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A Primer on U.S. Immigration Law, Issue Spotting, Hypotheticals, and Deciding to Become an Immigration Attorney

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Introduction

Malcolm Gladwell, the New York Times bestselling author of *Outliers* has observed that to be successful in any field, it takes approximately 10,000 hours (five years) of practice. Experience confirms his observation. This article is a primer which paints the gestalt on the immigration law canvas, the details of which take about five years of fulltime dedication to fully unfold, understand and utilize. It will be exemplified by hypotheticals with a view toward deciding whether to practice immigration law.

Permanent and Temporary Intent

An "alien" is a noncitizen or a national of the United States typically born in a foreign country. The most basic tenet of immigration law is that all aliens are presumed to have immigrant intent unless otherwise proven. Nonimmigrant intent is possible if immigrant intent is overcome.

Immigrant intent is intent to reside permanently or indefinitely in the U.S. Of course, it doesn't mean always. It really means having one's roots here without intention of uprooting them. Permanent residents are permitted to travel. But if they stay away too long, they can be presumed to have abandoned their permanent residence until proven otherwise. The immigrant intent presumption doesn't apply for permanent resident aliens who have been out of the U.S. for more than six months.

Nonimmigrant intent is limited in time and purpose. Overcoming immigrant intent (especially for those applying for temporary visas) can be difficult, particularly for citizens of countries with economic disparity with the U.S. It is the chief reason for nonimmigrant visa denials. Consular officers have a difficult time believing that an alien will come to the U.S. temporarily and leave.

Framework and Major Contemporary History

There are essentially two parts to immigration law: one is voluntary admission into the U.S. and the other is departure, voluntary or involuntary by "removal" (legacy deportation) from the U.S. An alien must prove admissibility to enter the U.S. Within the realm of admissions, there are three types: nonimmigrant, immigrant, and entries without inspection. Voluntarily induced departures occur

when a person holds a lawful immigration status or when an immigration judge or officer permits “voluntary departure”. Involuntary departure, “removal” takes place when terms of admission are violated or ignored altogether (in the case of illegal entrants) and a judge orders “removal” from the U.S.

Removal proceedings in immigration court replaced the bifurcated proceedings of deportation and exclusion in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), passed during William Clinton’s presidency. When lay persons or the press describe deportation, they really mean removal, unless they’re referring to old cases under pre-1996 law.

IIRAIRA is the most stringent immigration law passed in the history of the United States. IIRAIRA also notably created the infamous basis of removability for aggravated felons and inadmissibility, as well as removability, for false claims to U.S. citizenship. There is no waiver or other relief available for an alien who made a false claim to U.S. citizenship after September 30, 1996.

Ironically, the most generous immigration laws in recent history were passed during Republican administrations. Congress passed under Ronald Reagan the Immigration Reform and Control Act (IRCA) of 1986, referred to as “Amnesty.” This was the sole true amnesty ever passed in U.S. immigration history. No proposals described in the press in recent years as amnesties are amnesties in the tradition of IRCA. IRCA legalized some two million undocumented aliens. The press mistakes Comprehensive Immigration Reform (CIR) debated in recent congressional sessions for amnesty because of the large numbers of undocumented aliens who would be permitted to become permanent residents under CIR.

Under the watch of George Bush Senior, the Immigration Act of 1990 expanded the types of immigrants to include “million dollar” investors, widows/widowers, and permanent diversity immigration lottery. It established the “O” visa category for extraordinary ability aliens in the arts, science, business, education, and entertainment; the “P” category for professional athletes; the “Q” visa for “international cultural exchange; “R: visas for religious workers; and other categories for defense department and cooperative special education programs. It also created Temporary Protected Status for nationals of countries suffering political or environmental upheaval.

In more recent years, provisions of the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, reauthorized in 2006) included controversial provisions for indefinite detention of aliens suspected of terrorism. More recently, a far more generous law, the Child Status Protection Act (CSPA) passed in 2002, allows over 21 year old sons and daughters of U.S. citizens, permanent residents, and derivatives of principal aliens who would normally age out (become too old) on their 21st birthdays to qualify for immigration status normally

reserved for those under 21 when usual processing times (not quota waits) create delay and thereby disqualify them due to no fault of their own on account of the passage of time.

When George Bush Jr. was unable to pass comprehensive immigration reform, the Department of Homeland Security stepped up enforcement of immigration laws and increased the number of removals to approximately 400,000 annually. During the end of his administration and the beginning of the Obama administration, immigration advocates sought to at least pass the Dream Act for higher achieving high school graduate undocumented aliens who were brought to the U.S. when they were young and are ineligible for traditional means of securing immigration status. These efforts have been in vein with a Congress single mindedly focused on enforcement and border protection. The argument of immigration advocates is that the U.S. should not lose talent of young adults who may benefit the U.S. due to the poor decisions of their parents. Between this and stricter recent adjudication for immigration benefits across the board, Congress appears to be more concerned with enforcement than the benefits that aliens bring to the U.S., even those who are talented. The downed economy has added to the negative environment toward aliens in the U.S. today.

Admission and Removal

Within the realm of admissions, there is either nonimmigrant (temporary) or immigrant (permanent) admissions. There are also entries without inspection which are not considered to be admissions at all. If an alien is inadmissible to the U.S., he may be admitted with approval of a waiver. There are different waivers for immigrants and nonimmigrants. Nearly all bases of inadmissibility can be waived for nonimmigrants, except for those who are terrorists and the like. Immigrant waivers are predicated on having certain familial relationships with U.S. citizens or permanent residents and some involve a showing of extreme hardship to such relative if the alien was not permitted to enter the U.S. or the citizen relative was required to depart the U.S. to remain with the alien. Both nonimmigrants and permanent residents may be inadmissible; however, there are various waivers for both.

