around here—radio and newspaper interviews, and television appearances. Some folks agreed with AILA's stance while others condemned it. Among the many negative comments received, here's one of my favorites: "What part of illegal in illegal invading criminal aliens are you too stupid to get? Have your convention in Mexico you lying hypocritical morons."

Of the many who agreed with AILA's actions, one in particular stands out because she chose the old-fashioned way to communicate her views—she sought out a stamp and mailed a very positive note saying, "[O]n behalf of all Hispanic people, thank you so very much!"

Sure, there's some backlash with which AILA must deal. But history has proven that those who choose the path of least resistance stand to gain very little. Now that AILA has taken a stand, will you?

Tatia L. Gordon-Troy, Esq.
Director, AILA Publications

BROWN AROUND TOWN

COVER IMAGE: SHUTTERSTOCK.COM

AILA InfoNet Doc. No. 10060262. (Posted 06/02/10)

AZ DIGS

"In the United States of America, no law-abiding person—be they an American citizen, a legal immigrant, or a visitor or tourist from Mexico—should ever be subject to suspicion simply because of what they look like."

—President Barack Obama, **during Mexican President Felipe Calderon's visit (May 2010)**

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The Deprofiler Removes Reasonable Suspicion

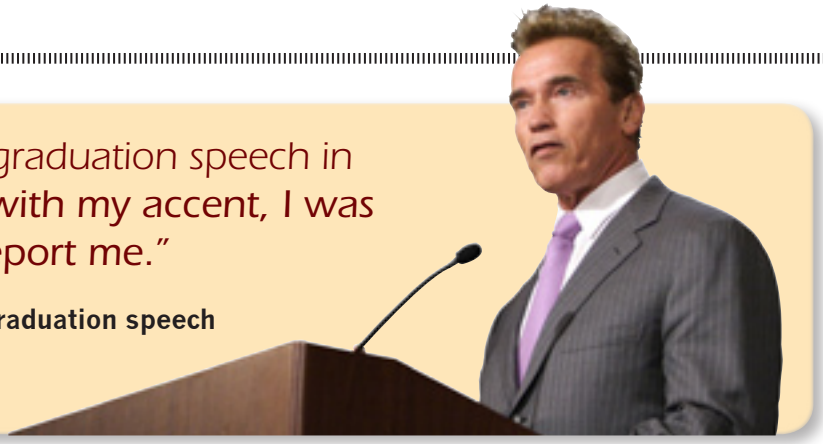
Deprofiler.com allows you to print a mask of a friendly white person's face to wear while visiting Arizona!

You might also want to pick up a t-shirt to go with your new look!

Your "Down with Arizona" look would NOT be complete if you miss out on your free bumper sticker. Presente.org is giving away bumper stickers (even free shipping) to spread the word that no one should stand for racial profiling.

"I was also going to give a graduation speech in Arizona this weekend. But with my accent, I was afraid they would try to deport me."

—Arnold Schwarzenegger, **during his graduation speech at Emory University (May 2010)**



SHUTTERSTOCK.COM/TOP RIGHT: PHOTO ILLUSTRATION

NEWSLINK

HIGHLIGHTS FROM AROUND THE GLOBE

"The Immigration Center and Boyce acted in bad faith and deceived customers."

Immigration Center accused of engaging in deceptive practices
Denver Post

New Americans in the Sooner State
Immigration Policy Center

"Nearly one-in-eleven Oklahomans are Latino or Asian."

Illegal Immigrant's 145G 'Deport Gift'
New York Post

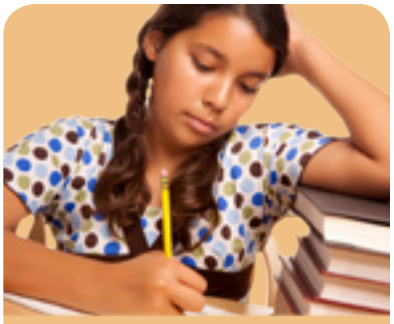
"It's ICE's problem to go find these guys."

"John McCain is a border hawk, you got that? He's 'one of us.' And to make that absolutely clear, he's released this new ad in which he stoically declares his plan to 'complete the danged fence.' You can expect that to be his new catchphrase."

McCain: 'Complete the Danged Fence'
Newser

Illegal Immigrant Students Protest at McCain Office
The New York Times

"The individuals have a right to peacefully protest in the senator's office."
—Brooke Buchanan



Arizona Outlaws Ethnic Studies
Newser

"It's just like the old South, *and it's long past time we prohibited it."*
—Tom Horne

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"[Arizona] readily could have written a law that said that **if a person required to produce an Arizona driver's license cannot do so, check for his proof of legal status.** That would have been ethnically neutral …" —Crystal Williams, AILA Executive Director

[Governor Brewer, Read Your Own Law!
AILA Leadership Blog]

"This law is shameful, un-American, it will undermine public safety and it is unconstitutional."
—Lucas Guttentag

[ACLU Sues to Stop Arizona's Immigration Law
Los Angeles Times]

[The Curious Politics of Immigration
The Conscience of a Liberal]

"But the cultural/nativist/tribal conservatives hate having these alien-looking, alien-sounding people on American soil."
—Paul Krugman, *NY Times*

[A Generation Gap Over Immigration
The New York Times]

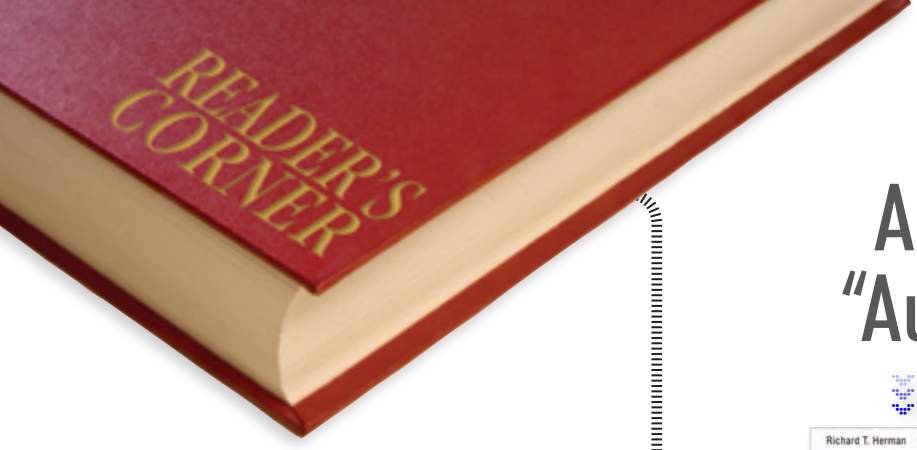
"Young people today have simply been exposed to a more accepting worldview."
—Cathleen McCarthy