The bases of inadmissibility include: having a communicable disease of public health significance (like HIV); being improperly vaccinated; having a physical or mental disorder; drug abuse; having been convicted of or admitting commission of acts of a crime of moral turpitude or controlled substance; having two or more convictions (except purely political) if sentenced to confinement of five years or more; aliens coming to the U.S. to engage in prostitution or who have engaged in it within the previous 10 years; security risks (those engaged in terrorist activities or who seek to violate U.S. laws relative to espionage, sabotage, prohibiting export, or any activity in opposition to the U.S. government); members of the Communist party; Nazis or other persecutors; those likely to become a public charge; persons seeking skilled or unskilled labor without a labor certification;

physicians who have not passed certain examinations, are not licensed to practice in a state, and those incompetent in English; certain healthcare workers, unless certified by the Commission on Graduates of Foreign Nursing Schools; those without proper documents, illegal entrants, and immigration violators; those who commit fraud or make material misrepresentations in seeking an immigration benefit (visa, application, or entry fraud); those ineligible for U.S. citizenship; and miscellaneous reasons (polygamists, international child abductors, and unlawful voters).

Removability is based on similar reasons as inadmissibility, though they're not exactly the same. Classes of removable aliens include those inadmissible at entry or during adjustment of status; those who violate their nonimmigrant status; those who commit marriage fraud; those convicted of moral turpitude or controlled substance crimes, depending on when and how many; aggravated felons; drug abusers and addicts; firearm offenders; those convicted of crimes of domestic violence, stalking, and child abuse; those failing to register (with immigration authorities); those falsely claiming U.S. citizenship; those who engage in espionage, sabotage, terrorism, etc.; those who have become a public charge within five years after entry for reasons other than those which arose after entry; and unlawful voters. As with inadmissibility, there are waivers for removability as well.

Removability can be cured by certain waivers as well as other relief, depending on the grounds of removability. Cancellation of removal both for permanent residents as well as those who are not permanent residents is possible. Where the alien has been a permanent resident for no less than five years, physically present in the U.S. for no less than seven years, and has been convicted of no aggravated felonies, cancellation of removal is possible. For those who are not permanent residents, cancellation of removal requires physical presence for not less than 10 years, good moral character, and exceptional and extremely unusual hardship to one or more close relatives: U.S. citizen or permanent resident spouse, parent, or child(ren). Whether permanent resident or not, there is an element of discretion involved with these cases and a seemingly approvable case can be denied in discretion.

Like other areas of federal administrative law, Immigration and Nationality law is limited by the Administrative Procedures Act. Federal agencies involved in the immigration process cannot abuse their discretion when it comes to statutes which Congress allows discretionary decisions. Those portions of statutes that allow discretion permit a level of autonomy necessary for individual case processing, but not frivolous, capricious regulations and other impermissibly enforced agency authority.

Visas

For those who never come in contact with the removal end of immigration law, which is of course preferable, their task is to secure the proper visa classification and remain in legal status.

The term “visa” is often confused with status in the U.S. A nonimmigrant visa is a document issued by the U.S. Department of State through a consular officer at a U.S. embassy or consulate abroad. It is issued after the application is submitted by an alien who wishes to enter the U.S. temporarily in one of dozens of nonimmigrant categories. A personal interview is required for the issuance of a nonimmigrant visa. If the alien qualifies for the particular visa category of application, a visa will be issued in that category. While it is possible to possess two or more valid visas during the same or overlapping validity periods, it is not possible to possess more than one immigration status in the U.S. at a time. The alien must choose one at time of entry (or at time of change of status). The most common visa is the visitor for pleasure visa, the B-2. Hundreds of millions of B-2 entries are effectuated annually.

Nonimmigrant visas contain identifying information about the passport holder, the post where issued, the visa number, the visa category, the date of issuance, the number of entries permitted on the visa, and the date of expiration. The visa permits a Customs and Border Protection Officer to admit the visa holder to the U.S. during the inspection process at a port of entry (air, land, or sea) in the category of the visa. A nonimmigrant alien must pass not just at the consulate, but also at the port of entry. Issuance of the visa doesn’t guarantee admission to the U.S. If admission is successful, the alien will usually receive a white card which includes identifying information about the alien, the date of admission, the classification of admission, and the date of expiration of stay. This card is called an “I-94.” The alien must depart the U.S. or extend or change status by the date of expiration to maintain lawful status in the U.S. Admissions can be authorized with a visa, or for some nationalities, without a visa. Countries with fewer incidences of unauthorized stays, primarily many European nations, Japan, and Australia, are permitted to enter as visitors for pleasure or business on visa waivers. Canadians are permitted to enter the U.S. in nearly all categories without any visa at all. Nevertheless, they must abide by the nonimmigrant category of their entry. As a result, Canadians are often under the mistaken belief that they are not required to maintain lawful status in the U.S., sometimes with devastating consequences.

The most common nonimmigrant classifications that immigration attorneys work with are visitors for business or pleasure, temporary workers (specialty workers and others), intracompany transfers, investors and traders, extraordinary workers, fiancés, and students. There are many other categories which attorneys less often work with, such as diplomats, crewmen, victims of certain crimes or human trafficking, amongst an alphabet soup of categories that range from the A

visa to the V visa. Dependent spouses and children under 21 years old can qualify as dependents of a principal alien.

Nonimmigrant to Immigrant to Citizen

There is a continuum of legal statuses in immigration law. The most limited is temporary nonimmigrant status. The next status, the one most sought by aliens is immigrant status, also known as permanent resident status reflected in a Permanent Resident Card, now white in color but which in the past has been varying shades of green and even pink. It is also referred to as “green card” on account of one of the historic versions of the card. Today the cards are issued to permanent residents who enter on immigrant visas and those who have been successful in applications for adjustment of status. The difference between these two is a matter of procedure. An immigrant visa is the documentation procured from an embassy or consulate abroad for admission to the U.S. the first time as a permanent resident. The other way of achieving permanent residence is within the U.S., not abroad, via the procedure called adjustment of status. Both achieve permanent residence.

Note the very important difference between adjustment of status and change of status. Change of status refers to changing from one nonimmigrant status to another, whereas adjustment of status changes from nonimmigrant (or sometimes expired or undocumented) status to permanent residence.

Permanent resident status is achieved through family or career relationships. Spouses of U.S. citizens, children under 21 of U.S. citizens, and parents of U.S. citizens who are at least 21 years old are all immediate relatives. Immediate relatives are the largest group of immigrants processed. Until 9/11, approximately one million aliens immigrated to the U.S. annually in this manner. Since then, the numbers have reduced to approximately 750,000 per year. There are an unlimited number of immediate relative immigrant visas and adjustments of status applications annually. As long as the relationship is established through approval of an I-130 Immigrant Petition for Alien Relative, and the alien is admissible, the alien qualifies as a permanent resident without waiting like preference classification aliens must wait.

Apart from immediate relatives, preference aliens subject to an annual quota of visa availability. They secure permanent residence with wait times ranging from those filed today if there is no backlog to approximately 23 years, depending on the preference classification and country of birth of the applicant. Countries that are backlogged more than the rest of the world’s approximate 200 countries are China, India, Mexico, and the Philippines. These countries are oversubscribed more than others because they have more aliens from these countries applying for permanent residence than any others. Right now the most backlogged

country and category is for siblings of U.S. citizens who are natives of the Philippines.

Family Based Immigrant Preference Classifications

Apart from immediate relatives, some other family relationships also qualify an alien for permanent resident status. Family members who qualify for immigration status who are not immediate relatives are known as preference aliens. Note that under the Immigration and Nationality Act, “children” refers to under 21 year old unmarried offspring. Sons and daughters refer to over 21 year old offspring.

This term “preference” is something of a misnomer, as they are not preferred compared to immediate relatives. There used to be a non-preference category which was a spill over when extra visas were available. This category currently does not exist. Preference aliens are limited by quota based on country of birth and preference classification. Cousins, grandparents, aunts and uncles, and relationships other than the preferences classes that follow, don’t qualify for immigration status at all. From that perspective, the following family based preference classifications are not just preferred but are necessary:

First Preference – Over 21 unmarried sons and daughters of citizens

Second Preference - Spouses and children and over 21 year old unmarried sons and daughters of permanent residents

Third Preference - Married sons and daughters of citizens

Fourth Preference - Brothers and sisters of over 21 adult citizens

Due to predictable oversubscription, whereby demand outstrips the number of visas available annually per country and per category, permanent residence is achieved after some period of years for family based preference aliens, either through immigrant visa processing or adjustment of status to permanent residence.

Employment Based Immigrant Preference Classifications

Before the filing of an employment based permanent residence petition, many aliens immigrating through their work are required to go through the Labor Certification process. A Labor Certification is not to be confused with a Labor Condition Application. Both are issued by the Department of Labor and require

payment to the alien by an employer of the prevailing wage, but that's where the similarity between these two applications ends.

The Labor Condition Application is a simple application used for temporary specialty occupation H-1B cases whereas Labor Certification is a lengthy, complex process whereby the U.S. job market is tested to see whether there is a qualified, willing, and available U.S. worker to perform the job offered the alien based on carefully crafted job description and requirements necessary to perform the duties. After unsuccessful recruitment of a U.S. worker, when a minimally qualified U.S. worker cannot be located for the position offered, the position may be permanently offered to the alien.

The job duties and requirements for qualifying to perform the duties are very specific, and the alien must meet or exceed the requirements. A common problem for the uninitiated is drafting a Labor Certification which, while may be approved, is poorly drafted so that the alien doesn't qualify for the position based on the requirements stated on the Certification. If that happens, then the I-140 Immigrant Petition for Alien Worker is denied and all work done is for naught, sometimes with devastating, life changing results. This requirement is simply avoided by making sure that the alien is qualified for the position as drafted before commencing employment with the employer or, if while employed by the Labor Certification employer, by making sure that the future job is more than 50% different from the current (and/or past) job(s).

Arguably, there are more pitfalls in the preparation and processing of labor certifications than in any other immigration application only rivaled by the fifth preference employment creation visa. For that reason, they should be avoided where possible. Below is a listing of employment based petition categories. The first, fourth and fifth preferences always avoid labor certification. When the second preference involves a National Interest Waiver, labor certification is also avoided. It is impossible though to avoid it for many employment based aliens. All professionals taking up jobs which require bachelor degrees, skilled and unskilled laborers, and most master degreed and exceptional ability aliens must have an approved labor certification before an I-140 petition can be filed.