[Holt Baker: Immigration Reform Protects All Workers
AFL-CIO Now Blog]

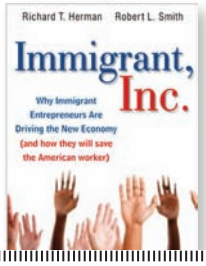
''[Immigrants] know that if they report dangers on the job, chances are, they will be torn away from their families and their communities and deported.''
—Arlene Holt Baker

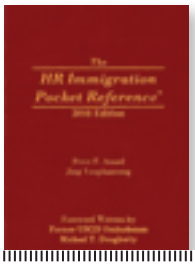
KEEP IT SIMPLE …

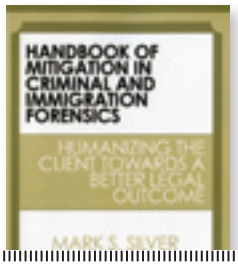
The **Center for Plain Language** held its first **awards ceremony** to recognize nonprofits, for-profits, and government agencies that actually use plain language (and those that hopelessly confuse us all). According to Association Biznow, the grand prize for least usable document went to the **U.S. Dept. of Homeland Security** for its **I-94 form**, which foreign citizens must complete when entering the country. The form begins with "Welcome to the United States" then goes on to ask visitors if they have been convicted of a crime involving "moral turpitude," are seeking to engage in criminal or immoral activities, or were involved in persecutions associated with Nazi Germany between 1933 and 1945.



AILA Members Add "Author" to Accolades







Immigrant, Inc.: Driving Force Behind the Economy

With more doom and gloom about the economy reported in the news, and immigration reform far from fruition, someone needs to give members of Congress a copy of *Immigrant, Inc.: Why Immigrant Entrepreneurs Are Driving the Economy (and how they will save the American worker)* ($29.95 hardcover; John Wiley & Sons, Inc. 2010). Written by AILA member Richard Herman and co-author, Robert Smith, a veteran journalist, the book highlights the accomplishments of immigrant entrepreneurs across the country. From founders of big Fortune 500 companies—such as Google, Intel, Yahoo, Hotmail, Sun Microsystems, YouTube, and eBay—to university laboratories and urban neighborhoods, immigrants are playing key roles as innovators and job creators. With personal stories of immigrant journeys, the authors reveal the passions motivating America's immigrant achievers, their success strategies, and their power to revive communities and create new industries.

Chicago Area Businesses Join Push for Reform

About 200 Chicago-area businesses joined former Illinois Governor Jim Edgar in announcing the formation of a new coalition to push for federal immigration reform. The group argued that legal status for an estimated 540,000 illegal immigrants in the state would result in billions of dollars of new economic activity.

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Immigration Guide for HR Professionals

For those companies that are hiring, a must-have for their human resource (HR) departments is *The HR Immigration Pocket Reference*, 2010 Ed. ($39.95 paperback; Society for Human Resource Management). Co-authored by AILA members Peter Asaad and Jing Yeophantong specifically for HR professionals, this compact and handy book is designed to be a quick reference tool that addresses everyday immigration issues in HR management. It provides explanations in a comprehensible manner, and presents information in checklist, table, and bullet-point format to facilitate quick reference and meaningful daily usage in HR management.

Mitigation Forensics: Humanizing Clients in Court

Advocating in court for a criminal client who is one step closer to deportation requires the attorney to deftly handle the complexities of both criminal and immigration issues plaguing such a case. *Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Towards a Better Legal Outcome* ($19.95 paperback; Mark S. Silver, 2010 Ed.) by AILA member Mark Silver is an essential companion to any criminal or immigration lawyer who wishes to better advocate for his or her client. Silver writes that humanizing the individual and presenting important psychosocial details from the client's life has a positive impact on the factual analysis of the case, which leads to a better legal outcome.

SCOTUS Affirms That Immigrants Are People, Too!

The U.S. Supreme Court recently issued what can only be considered a seminal decision as it applies to the constitutional rights of all immigrants. In *Padilla v. Kentucky*, the Court expressed, at least in summary, its dismay over the increasing difficulties caused by today's immigration laws.

Immigration Law Crash Course for Defense Attorneys

Criminal attorneys are scrambling to bone up on immigration law as it pertains to criminal cases, with the recent landmark *Padilla v. Kentucky* decision now forcing them to be more cognizant of the potential impact their client's criminal proceedings may have on his or her immigration status.

SPOT LIGHT

HEART Act Taxes "Wealthy" Expats

by PAULA JONES

Wealthy individuals giving up green cards or U.S. citizens (USCs) giving up citizenship after June 17, 2008, are now subject to tax laws, according to the Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245 (**HEART Act**).[1]

A "wealthy" individual is defined as one : (a) with an average annual income of $145,000 for the five years prior to expatriation from the United States; (b) with a net worth of $2 million or more; or (c) who had failed to comply with expatriation filing requirements for the five years prior to leaving the United States. In addition, green card holders, in order to be subject to HEART law, must have held the green card for at least eight of the prior 15 taxable years.

Paula Jones *is an associate at Reed Smith in Philadelphia. She has written several articles on tax, benefits, and wealth planning.*

Income Tax

If one is determined to be subject to the HEART Act, he or she incurs a "mark-to-market" exit tax, which operates as a trigger for capital gain on all worldwide property (*see* 26 USCA §877A(a)). There is exclusion on the capital gain up to $600,000, which is adjusted for inflation (*see* 26 USCA §877A(a)(3)). The basis for capital gain purposes is the date at which the taxpayer became a resident for federal income tax purposes (*see* 26 USCA §877A(h)(2)). The payment of tax may be deferred by the taxpayer, but only if the taxpayer furnishes a bond (or other security) to the Internal Revenue Service.

The taxpayer must also waive any treaty provision that would prevent the taxpayer from paying the tax (*see* 26 USCA §877A(b)(4), (5)). Deferral of the tax payment may be made on an asset-by-asset basis, and once made, is irrevocable (*see* 26 USCA §877A(b)(6)). Tax is otherwise due when the property for which the election is made is disposed of, or the last income tax return due for a deceased taxpayer, whichever is earlier.

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Federal Inheritance Tax

In addition to the exit tax for federal income tax purposes, the new law creates a federal inheritance tax, imposed on those receiving gifts and/or bequests from former green card holders and former USCs subject to the HEART Act (*see* 26 USCA §877A(b)(3)). Upon the death of an individual who is subject to the HEART Act as discussed above, an estate tax—at a flat rate equal to the highest estate tax rate in effect at the time of death—is imposed for any amount passing to a U.S. beneficiary (*see* 26 USCA §2801(a)(1)). Similarly, if an individual subject to HEART transfers assets during his or her life to a U.S. beneficiary, a gift tax is imposed at a flat rate equal to the highest gift tax rate in effect at the time of the gift. *Id.*

1 26 USCA §7701(b)(6), Treas. Reg. §301.7701(b)–1(b).

Do We Need a License for *That*?

What Employers Need to Know About Export Control Licensing

by STEVEN BROTHERTON
and RÓMULO E. GUEVARA

A relatively small number of products exported from the United States require an export license from either the U.S. Department of Commerce or another U.S. agency like the Department of State. Whether an export license is required depends on the product's technical characteristics, its destination, and the end-users and end uses.

In a recent proposal by U.S. Citizenship and Immigration Services (USCIS), the agency purports to revamp its Form I-129, Petition for a Nonimmigrant Worker,[1] by including an acknowledgment and attestations pertaining to deemed export licensing compliance. Needless to say, this change will significantly impact businesses that seek foreign temporary workers. It is an effort at policing noncompliance with export control laws that is misguided at best.

Understanding Export Control

In order to safeguard the interests of U.S. national security and foreign policy, the Export Administration Act of 1979 (EAA), as amended and reauthorized, and the Export Administration Regulations (EAR) authorized the U.S. Department of Commerce (DOC) to control the export of certain sensitive technologies. President George W. Bush reauthorized EAA under the International Emergency Economic Powers Act on August 17, 2001.

Companies are required to obtain a license before exporting "dual-use" technologies, *i.e.*, civilian technologies that also have military uses. Under the EAR, the transfer of dual-use technologies to a foreign national within the United States is deemed an "export" that is subject to control and licensing requirements if the export of the technology to that person's country of citizenship would require a license. In other words, a U.S. company may be required to obtain an export license if it plans to employ a foreign national in a position that directly handles a controlled dual-use technology. (15 CFR §734.2(b)(2)(ii)). This is commonly referred to as the "deemed export" rule.

According to EAR, technology is "deemed exported" when it is released to a foreign national within the United States either through visual inspection, verbal communication, or when it is made available by practice or application under the guidance of persons with knowledge of the technology. (15 CFR §734.2(b)(3)).

Thus, a license is required if a transfer of the same technology to the foreign national's home country would require an export license.

The Bureau of Industry and Security (BIS) is responsible for implementing and enforcing the EAR, including processing export license applications. Until a license application is approved by BIS, foreign nationals who are employed in a capacity that would qualify under the "deemed export" rule are unable to start their employment. 15 CFR §§730–774.

The **International Traffic in Arms Regulations** (ITAR), administered by the U.S. Department of State, Directorate of Defense Trade Controls (DDTC), controls the export and temporary import of defense articles and defense services. 22 CFR §§120–130. Defense articles generally cover items that are specifically designed, developed, modified, configured, or adapted for military or certain space applications. *See* 22 CFR §120.3 and §121.1.

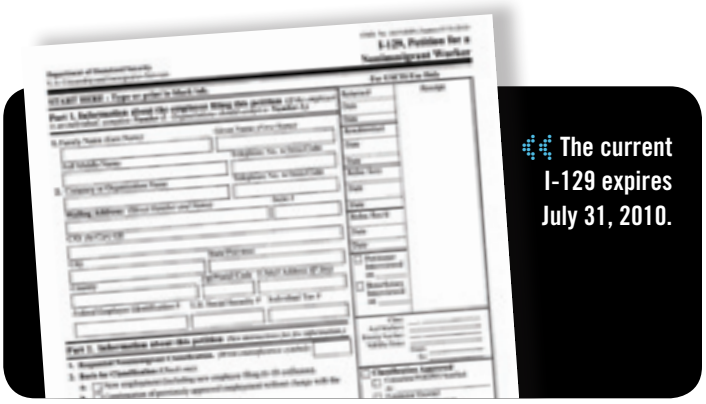
Under the ITAR, the general rule is that an export license is required prior to the transfer of ITAR technical data or defense services to a foreign national. 22 CFR §123.1 and §124.1. Companies planning to transfer ITAR technical data to foreign nationals with certain nationalities, including China, may not be able to obtain an ITAR license due to arms embargoes or other policies. *See* 22 CFR §126.1.

How Form I-129 Comes into Play

The fundamental flaws in the inclusion of export control licensing compliance in Form I-129 are substantial. First, it encompasses the misconception that an EAR–deemed export license is a firm pre-condition to employment. Second, it suggests that USCIS has the power to enforce another agency's rules, when administration and enforcement belongs to BIS. Third, it ignores the impact the new I-129 will have on employers and BIS alike. Fourth, it focuses on civil and dual-use technologies that are subject to the EAR and does not contemplate compliance with ITAR. Finally, the new I-129 creates redundancy in enforcement.

An Erroneous Pre-condition

The first sentence of the proposed instructions to the new I-129 say that to be eligible for employment through an I-129 petition, certain H-1B, H-1B1 Chile/Singapore, L-1, and O-1A beneficiaries "must" have a deemed export license. Note 1 *supra* at 4. However, the EAR does not require an export license for ALL non–permanent resident foreign workers employed in a company where sensitive technologies are used. Rather, the license is required *if* the company will transfer technology to the targeted employee, if such transfer would require an export license to the foreign national's home country.[2] 15 CFR §734.2(b)(2)(ii). It is common for employers to assign non–permanent resident employees to work in areas where the sensitive technology is not used while the export license is sought. Once the license is approved, the company may expand the worker's technology access to include the licensed area. →



The current I-129 expires July 31, 2010.

The Timing Requirement

The new I-129 also dictates the timing of the license application, instead of allowing the employer to determine when to apply for the license based on its own processes, controlled technology environment, and procedures. The employers that do routinely file export licenses already have expended significant resources to develop and establish internal technology control groups that determine the who, what, where, and when of export control issues.

If a deemed export license is required, employers typically request a license prior, concurrently, or subsequent to the I-129 filing. In fact, some employers file the export license after the foreign worker has obtained the U.S. visa. Others seek the license after employment has commenced, if circumstances of employment and technology access require the license at a later point. In addition, under 15 CFR §740.5, an employer can also file a Foreign National Review Request, which applies generally to the transfer of controlled microprocessor technology to foreign nationals of certain countries. If approved, the employer is permitted to give the foreign national access to the controlled technologies.

The implications of requiring export control licensing information on the I-129 are more critical for employers that normally do not need to file export control licenses.

The proposed I-129 fails to acknowledge these business realities, which are perfectly legal under the EAR. USCIS also does not provide reasonable notice or options for employers to consider in the export control area.