Employment based petitions are not allotted in unlimited numbers. Like the family preference categories, they are also referred to as "preference aliens" and likewise are subject to annual quotas varying by classification and country of birth. The employment based preference classifications include:

> First Preference - Priority Workers: extraordinary ability aliens, multinational executives and managers, and outstanding professors and researchers

Second Preference - Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability

Third Preference - Skilled Workers, Professionals, and Other Workers

Fourth Preference - Certain Special Immigrants: Religious Workers

Fifth Preference - Employment Creation, including at least 3,000 reserved for investors in a targeted rural or high-unemployment areas, and 3,000 for investors in Regional Centers

Special rules not covered here apply to admission of medical doctors.

While the time frames for handling cases based on backlogs varies month by month and is published in the Visa Bulletin of the U.S. Department of State, there may be ways of speeding the process. One way is cross-chargeability. Cross-chargeability refers to an alien seeking permanent residence who is native of a country that is backlogged longer than his or her spouse. In that case, the country of the spouse's nativity can be attributed to the alien to speed the case up. A second way cases can be sped up is by choosing the quicker means of acquiring immigrant status when processing via adjustment of status is very different from immigrant visa processing. Choose the faster procedure. A third way is the use of Premium Processing. For an additional $1,000.00, the government must adjudicate the immigrant petition within 15 calendar days, though currently it is not available in many cases. Only certain forms can be premium processed. The rules regarding which procedure is faster change sometimes very rapidly and should be checked when a case is ripe for final permanent residence processing.

Permanent residence is finally achieved for preference aliens, whether employment or family based after some period of years, either through immigrant visa processing or adjustment of status to permanent residence.

The Importance of Maintaining Status

It is possible to change from one nonimmigrant status to another nonimmigrant status and it is possible to extend nonimmigrant status, as well. In both instances, maintenance of status without violation is necessary. It is not possible to change or extend from a visa waiver entry, but it is equally important to maintain status as a visa waiver entrant. Failing to do so could result in future visa or entry denials.

It is also possible to adjust status to permanent residence for preference aliens who have maintained status in the U.S. and who have a current priority date. The

priority date is established in employment based cases on the date of filing a labor certification or I-140 (when the case does not entail a labor certification). In family based cases it is set upon filing an I-130. Preference aliens who have not maintained status generally are not eligible to adjust status, absent approval of a waiver. Immediate Relatives need not have maintained status in the U.S. to qualify to adjust; however, they are required to have made a legal entry, with exceptions. Where maintenance of status is required for adjustment, failing to maintain status can ultimately affect a person's ability to remain in the U.S. legally altogether.

The politics of immigration reveals the schizophrenic nature of immigration law in the U.S. today. At once, a person can be authorized to be in the U.S. lawfully while at the same time, for certain purposes can be ineligible to secure permanent residence. A person can be admissible and removable at the same time. A common example of this is the applicability of the Immigration and Nationality Act §245(i). Section 245(i) permits aliens to qualify to adjust status to permanent residence in the U.S. when they would normally not be permitted to. This would happen if they entered illegally or were in an expired status (and they are not immediate relatives). Generally, a person must be in legal status in order to adjust status in the U.S. as a preference alien. Before IIRAIRA, it was possible for persons who had previously entered the U.S. illegally or were in expired status to depart the U.S. and simply return to the U.S. on immigrant visas, but after the 1996 law, aliens became inadmissible to the U.S. if they entered illegally or were in an expired status for more than 180 days. That means that theoretically, the person could qualify substantively for permanent residence but be unable to effectuate it due to their unlawful presence. Section 245(i) cured this defect by permitting those who had immigrant petitions or labor certifications filed prior the April 30, 2001, and were physically present in the U.S. on December 20, 2000, to adjust their status to permanent residence, despite illegal entry or expired status. But even with this generous legislation, such persons remain removable while at the same time being eligible to adjust status in the U.S. and they are sometimes removed from the U.S. Sometimes it is a matter of the luck of timing whether a person becomes a permanent resident or is removed.

Refugees and Asylees

The sole difference between refugees and asylees is procedural. Refugees apply for a refugee status outside their home country and outside the U.S. typically involving a nonprofit or nongovernmental organization to help place the person from abroad, whereas an asylee is one who makes an application for asylum filed at the Citizenship and Immigration Services office of the Department of Homeland Security in the U.S. or abroad. There are a few CIS offices outside the U.S. though most are in the U.S.

It is also possible to make an application based on fear of persecution during the admissions process at the time of nonimmigrant admission to the U.S. even when a person appears to be securing entry with a different sort of nonimmigrant visa.

Refugee and asylee status are predicated on well founded fear of persecution on account of race, religion, membership in a particular social group, ethnicity, or political opinion. They are not supposed to be political, but have been applied that way, for example, in the context of political or religious refugees from the former Soviet Union.

If an application for asylum is denied, it can be renewed in immigration court. The likelihood of success in asylum cases is small, though likelihood of success increases dramatically when aliens are represented by counsel.

Refugees and asylees qualify for permanent residence in the U.S. after one year in either status.

Naturalization and Citizenship

After securing permanent residence, the most protected status an alien can achieve is that of U.S. citizen. U.S. citizenship is secured in a number of ways.

The most common means of becoming a U.S. citizen is through birth in the U.S. Nearly all people born in the U.S., except notably diplomats' children, are citizens of the U.S. at birth. The next most common path is through naturalization, after being a permanent resident for five years or three years (for spouses of U.S. citizens for three years), and possessing good moral character for the requisite period of residence (except for some applicants in the military) and being physically present in the U.S. at least half the time as the requisite residence period (also excepting some military applicants). Applicants must also pass an English language and history test. Naturalization is also possible for those who serve in active duty military combat, regardless of their status. It is thus possible to be become a U.S. citizen without interim permanent residence normally associated with naturalization.