Negative Impact on Employers and BIS

The implications of requiring export control licensing information on the I-129 are more critical for employers that normally do not need to file export control licenses. Statistically, only a small segment of U.S. employers engage in business that involves technologies subject to the EAR. In fact, BIS reports it only receives approximately 1,000 applications for deemed export licenses on a yearly basis.[3] Compare this, at minimum, to the H-1B annual quota of 65,000 and the quota for advanced degrees of 20,000 visas. Clearly, the vast majority of employers will not be familiar with export control and will need to invest tremendous amounts of time and expense to determine if export control rules apply to them.

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For example, H-1Bs may be filed by hospitals, finance, clothing companies, or fashion models. L-1 petitions can be filed by textile, international marketing, and retail companies involved in management. O-1As are filed by acclaimed artists, entertainers, and neurosurgeons. These entities would be completely unfamiliar with the EAR and its requirements. How would one of these employers determine, without proper education or counsel, whether the technology is subject to the EAR, whether there is an exception, and which government entity governs compliance requirements?

If an employer is uncertain about whether its activities will trigger the EAR, it will have to file a commodity classification request with BIS. This will take 14–60 days or more to process. 15 CFR §750.2(a). If BIS provides a ruling indicating that an export license is required, the license processing timeframe is approximately 65 days or more. 15 CFR §750.4(a).

Export Licensing and Its Effect on the H-1B

In a healthy economy, the H-1B cap would be met in the first three days of the new fiscal year filing window (April 1–3 for October 1 start dates). With the proposed changes to the I-129, employers would be required to file their deemed export licenses at least 90 days prior to April 1 to properly respond to the questions on the form. If the license is not issued in time, and the cap is met, the employer will not be able to properly document the I-129 requirements.

ILLUSTRATION BY BRADLEY AMBURN/SHUTTERSTOCK.COM

Portability

Under §214(n) of the Immigration and Nationality Act, an H-1B holder can begin working for a new H-1B employer upon a properly filed petition. But the proposed revision would create significant delays because deemed export licenses are not trans-

ferable to a new employer, except in a "mergers and acquisitions" context. Thus, the lapse in time to obtain an export license could lead the H-1B holder to fall out of status.

Subsequent Need for a License

The new form lacks any guidance or instruction about a situation where a deemed export license is not initially required, but a license is required at some point after the issuance of an H-1B visa. In proposing the new form, USCIS did not consider situations where there are changes in technology at the workplace. For example, the employer petitions for a foreign national worker to occupy a position with duties that did not involve sensitive technologies. Sometime after the H-1B becomes effective, she is moved into an area that is subject to licensing restrictions. Would such a circumstance require an amendment to the H-1B even though the actual duties have not materially changed?

Unintended Consequences and Loopholes

The revised I-129, with its unclear instructions, also will create an increase in BIS filings, primarily from employers who prefer to seek official recommendations or determinations about their export control uncertainties. There likely will be unnecessary deemed export license applications and commodity classification requests. This may further extend the processing times for export licenses, thus aggravating an employer's ability to properly respond to questions regarding the adjudication of the I-129.

In addition, the new form creates a loophole by focusing exclusively on deemed export licenses related to civil and "dual use" technologies with no mention of the most sensitive of U.S. technologies subject to the ITAR, which is administered by the DDTC. This oversight would be detrimental to the form's intended purpose of policing requirements with deemed export regulations.

Redundancy

There already are two government processes in place that are focused on EAR compliance. First, the Visas Mantis program is designed to check whether a visa applicant works in a field identified on the Technology Alert List (TAL). As part of this process, the U.S. government reviews whether the individual requires an export license. 9 FAM 40.31 Notes (Apr. 15, 2010).

Further, the DOC's Visa Application Review Program exists to review applications so that it can detect possible EAR violations by foreign nationals. The DOC makes recommendations on whether the visas should be denied based on deemed export reasons.[4]

Not Well–Thought–Out

The proposed change to add export control attestations to the new I-129 are misguided at best. It creates an erroneous pre-condition to employment that will have a negative impact on employers and on the rightful adjudicators of export control issues. It also creates redundancy in the process and a critical loophole by focusing on deemed exports. While the economy has shown a modicum of recovery from the 2008 recession, employers remain impacted by the economic downturn. To require export control attestations for the H-1, L-1, and O-1 classifications is to create an undue burden on employers that will further limit the economy's ability to fully recover.

CASE CAUGHT UP IN RED TAPE? **AILA Liaison works to resolve your problem cases and cut through the red tape. Check the eligibility requirements, as different agencies and offices have various protocols for liaison inquiries. If eligible, submit your inquiry for cases at the CSC, NBC, NSC, TSC, VSC, DOS, SSA, and/or AAO.**

Steven Brotherton *is a partner at Fragomen, Del Rey, Bernsen & Loewy, LLP in San Francisco, and* **Rómulo E. Guevara** *is an associate at the firm's location in Phoenix. The authors' views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 USCIS, OMB No. 1615-0009 (Jan. 27, 2010, Draft – Not for Production).
2 See also, BIS, "Deemed Export" Questions and Answers, http://www.bis.doc.gov/deemedexports/deemedexportsfaqs.html (last visited Apr. 15, 2010).
3 The Export Practitioner, 200 Firms May Benefit from Proposed ICT Exception, BIS Officials Estimate, Vol. 22, No. 8 (Nov. 2008) (citing Bernie Kritzer, Director of the BIS Office of Exporter Services, statement on Oct. 27, 2008).
4 BIS, Export Enforcement, http://www.bis.doc.gov/complianceandenforcement/index.htm (last visited Apr. 15, 2010).

Are same-sex marriage and immigration at a ...

by SCOTT TITSHAW

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Just six years ago, Massachusetts became the first state to legalize gay marriage, stemming from the outcome of a November 2003 ruling by the Massachusetts Supreme Judicial Court that declared the prohibition of gay marriage to be a violation of the state's constitution. Now the fight for federal recognition of these unions is heating up. Plaintiffs have filed suit in federal courts challenging the constitutionality of the federal Defense of Marriage Act (DOMA), which defines marriage as "a legal union between one man and one woman as husband and wife," with the word spouse referring only to "a person of the opposite sex who is a husband or a wife."[1]

In the United States, five states (Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire) and the District of Columbia now legally recognize the marriages of same sex couples.[2] Three more states (New York, Rhode Island, and Maryland) recognize the marriages of same-sex couples from other jurisdictions.[3] California legally recognizes the marriages of a select group of same-sex couples who celebrated their marriages there during the five-month period in which they were sanctioned by that state.[4] Although Proposition 8 amended the California state constitution to define marriage as an exclusively heterosexual institution going forward, the California Supreme Court held that the marriages of gay men and lesbians celebrated between mid-June and early-November 2008 remain valid in that state. On May 15, 2008, the California Supreme Court held that discrimination against same-sex couples violated the equal protection clause of the California state constitution. But on November 4, 2008, California voters approved Proposition 8.

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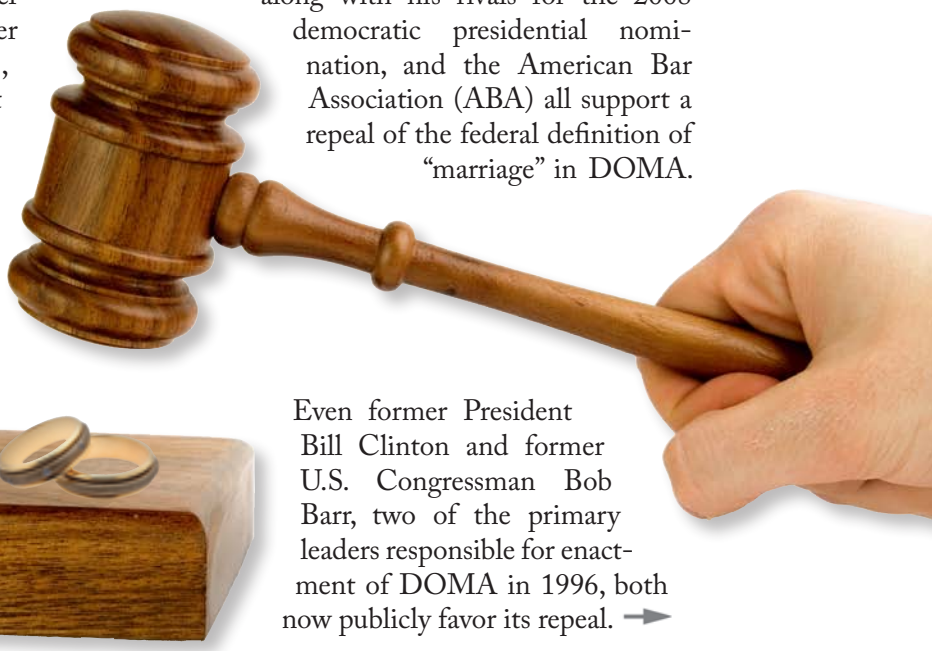
The Intersection of Immigration and Same-Sex Marriage

So how does all of this relate to immigration law? At present, gay and lesbian marriages are recognized in 10 countries. The Netherlands, Belgium, Spain, Canada, South Africa, Norway, and Sweden recognize marriage equality uniformly throughout their territories.[5] Same-sex marriages also are recognized in some parts of Argentina and Mexico.[6] However, DOMA closes the door to same-sex marriage recognition under any federal law, including the Immigration and Nationality Act (INA). So for those couples who have united legally in one of the many countries stated above, DOMA would keep federal immigration laws from legally recognizing those unions upon their immigration to the United States.

Many courts have found that the language of DOMA is clear and unambiguous. But can DOMA be struck down?[7] In addition to suits filed in Massachusetts,[8] at least one other high-profile case in California, *Perry v. Schwarzenegger*, D.Ct.N.D.Cal. case 3:2009cv02292 (filed May 22, 2009), is currently challenging the constitutionality of discrimination against same-sex marriages more generally. If such a case were successful, it might lead courts to strike down DOMA and all anti-gay state marriage amendments, presumably resulting in the clear recognition of all *bona fide* same sex marriages in the United States.

And if DOMA is repealed or struck down, the assumption is that same-sex marriage should be recognized under U.S. immigration law; however, there still would be some complications.[9] Legislation to repeal DOMA was introduced in September 2009 with 91 original co-sponsors in the House of Representatives. President Barack Obama, along with his rivals for the 2008 democratic presidential nomination, and the American Bar Association (ABA) all support a repeal of the federal definition of "marriage" in DOMA.



Even former President Bill Clinton and former U.S. Congressman Bob Barr, two of the primary leaders responsible for enactment of DOMA in 1996, both now publicly favor its repeal. →

ILLUSTRATION BY BRADLEY AMBURN/SHUTTERSTOCK.COM

> In a world without DOMA, U.S. immigration law would clearly recognize the same-sex marriage of a couple residing in a U.S. state that recognizes the marriage.

But absent legislative action, such as enactment of the Uniting American Families Act (UAFA),[10] even without DOMA, only those whose marriages are valid where celebrated would be recognized as "spouses" under the INA. Therefore, qualification for immigration benefits would be limited to couples who celebrate their marriages in one of the U.S. or foreign jurisdictions that recognize same-sex marriage. The situation might be complicated further for couples who reside, or intend to reside, in states that do not recognize their marriages. Twenty-nine states have constitutional amendments defining marriage as an exclusively heterosexual institution; Hawaii, in particular, has a constitutional amendment that authorizes the state legislature to make that determination).[11]

USCIS and DOS: Determining Validity Without DOMA

Generally, marriage validity under the INA could be undertaken as a three-step process, focusing on: (1) whether the marriage was valid where celebrated; (2) whether there is a strong state or federal public policy exception to the category of marriage in question; and (3) whether the particular marriage is *bona fide*.[12]

Step 1 will be satisfied if a gay or lesbian couple marries in a jurisdiction that recognizes marriage rights for same-sex couples. If USCIS or DOS officials find the couple's specific marriage to be *bona fide*, then Step 3 would be satisfied, leaving only Step 2 of the analysis.

While the general rule is that a marriage will be recognized for immigration purposes if it is *bona fide* and valid where "celebrated," there are a handful of rare categorical exceptions to this general rule of recognition based on a strongly held specific state or federal public policy objection to a "type" of marriage. In the case of same-sex marriage, DOMA currently expresses a clear categorical federal public policy objection. If DOMA were repealed or struck down as unconstitutional, this federal public policy exception would vanish.

In the pre-DOMA 1982 case of *Adams v. Howerton*, the U.S. Ninth Circuit Court of Appeals used similar rationale to hold that a purported same-sex marriage was clearly outside the federal definition of "marriage" and "spouse" in the INA, regardless of its validity under Colorado state law. However, *Adams v. Howerton* could be distinguished on several grounds. Most significantly, *Adams* was decided at a time when the INA still barred any homosexual person from admission to the United States under the category of "psychopathic personality … or mental defect," *Boutilier v.*

IN THE NEWS

- A. Goodnough, **"With Victories, Gay Rights Groups Expand Marriage Push,"** New York Times, April 8, 2009 (Vermont's legislature overrode Governor Jim Douglas's veto of that state's same-sex marriage bill)
- A. Goodnough, **"New Hampshire Legalizes Same-Sex Marriage,"** New York Times, June 4, 2009
- **"D.C. Mayor Signs Same-Sex Marriage Bill,"** CNN.com, Dec. 18, 2009

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Immigration Service, 387 U.S. 118 (1967), a bar that was repealed upon adoption of the 1990 amendments to the Immigration and Nationality Act.