A less common but a more powerful manner of becoming a U.S. citizen is by descent through a U.S. citizen parent or earlier ancestors. Depending on the year of birth of the subject, the citizenship status of the parent(s) before birth of the subject, and the period of physical presence in the U.S. of the parent(s) before the birth of the subject, the subject can obtain U.S. citizenship remarkably even if the subject is otherwise undocumented. Citizenship acquired through descent can sometimes confer citizenship down through several generations and is most

prevalent for those living closer to the Mexican and Canadian borders where families sometimes consisted of parents from both countries.

Hypotheticals

1. The Frustrated Fiancée

Facts: Aida is a 36 year old single citizen of Armenia. She is a professional pharmacist and has no children. Her sister lives in the U.S. and is a U.S. citizen. She met a nice single American man, Bobby, in September, 2005. Bobby is 50 years old. She met him through a close friend who is married to Bobby's brother. They began their relationship by corresponding online by email and instant messaging. They speak of things in Armenian as Bobby is also of Armenian descent. Bobby invites Aida to visit him in the U.S. Aida makes an application for a B-2 visitor visa at the American Embassy in Yerevan in the February of 2006 but is denied. They continue their conversation over several months. Bobby and Aida would both like to have children and discuss the possibility of marriage. Bobby visits Aida in Armenia in September 2006 for two weeks. While there, they organize for her to apply for a student visa so she can learn English in the U.S. for a few months and get to know each other better. The student visa application is also denied. Bobby returns to the U.S. and their conversation continues. Six months pass and they are desirous to move their relationship forward still. In March 2007, Bobby contacts an immigration lawyer for advice as to how they can be together and informs the lawyer that he wishes to go to Armenia to spend Christmas of 2007 with Aida and bring her back to the U.S. with him. Is this feasible? What is their best course of action?

Analysis: Aida applied for two nonimmigrant visas, first as a visitor (INA 101(a)(15)((B), 22 CFR 41.31, and 9 FAM 41.31) but then as a student (INA 101(a)(15)(F) and 8 CFR 214.2(f)) within the period of seven months. She was denied because she was viewed by the consul as an intending immigrant. Aliens of working age such as Aida who is 36 and a professional pharmacist can earn a much better living in the U.S. than in Armenia. Moreover, Aida has a U.S. citizen sister and a close friend living in the U.S. She has no children. Under these circumstances, it is difficult for Aida to enter the U.S. as a traditional nonimmigrant as she will likely be denied again as an intending immigrant. The seven month hiatus, while long enough to change her intention, is not long enough to convince the consul that she will depart the U.S. when lawfully required to. Fiancée visas are appropriate for couples who are free to marry (not currently married), who have met each other within the past two years, and who intend to marry in a bona fide marriage within 90 days of the alien's entry to the U.S. (INA 101(a)(15)(K)(i) and 9 FAM 41.81) The bona fides of their relationship is apparent given several facts. While their attempts to be together to get to know each other on a temporary basis have failed, they did not give up. They have

been getting to know each other over one and a half years by the time Bobby contacts the lawyer. He has visited Aida within the past two years. They are both Armenian and both wish to have a family. Even though there is a 14 year age difference, this is not highly unusual so as to indicate lack of bona fides of their relationship. Aida's close friend is married to Bobby's brother which is neither indicative of bad intent or good intent. Altogether, they have much in common. Although Aida was unsuccessful in securing a temporary visa, is now applying as a fiancé, and will eventually become an immigrant, the facts are such that her intentions were not fraudulent in applying for the prior visitor and student visas at those times. She intended to engage in those activities previously, but as the relationship with Bobby grew, the time ripened to permit qualification for the fiancée visa now.

Immigration lawyer recommends filing a fiancée petition. Upon arrival in the U.S., Bobby and Aida married and applied for her permanent residence by adjustment of status. (INA 245, 8 CFR 245.1 et. seq.) They both lived happily ever after.

2. The Ambitious Academic

Facts: Beta graduated in June 2008 from a U.S. university with a Masters degree in Organic Chemistry. He currently holds an F-1 student visa. He won a small scholarship in college, but apart from that, and graduating cum laude, nothing stands out about his academic life. He has applied for and received Optional Practical Training and an Employment Authorization Card valid for a year ending July 15, 2009. He has been offered the opportunity of continuing on with the employer for which he is training, Green Technologies, Inc. which is a start up that luckily received a lucrative government contract and participates in E-Verify. This is his second employer since graduation. He worked with the first employer, a company similar to Green - Blue, Inc. - in a similar position as he has now for six months after graduating. He is an Organic Chemist researching the effects of carbon exposure to plant life for the development of products by Green Technologies to suppress or halt any negative effects. To do this work, Green Technologies requires a Masters Degree in Chemistry or Chemical Engineering and detailed knowledge of greenamagigs, computerkazams, and digitalmuck which Beta learned as part of his advanced course work and while at Blue, Inc. He and his current employer have spoken about keeping him on board for a very long time. His boss believes he is very talented and has a promising future. Beta is from mainland China. What are his options?

Analysis: The most obvious choice is to extend his F-1 student status (INA 101(a)(15)(F) and 8 CFR 214.2(f)) as an alien wishing longer employment authorization as a graduated student in one of the Scientific, Technology, Engineering, or Mathematics (STEM) fields. As his field is in organic chemistry and this is on the STEM list of majors, he qualifies. Even though his employer is just a start up, they have a lucrative contract with the government and are part of the E-Verify system, which is required of STEM employers. Beta qualifies to

extend his employment authorization in Optional Practical Training as an F-1 student graduate until January 14, 2011, 17 months after his current practical training expires on July 15, 2009. He should apply early to maintain authorization to work continuously; otherwise, upon expiration of his Employment Authorization card in July 2009, he will have to cease working until approval.

As Green Technologies seeks Beta for a longer term, they may keep in mind the H-1B specialty occupation category (INA 101(a)(15)(H)(i)(b) and CFR 214.2(h)). However, since H-1s are subject to an annual quota of 65,000 beginning each year on October 1, the application must be carefully timed. Applications for H-1B status may be filed as early as April 1 of the same year, six months in advance of the earliest start date of employment for the next fiscal year (October 1). Even though Beta's employment won't expire upon extension until January 14, 2011, they should apply by April 1, 2010, if they continue to wish to keep him thereafter. That's because it is possible that H-1B numbers will run out and they might not be able to keep him at all after January 14, 2011.

Since Beta is currently an F-1 student, he must intend in this status to remain in the U.S. temporarily and depart at the end of his lawful stay. But upon securing H-1B status by change of status (assuming numbers don't run out), he may also have the intention to be in the U.S. simultaneously on a permanent basis per special rules which permit dual intent for H-1 aliens. They can intend to be in the U.S. temporarily and permanently at the same time.

The H-1B qualifies specialty occupation aliens for a three year renewable status, up to six years. If the company wishes to keep him longer than that, it would be necessary to file for a labor certification (INA212(a)(5)(a) and 20 CFR 656) or I-140 petition before the start of the sixth year to keep him here in legal status during the several years it will take to acquire permanent residence. As China is oversubscribed, Beta's priority date may not be current by the time his second H-1 expires, so the permanent case must be carefully timed to keep him here in H-1B status in the interim.

It is highly unlikely that Beta will rise to the level of national interest waiver, exceptional ability, or extraordinary ability alien 1st or 2nd preference classifications to avoid traditional labor certification, unless in the near term he makes some revolutionary discoveries that are widely accepted.

Though Beta will be able to remain in the U.S. until January, 2011, without interruption, it cannot be predicted whether he will be able to secure permanent residence without first having to depart the U.S. or continue in school at least for the time it takes to process for permanent residence. To remain in the U.S. uninterrupted, he will have to secure H-1B status. As long as the economy is weak this won't be a problem as the limited number of H-1s is less likely to be an issue. But if the economy strengthens, he will need to be lucky to get one of the 65,000 H-1s available.

3. The Entrepreneurial Employer

Facts: Eddie Entrepreneur is a citizen and native of Canada. He is engaged in online business-to-business software development through a company he founded, CompuTrade, and markets his software to small and medium sized businesses which seek to optimize their systems. He contracts with many outsourced computer programmers and a sales team which works independently. The vast majority of his clients are located in the U.S. The rest are Canadian. On a shoestring budget, he has managed to realize huge income, including sales with the U.S. of over $100,000 per month over the past year, even though he has no employees and little overhead. Eddie wishes to reside on the beach in Malibu, and with his laptop on the sand conduct business. What are his immigration options?

Analysis: The E-1 nonimmigrant category of INA section 101(a)(15)(E)(i) is for those who are Treaty Traders. Treaty Traders must be citizens of a country that is signatory to a treaty with the U.S. which permits issuance of the E-1 status. Canada is such a country. Though a vast majority of Canadian statuses don't require a visa, the E-1 does. Also, substantial trade, and majority of trade must exist between the treaty country and the U.S., as is the case here. Trade can be not only in goods, but in services too. Online software can be viewed as partly goods as well as arguably services. Eddie has created substantial trade with the U.S. by virtue of his $100,000 per month in transactions between the two countries and with no others. Substantial trade must be over time and with a number of transactions. One year is a sufficient track record for issuance of the visa, but he'll need to keep it up, though that high a level is not necessary. The Treaty Trader must manage and direct the enterprise, which he does by virtue of his work with many programmers and sales reps. If Eddie marries an alien, he can bring her and his under 21 year old offspring to the U.S. as derivatives. Spouses of E-1s are eligible for employment authorization.

Another option would be an E-2 status for those who make a substantial investment in an active business which the alien manages and directs and which is not marginal. Substantial investment amount depends on the type of business. Surely what is substantial for a manufacturing company will be more than a service based business. Marginality refers to the effect on the local economy either by generating revenues more than necessary to support the alien and his family and/or by creating employment opportunities for U.S. workers. Unlike the EB-5 employment creation permanent residence category, the E-2 does not require that a certain number of jobs be created. Eddie could set up shop in the U.S. with a relatively small investment which could still be considered substantial for his business and as long as he manages and directs it, and creates substantial net income and/or creates jobs. Such are not required to be W-2 employees, though it may be easier to prove that jobs were created this way. Net

income should be sufficient as expenses appear to be quite low, so marginality, a frequently sticky issue for E-2s, is avoided.

Permanent residence is not likely however for Eddie. He doesn't qualify for the million dollar investor case. For that he would have to create 10 fulltime U.S. payroll employees, which he has not and doesn't anticipate doing. He also doesn't qualify as a multinational executive under the 1st priority category as it would be difficult to establish such function as he sits on the beach to work. Though wildly successful, it would be difficult to convince a consular officer of such characterization of his position even though advances in technology sometimes lead the way in visa classifications such that someday the Citizenship and Immigration Services might recognize his function as that. Fortunately, the E-1 status can be extended over the course of Eddie's entire career in CompuTrade, even for decades. Thereafter though, unless he secured permanent residence another way, his stay in the U.S. would need to end. That would not preclude him from being a snow bird and visiting the U.S. seasonally or otherwise.