However, the government might still argue that strongly held state public policy objections to same-sex marriage are sufficient to refuse recognition of a same-sex marriage if the couple resides in an anti-gay-marriage state.

In a world without DOMA, U.S. immigration law would clearly recognize the same-sex marriage of a couple residing in a U.S. state that recognizes the marriage. It is also highly likely that the marriages would be recognized for residents of other states with no laws prohibiting same-sex marriage. States with "mini-DOMA" laws and constitutional amendments prohibiting same-sex marriage would present a more difficult question. However, precedent suggests an extremely high threshold for recognition of a public policy that is sufficiently "strongly held" to overcome the general federal policy in favor of recognizing *bona fide* marriages that are valid where celebrated. For instance, the Board of Immigration Appeals has long recognized marriages that would have been prohibited under state anti-miscegenation or incest prohibitions in the couple's state of domicile:

- *Matter of Da Silva*, 15 I&N Dec. 778 (BIA 1976) (recognizing a Georgia marriage between an uncle and his niece although they could not have legally married in New York, the couples state of domicile);
- *Matter of Hirabayashi*, 10 I&N Dec. 722 (BIA 1964) (recognizing a marriage between first cousins although it would not have been possible in their state of domicile, Illinois); and
- *Matter of Zappia*, 12 I&N Dec. 439 (BIA 1967) (refusing to recognize a South Carolina marriage of first cousins that would have been both void and subject to criminal sanction in the couple's state of domicile, Wisconsin).

The only public policies deemed sufficiently strong to create an exception under the INA have resulted from state criminal penalties triggered by cohabitation or evasion of state anti-miscegenation or incest laws.[13] And, in some cases, even those laws were deemed insufficient. For example, in 1952, the BIA recognized a biracial marriage for immigration purposes in the case of a couple domiciled in Maryland, where it was a crime to marry in another state and return to live in Maryland. *Matter of C–*, 4 I&N Dec. 632 (1952).

Scott Titshaw *is a professor at Mercer University School of Law. He previously practiced for 12 years at Arnall Golden Gregory in Atlanta. He served on the board of Immigration Equality and several national AILA committees, and is a past chair of AILA's Atlanta chapter. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 Defense of Marriage Act, Pub. L. No. 104-199, 100 Stat. 2419 (Sept. 21, 1996), codified at 1 USC §7 and 28 USC §1738C.
2 *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), *Kerrigan v. Comm'r of Pub. Health*, 798 A.2d 407 (Conn. 2008), *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *See also* National Conference of State Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships*, October 2009, [hereinafter NCSL Marriage Report].
3 *See* NCSL Marriage Report, *supra* note 2.
4 *See In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008). *See also NCSL Marriage Report, supra* note 2.
5 The World: *Timeline of Gay and Lesbian Marriage*, Partnership or Unions Worldwide, (last visited 2/21/2010).
6 *Id.*
7 *See infra* notes 8 and 9.
8 *See Gill v. Office of Personnel M'gmnt*, No. 1:09-cv-10309 (D. Mass. filed July 31, 2009); *Commonwealth of Mass. v. U.S. Dep't of Health and Human Serv.* (D. Mass. filed July 8, 2009).
9 *See* S. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 *Wm. & Mary J. Women & L.*, ___ (forthcoming May 2010) at notes 10–14 and accompanying text. This article presents a detailed analysis and argument related to the likely results in same-sex spouse immigration cases if DOMA is repealed or struck down.
10 The Uniting American Families Act (UAFA, H.R. 1024, S. 424) is a U.S. bill to amend the Immigration and Nationality Act to eliminate discrimination in the immigration laws by permitting permanent partners of U.S. citizens and lawful permanent residents to obtain lawful permanent resident status in the same manner as spouses of citizens and lawful permanent residents, and to penalize immigration fraud in connection with permanent partnerships.
11 *See NCSL Marriage Report, supra* note 3.
12 Titshaw, *supra* note 9 at notes 33–42 and accompanying text.
13 *See* Titshaw, *supra* note 9; *see also,* Kerry Abrams, "Immigration Law and the Regulation of Marriage," 12 *Bender's Immigr. Bull.*, 1421, 1441–42 (Oct. 15, 2007);

LEFT: PHOTO COURTESY OF JENNY LEVY, AILA NATIONAL OUTREACH & COMMUNICATIONS MANAGER/
PHOTO COURTESY OF THE MIGRANT HERITAGE COMMISSION; RIGHT: SHUTTERSTOCK.COM

Every American business, community, and family is affected by the outdated laws that regulate the flow of foreign workers, students, and family members to the United States. And each year that policymakers fail to rework the immigration system becomes another year of missed opportunities for economic and social gains. The U.S. government, for example, foregoes billions of dollars in potential tax revenue, while businesses lose tens of thousands of potential workers, experts, and opportunity for cutting-edge innovation. Also caught in the web of dysfunction are the thousands of families who are deprived of the chance to reunite with their loved ones. It is time to develop a forward-looking immigration policy that will help rebuild the down-trodden economy, refocus shifting national security efforts, and contribute to America's overall prosperity into the 21st century. →

To advance America's interests and protect this country's core traditional values as a generous, welcoming nation deeply committed to the rule of law, nothing less than a top-to-bottom overhaul of the current immigration system is acceptable. Immigration policies have been known to profoundly impact this nation's social, political, economic, and security institutions. The backward-looking immigration system in place today only weakens national interests by slowing economic growth, forestalling family unification, and undermining strategic foreign policy objectives.

Achievable Solutions

Any effective, long-term solution to the immigration problem must: (1) promote economic growth—in particular, jobs for American workers—by providing fair and lawful ways for employment-based immigrants to come to America and grow the economy; (2) protect U.S. workers from unfair competition and all workers from exploitation; (3) reduce the unreasonable and counterproductive backlogs in family– and employment-based immigration; (4) ensure the permanent immigration system provides adequate visas to meet the needs of American families, businesses, and communities; (5) require the unauthorized population to come out of the shadows, register their presence with the government, while offering them the opportunity to *earn* lawful status; and (6) preserve and restore the fundamental principles of due process and equal protection while providing national security and maximizing the contributions the immigrant population can make to this country.

> Overly aggressive enforcement practices and the absence of urgently needed reforms to the immigration court system have severely undermined due process and fundamental fairness.