4. The Undocumented Citizen?

Facts: Maria was born in Mexico on April 17, 1954. Her father, Glenn, was born in Pennsylvania on March 24, 1934 and lived there until age 18 when he moved to San Diego and joined the U.S. Navy on June 15, 1952. He married Fidalma, Maria's mother, on June 20, 1953 in San Diego. Fidalma is a Mexican citizen who has always lived in Mexico. She has a visitor for pleasure visa and comes to San Diego from time to time for shopping only. Glenn and Fidalma had several other children, some of which were born in Mexico and some in the U.S. Glenn lived on the Naval Base or at sea during his one tour of duty and when he had time off, he visited his wife who lived in Tijuana, Mexico, until he was other than honorably discharged from the Navy on June 15, 1955. He moved to Mexico for the following five years. Glenn worked in the U.S. off and on after his discharge, but was unable to make ends meet. He brought Maria to the U.S. to be raised by his sister on Jun 25, 1955. Maria has no passport at all. Her only identification is her Mexican birth certificate. Is Maria a U.S. citizen? If not, does she qualify for any immigration status?

Analysis: No, Maria did not acquire U.S. citizenship by descent for persons born abroad at the time of Maria's birth in 1954, but she qualifies as a permanent resident. In Section 301(g) of the Immigration and Nationality Act, the acquisition statute has morphed over time and the version in effect at that time of Maria's birth required in the case of a legitimate child born of one U.S. citizen parent to have been physically present in the U.S. for 10 years prior to her birth, five of which must have been after age 14. Time spent in the military, even if outside the U.S., counts toward the physical presence requirement, when the service was honorable. Portions of service can include both honorable and other than honorable periods when there is more than one tour of duty.

Glenn is a U.S. citizen by virtue of his birth in Pennsylvania and Fidalma is not as she was born in Mexico and did not acquire U.S. citizenship. Maria was legitimate as she was born after her parents married. Therefore, Glenn must have resided and been physically present in the U.S. for 10 years after his birth on March 24, 1934, at least five of those must have been after March 24, 1948, when he turned 14. The five years ended on March 24, 1953. Glenn served one three year tour of duty in the Navy, but it was other than honorable. His service started on June 15, 1952, when he was 18, and ended after Maria's birth. None of the time he served in the Navy, counts toward the physical presence requirement. Time after her birth he was present in the U.S. does not count either. As he was 18 at the time he joined the Navy, he cannot meet the five year physical presence requirement after age 14. Maria is not a U.S. citizen.

Maria does qualify for registry under INA section 249 for those who entered the U.S. prior to January 1, 1972, have resided here since, and are of good moral character. Maria meets these requirements and should file an application to adjust status in the U.S. She can become a permanent resident this way and after five years naturalize to U.S. citizenship.

5. The Criminal Alien

Facts: Hubert, the 19 year old H-4 dependent of an H-1 specialty occupation alien from Japan, is convicted of possession of a controlled substance consisting of 31 grams of marijuana. Herbert entered the U.S., is single with not children and lives with his parents. They have been in the U.S. for five years and the conviction has occurred while here in the U.S. He pleads guilty and is placed on probation for a year. Is he removable? Is he admissible? Does he have any remedies?

Analysis: The immigration status of an alien doesn't matter when it comes to controlled substance convictions. Conviction of possession a controlled substance over 30 grams of marijuana makes any alien, whether permanent resident, nonimmigrant or undocumented, both removable under 237(a)(2)(B)(i), and also inadmissible under 212(a)(2)(A)(i)(II).

There is a waiver of inadmissibility for first time conviction for simple possession of 30 grams or less of marijuana under 212(h) of the Immigration and Nationality Act with extreme hardship to U.S. citizen or permanent resident parents, spouse or children. But since Hubert had 31 grams in his possession and more important, he doesn't have a US citizen or permanent resident close relative, he doesn't qualify even if the conviction were 30 grams or under. Herbert is inadmissible were he to depart the U.S. and attempt return. Herbert can remain in the U.S. until his H-4 expires, but he is in violation of his status as he has a conviction for an offense that makes one inadmissible.

Even if Hubert qualified for the waiver, the level of hardship to the relevant relative required for a 212(h) waiver must be extreme. This standard is difficult to meet. If he had a U.S. child, for example, he may want to seek post conviction relief to get the conviction vacated, or re-plead to less than 30 grams and apply for the waiver. As he's an H-4 he is as unlikely to have a U.S. citizen or permanent resident spouse. If he remains convicted, he is subject to admissibility under Section 212 of Act.

If he departs the U.S., Hubert would be inadmissible. He is also unable to extend or change status due to the conviction because the conviction is a violation of his nonimmigrant status.

Hubert is also removable as there is no waiver for even a small marijuana possession charge and cancellation of removal is not currently available as he has not been in the U.S. for at least 10 years. A plea with probation is a conviction for immigration purposes, even if charges are later dismissed on completion of probation. Expungements do not generally mitigate convictions, since entry of a plea is enough to establish a conviction under INA § 101. However, the expungement serves to allow a finding of good moral character required for cancellation.

In the 9th Circuit at least, Lujan-Armandariz v. INS (227 F3d 734 (9th Cir. 2000) has established that the Federal First Offender Act, 18 USC 3607 serves to mitigate any first drug offense for simple possession, provided that the applicable local expungement procedure is followed. Therefore, on this basis, Hubert would not be removable if he resided in the 9th Circuit's jurisdiction. He qualifies to terminate proceedings in that case and continue undocumented (after turning 21) or in violation of his status (if under 21).

It is not clear whether he will qualify for immigration status going forward. If Hubert remains under 21, he would be able to remain in the U.S. on his H-4. If he remains in the U.S. and does nothing, he will overstay his status and become undocumented. Upon turning 21 he loses the H-4 status as he would no longer be a derivative minor and would therefore not hold the status at that point, even if his 21st birthday is prior to the validity period of his parent's H-1 petition and his I-94 entry/exit card includes incorrectly time after turning 21.

He might come under the radar of the Immigration and Customs Enforcement (ICE). He might also not be detected by ICE since there is no sentence imposed and no time served.

He likely does not have remedies apart from termination of removal proceedings in the 9th Circuit under Lujan- Armandariz. In other circuits, he would have no relief.

As a citizen of Japan, it is unlikely he would face persecution by the government to qualify for asylum or the deferral of removal under Convention Against Torture. Were he from a country where he might face persecution, then the outcome might be different.

The good news is that he has a legal entry and may be able to adjust status if he marries a USC marriage down the road, applying Lujan, if remains in 9th Circuit jurisdiction. Also after 10 years since last admission, he would be eligible for cancellation of removal for non-permanent residents as the expungement allows for a finding of good moral character.

Hubert might become one of the double digit millions of undocumented aliens in the U.S. today. The future of his life will determine his immigration status. Until then, he should not depart the U.S., change status, or extend status. He should live as well as possible as a good example to others and avoid future prosecutions. He should also get lucky and marry for reasons other than immigration status. To marry for permanent residence is immigration fraud and federal crime punishable up to five years in prison and a fine of $10,000.00. If he marries it must be for reasons apart from immigration status.

None of the above analysis would have been necessary had the conviction taken place under the age of 18. In that case, the conviction does not affection immigration status and he would be free to pursue whatever status he qualified for without inadmissibility on account of this minor marijuana possession conviction.

Considerations to Becoming an Immigration Attorney

Given the above complex body of law, the explanation of which presented above is only a small portion; there are many considerations to be taken into account in deciding whether this area of practice is right for you.

Ask yourself:

1. Do I enjoy highly technical law involving many standardized forms which must be customized and require precision in their preparation?
2. Am I a detail oriented person or a big picture person?
3. Do I enjoy working with people?
4. Am I prepared to either have many clients and paralegals which can sacrifice quality or am I willing to be more hands on and sacrifice income?
5. Am I most comfortable being a sole practitioner or work in a small firm rather than a large firm?

6. Am I interested in working for a non-profit agency that handles immigration cases (representing indigent, HIV positive aliens, etc.) or for the government (to remove aliens)?
7. Do I enjoy the foreign born, those with accents, or who appear different?
8. Am I interested in international politics and cultures?
9. Can I manage learning new things on a daily basis that could immediately affect my work?
10. Am I flexible enough to drop everything to get a client out of unexpected detention?
11. Can I deal with the frustrations associated with working with inefficient, federal bureaucracies?
12. Am I interested in transactional work?
13. Do I want to litigate in federal court, including class actions?
14. Am I interested in administrative proceedings and a quasi-judicial immigration court?
15. Can I handle bureaucrats who have the ability to make discretionary decisions that can only be overturned if they are abusive or abridge constitutional rights?
16. Can I be a rainmaker continually, understanding that a successful immigration entails losing a client once permanent residence or citizenship is attained?

These questions and answers are highly personal. Some may not be relevant. Other questions particular to you should be added and answered.
If you answered yes to a sufficient number of these (and other) questions, you may wish to venture into becoming an immigration lawyer.

Primary Source Materials and Other Basic Sources of Information in Immigration Law

8 United States Code Annotated, §§ 1-1434, Aliens and Nationality

Immigration and Nationality Act

Federal Register

Code of Federal Regulations, Titles 8, 20, 22, 28, 29, 42

Foreign Affairs Manual

Legislative History of…Immigration and Nationality Acts (and related documents)

Administrative Decisions under Immigration and Nationality Laws of the United States (Board of Immigration Appeals and Administrative Appeals Office Decisions)

Office of the Chief Administrative Hearing Officer Decisions

Board of Alien Labor Certification Appeals

Treatise: Kurzban's Immigration Law Sourcebook

Periodical: Interpreter Releases

Organization: American Immigration Lawyers Association

About the Author

Alice M. Yardum-Hunter, Certified Specialist and Former Commissioner, Board of Legal Specialization, California State Bar, has practiced business immigration law for more than 30 years. She has been designated annually a "Super Lawyer" by Los Angeles Magazine every year since inception in 2004. Alice is 1st Vice Chair for the L.A. County Bar Association, Immigration Section. She has served on the Distance Learning Committee of the American Immigration Lawyers Assn., for which she has been a conference speaker and edited two books: California Chapters Conference Handbook and Practice Before the Department of Labor. In 2007, she was nominated as among the top 25 lawyers among 9,000 practicing in the San Fernando Valley. She has also delivered talks for the American Immigration Lawyers Association, the Beverly Hills, Los Angeles and San Diego County Bar Associations, ilw.com, as well as for ethnic and human resources organizations.

Disclaimer

This article provides basic information for non-immigration attorneys about general issues, the immigration law framework, and considerations for becoming an immigration attorney. This article is not intended to substitute for individualized legal advice from a competent immigration attorney. Readers are cautioned to seek advice from such an attorney if they have further questions. A competent immigration attorney can assist non-immigration lawyers and aliens in deciding whether an alien qualifies for an immigration status in the United States.