Create and Control Future Flow of Foreign Workers

Currently, there is *no* temporary visa category authorizing essential workers in low or semi-skilled occupations to work in the United States, except on a seasonal basis. In order to regulate and control the future flow of essential workers, Congress must create a new program to provide visas, full labor rights, job portability, and a path to permanent residence for those who would not displace U.S. workers. It would, thereby, significantly diminish illegal immigration by creating a legal avenue for people to enter the United States and return to their countries, communities, and families.

RESOURCES

To read more of AILA's Achievable Solutions, view and download *AILA's Policy Manual*.

Improve Family– and Employment–Based Permanent Immigration Programs

Congress must restore family values to the family-based program by eliminating the family-based visa backlogs, reforming the family preference system, and providing adequate numbers of visas to support family reunification. Likewise, alleviating the employment-based backlogs and providing appropriate numbers of employment-based visas will ensure the continued growth and vitality of the economy. U.S. citizens and lawful permanent residents are often required to wait seven to 10 years (and sometimes up to 20 years) to reunite with their close family members. Such long separations make no sense in this pro-family, pro–free-enterprise nation, and they undermine one of the central goals of our immigration system: family unity.

Backlogs for employment-based immigrant visas also have increased dramatically for workers with certain high-demand skill sets from certain countries. These backlogs make it difficult for employers to attract and retain the best and brightest talent from around the world, thus undermining U.S. competitiveness in the global economy. Any workable comprehensive immigration reform proposal must eliminate both family– and employment-based immigrant visa backlogs and improve preference systems to adjust to 21st century realities.

Address Situation of Unauthorized People Living and Working in the United States

Most unauthorized workers are law-abiding, hardworking individuals who pay their taxes and

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contribute to society; as such, they are essential to many sectors of the U.S. economy. Let's require these people to come out of the shadows, register with the government, pay an appropriate fine, go through security checks, and earn the privilege of permanent lawful status to restore the rule of law in U.S. workplaces and communities.

Implement Smarter Enforcement Strategies

Congress should implement smart enforcement that includes effective inspections and screening practices, fair proceedings, efficient processing, and strategies that crack down on criminal smugglers and lawbreaking employers. At the same time, U.S. border security practices must facilitate the cross-border flow of goods and people that is essential to the U.S. economy. A vibrant economy is essential to the funding of this country's security needs.

Restore Fairness, Due Process, and Humanity to Immigration Courts and Detention Centers

Overly aggressive enforcement practices and the absence of urgently needed reforms to the immigration court system have severely undermined due process and fundamental fairness. Since 9/11, immigrants have faced more punitive enforcement practices, from increased apprehension and removal practices to skyrocketing growth in the number of people held in detention. Many detention facilities operate under substandard conditions and do not provide medical care. Simultaneously, as more noncitizens are being apprehended and detained, immigration courts and the Board of Immigration Appeals remain ill-equipped to provide fair and consistent review of the growing number of immigration cases that enter the system. These chronic problems not only deny basic due process to noncitizens who are detained and face removal, but also diminish the United States's standing as a nation governed by a fair and equitable constitution and rule of law.

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BLOGGING IT

Get more information from the AILA Leadership Blog on the immigration overhaul and join in the discussion by posting your comments. VOICE will run snippets of your comments in an upcoming issue.

These chronic problems not only deny basic due process to noncitizens who are detained and face removal, but also diminish the United States's standing as a nation governed by a fair and equitable constitution and rule of law.

Support the Public's Desire for Immigration Solutions

Polling and election analysis underscore the broad-based support for comprehensive reform among the American people. Voters want Congress to solve the immigration problem, and they believe it can be accomplished during this economic downturn and time of high unemployment.

According to a December 2009 poll,[1] 65 percent of voters prefer to have Congress take up the immigration issue this year rather than wait until later. Sixty-six percent of respondents supported comprehensive immigration reform before even hearing details of the plan. Support for reform continued to cut across party lines, with 69 percent of democrats, 67 percent of independents, and 62 percent of republicans supporting comprehensive reform. When given details, support for comprehensive reform increased. Requiring unauthorized immigrants to register with the government and meet certain conditions, including working, paying taxes, and learning English in order to apply for citizenship, was supported by 87 percent in December. These findings show continued support for reform following similar polls in November 2008 and May 2009, even during this country's harshest economic crisis in decades.

So, Congress, let's get moving on solutions that are long overdue. Our economy needs it, our immigration system requires it, and the people want it.

David Leopold *of David W. Leopold & Assoc. Co., LPA in Cleveland is the incoming 2010–11 AILA president;* **Jenny Levy** *and* **Loren Crippin** *are AILA National's outreach & communications manager and advocacy associate, respectively.*

1 *America's Voice*, Benenson Strategy Group Poll, December 2009.

MARKETPLACE

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I'd Like to Thank the Academy ...

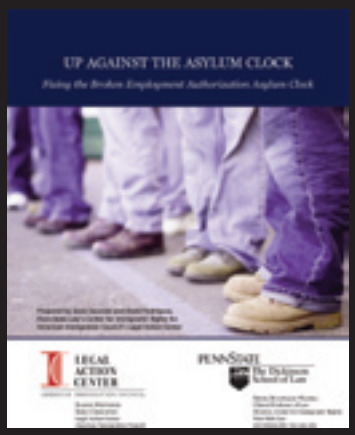
AILA's Military Assistance Program (MAP) is one of 13 programs to win the Award of Excellence in the first round of the 2010 Associations Advance America Awards program, a national competition sponsored by the American Society of Association Executives (ASAE) & The Center for Association Leadership. Washington, D.C. Mayor Adrian Fenty also recognized AILA for its efforts in helping those in need.

MAP is a collaborative effort between AILA and the Legal Assistance Offices of the U.S. Judge Advocate General Corps to expand traditional legal assistance for members of the military to include specialized help on immigration matters. MAP matches volunteer attorneys with military personnel stationed around the globe. Since January 2008, AILA has provided pro bono (free) legal services to more than 350 military families.

INTER ALIA

Renaming, Rebranding, Relaunching

The American Immigration Council (The Council) began 2010 with a new name, a new brand, and a new website, "The Community Education Center, International Exchange Center, Legal Action Center (LAC), and Immigration Policy Center (IPC) have never been busier, and our work never in greater demand," said Benjamin Johnson, the Council's executive director.



"Up Against the Clock ..."

For instance, IPC has published a series of "problem" and "solutions" papers, which clarify the problems with our broken immigration system and highlight what must be done to resolve these problems through comprehensive immigration reform legislation. And the LAC just released a new study with Penn State Law's Center for Immigrants' Rights titled, "Up Against the Clock: Fixing the Broken Employment Authorization Asylum Clock." The Council's Community Education Center just released a compelling You Tube video on What Makes Us American, and its International Exchange Center continues bringing highly qualified and motivated individuals to the United States through the J-1 visa program.

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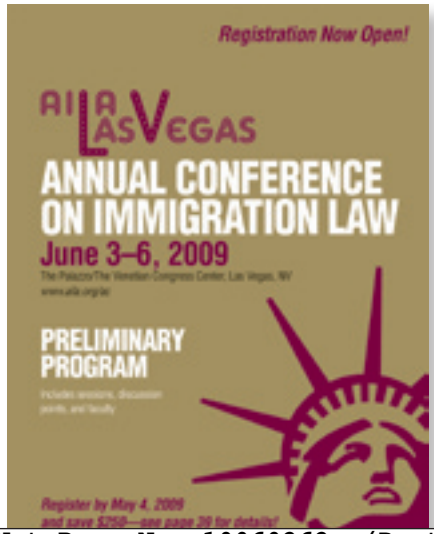


And the Emmy Goes to ...

Promotional materials for AILA's 2009 annual conference in Las Vegas have won the American Inhouse Design Award from Graphic Design USA. More than 4,000 entries were received in 24 categories. Only 15 percent of the entries are selected as winners. According to Graphic Design USA, "This ... program is ... the original and premier showcase for the outstanding, and too often underappreciated, work of inhouse design departments ... at companies and institutions."

TOP LEFT: ILLUSTRATION BY BRADLEY AMBURN/SHUTTERSTOCK.COM

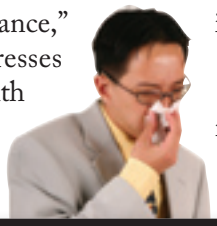
balance
\ˈbalən(t)s\
n: a counterbalancing weight, force, or influence: physical equilibrium: mental and emotional steadiness

Got Neti? Maintaining a Healthy Balance During Allergy Season

by DANIELLE POLEN

Danielle Polen *is associate director of AILA Publications. She is also an experienced, registered yoga teacher through the Yoga Alliance (E-RYT, RYT500) and a member of both the Mid-Atlantic Yoga Association (MAYA) and the International Association of Yoga Therapists (IAYT). She practices and teaches yoga in Washington, D.C., and also leads workshops and retreats throughout the United States and Puerto Rico. She can be reached at dpolen@aila.org.*

Maintaining balance in our lives is no simple task. Indeed, the mere act of juggling our many daily responsibilities can lead us to feel as if we're careening downhill on a rickety roller coaster—without brakes. Welcome to "Balance," where our first tip addresses maintaining balanced health during allergy season.



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Summertime in Washington, D.C., is an exotic mélange of colorful blooms, open-air cafés, presidential sightings, and a multitude of outdoor activities from which to choose. Unfortunately, summertime—both in the nation's capital and elsewhere—also can be a time of misery for individuals who suffer from seasonal allergies.

Many pollen and mold allergy sufferers, including yours truly, turn to the ancient practice of *jala neti* (nasal irrigation) for seasonal allergy relief. For this technique, lukewarm salt water is poured from a *neti* pot into one nostril with the head tilted in such a way that it exits through the other nostril. The procedure is then repeated on the other side, after which the nose is dried. The practice of *jala neti* naturally cleans and protects the nasal passages, one of our body's first lines of defense against illness, and has been used for thousands of years by practitioners of Ayurvedic medicine to alleviate sinus and allergy problems.

Are you ready to *neti*? The Himalayan Institute offers a video guide showing just how easy it is to use a *neti* pot. There's also an easy-to-follow YouTube demonstration—and if you can stand it, there are some really humorous *neti* spoofs, as you can imagine. Get started today and breathe easier right away!

Do you swear by your *neti* pot? Check out comments from some *neti* users on a CNN iReport.

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What's Happening

THE 4-1-1:

NEIL RAMBANA, of Rambana & Ricci, P.A., spoke to some young Tallahassee students about immigration in May 2010.

LAURIE WOOG of New Jersey's Woog Law Office published an article about *Kazarian v. USCIS in the New Jersey Law Journal*. The Ninth Circuit case deals with evidentiary requirements for extraordinary ability petitions.

AILA law student member **CHRISTINA M. FIALHO**, along with the help of AILA member **RANDALL CAUDLE** and AILA Member Outreach Associate **PAUL LEAHY**, founded the immigration law student group at Santa Clara University School of Law.

REGINA GERMAIN, author of *AILA's Asylum Primer*, now teaches Asylum Law and an Asylum Law Practicum at the University of Denver Sturm College of Law.

NANCY MAO has opened her solo practice in Martinez, CA. She also has a satellite office in Sacramento.

ELIZABETH RICCI of Rambana & Ricci, P.A., was honored at Hotel Duval in Tallahassee as a Distinguished Woman in Law by the Girl Scout Council of the Florida Panhandle for her achievements, commitment to the community, and pro bono service.

MARIELA CARAVETTA has been selected as "Mujer Destacada" by the Spanish Newspaper, *La Opinion*. She is one of 30 women who received this distinction.

SUSAN HENNER of Scarsdale, NY, gave birth to a baby boy, Max Ethan Smith, on January 23, 2010.

DEBRA AUERBACH CLEPHANE was named one of the 2009 Super Lawyers within the firm of Vercruysse Murray & Calzone.

ADAM CHESTER of Las Vegas has accepted a position with USCIS as associate regional counsel in El Paso.

GARY C. FURIN of Atlanta (join date: 5/7/1975) and **RICHARD R. RULON** of Philadelphia (join date: 5/17/1975) are celebrating their 35th anniversary as AILA members.

AILA's "unofficial" poet laureate, **LESLIE HOLMAN**, submitted these lyrics to the tune of "Take Me Out to the Ballgame":

Why the major leagues should boycott AZ:

They'll take you out of the ballgame

They'll pick you out of the crowd.

They'll hand you a warrant, your bags they will pack

They'll make sure you never get back

'Cause they root, root root for their "home" team

If you're not white it's a shame

Don't say uno, dos, or tres strikes you're out at an AZ ballgame!

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AND: Visit us in the Exhibit Hall during the AILA Annual Conference, June 30–July 3, for in-person trainings.

(Posted 06/02/10)

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- 33 Due Process/Enforcements Sessions
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- 21 Fundamentals Track Sessions
- Federal Court Mini-Track
- PERM Mini-Tracks
- Interactive Workshops
- Criminal Law Panels
- Asylum Sessions
- 16 Law Practice Success Sessions
- Daily Brown Bag Lunch Sessions
- 4 Days of Practice Roundtables
- Dedicated Networking Sessions

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