ABA Section of International Law
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Immigration & Naturalization Committee Newsletter

A quarterly newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Winter/Spring Issue 2016

Editorial Note

Dear Committee Members,

On behalf of the committee, we are pleased to present the Winter/Spring 2016 issue of the Immigration and Nationality Law News. This issue contains:

- Co-Chair's Note - *By Audrey Lustgarten and Michelle Jacobson*
- Leaders in the Limelight: Audrey Lustgarten - An interview *by Annie Jacobs*
- French Citizenship: Stripping Down the Root Issue - *By Amanda Z. Quenette*
- OPT STEM: Past, Present, Future - *By Autumn Misiolek Tertin, Esq.*
- Direct EB-5s in the Spotlight as EB-5 becomes more expensive for Brazilians - *By Renata Castro, Esq.*
- The Refugee Crisis: Europe's Moment of Truth - *By Stefan Müller*
- Temporary Foreign Worker Program (TFWP) - *By Jacqueline Bart*
- Updates from Committee Vice Chairs

Our sincere gratitude to the authors for their contributions. It has been a pleasure putting this issue together and managing the desktop publishing with assistance from my office team.

We are always interested in hearing from you! We are collecting contributions for the Fall 2016 issue and request expressions of interest before April 15, 2016. We welcome contributions that may focus on immigration law or practice management. They could be practice pointers, success stories, commentaries of summaries of changing laws and trends, etc. You may submit your prior writings, such as commentaries, briefs, letters, blog posts, or articles published elsewhere. Author guidelines are available and will be provided on request.

The final copy of the articles should be emailed to poorvi@lawquestinternational.com or sabrinadamast@gmail.com on or before May 16, 2016. Please feel free to contact us with your suggestions or ideas for future issues or articles at any time.

Regards,
Poorvi Chothani *&* Sabrina Damast (*Editors*)

Co—Chair's Note

Dear Committee Members,

We are pleased to present the Winter/Spring edition of our Committee Newsletter. We are grateful to our editors, Poorvi Chothani and Sabrina Damast, for their tireless efforts and commitment to our wonderful publication. We also thank our contributors for this edition who took the time to write such fascinating articles on a diverse selection of topics. It is such contributions from our members that make for the successful committee year we have enjoyed to date.

We look forward to our upcoming Spring Meeting, which shall be held in New York from April 12 through April 16. Many of our committee members will be presenting panels including, "Has the Board Untangled 'Particular Social Group' Asylum Law," "Syria Refugees: What Are The Economic and Social Consequences to the States Granting Asylum to Those Displaced," and "Till Death Do Us Part…or Not? International Issues in Marriage, Divorce, and Custody." We will also hold a committee breakfast on Thursday, April 14 during the conference. In addition, we invite all to join our next monthly committee call to be held on April 6 at 1 p.m. EST.

A reminder to our membership that we encourage participation and as such, you are always welcome to post immigration questions or issues to our Immigration and Naturalization Committee listserv at intimmigration@mail.americanbar.org.

If you have any questions or are interested in getting more involved in these or other areas please let us know at alustgarten@lustgartenglobal.com or mjacobson@fragomen.com.

Sincerely,
Audrey & Michelle

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Office Bearers

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Call for Submissions

Member can submit articles, practice pointers, professional news and other items that they might think would interest our member base. If any member has just received an award, has been nominated for an award, moved firms, changed roles in the firm, or is speaking at an event, publishing an article, engaging in a volunteer project, or anything else noteworthy please let us know. Please note that all contributions on substantive law and practice pointers should focus on immigration law and practice.

Articles should be sent to poorvi@lawquestinternational.com and/or sabrinadamast@gmail.com.

Leaders in the Limelight: Audrey Lustgarten

By Annie Jacobs

Audrey Lustgarten is Co-Chair of the Immigration and Naturalization Committee. The founder of the boutique immigration firm Lustgarten Global LLC, Audrey brings to her practice of outbound (non-U.S.) immigration law a global perspective that is rooted in, and enlightened by, her strong, long-held interest in international relations.

After earning a Master's degree in this subject from Florida International University, Audrey went on to study law at the University of California Los Angeles, where she was a member of the order of the coif. She credits her prior study at FIU with having given her the background necessary for a comprehensive understanding of the topics covered in her international law classes and with informing the ways that she approaches the needs of her clients. Her knowledge of the political and historical context in which a matter is situated allows her to anticipate potential difficulties and to devise the best resolutions for them.

Following graduation, Audrey practiced immigration law at Paul Hastings and Fragomen prior to founding Lustgarten Global. Audrey joined the American Bar Association several years into her practice and highlights what an important and positive an organization it continues to be for her. An active member of multiple committees and sections of the ABA, Audrey enjoys pursuing the opportunities that this work opens up to her to expand and enrich her international network of trusted colleagues and friends. She encourages new and experienced lawyers alike to get involved with

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the ABA and become active in committee work to make the most of their ABA experience and expand their own networks.

She is also active with the American Immigration Lawyers Association, where she has held several leadership positions and has played a central role in the establishment of a program that provides pro bono assistance to unaccompanied minors and their guardians involved in proceedings in the Atlanta, Georgia immigration court system.

Annie Jacobs *is a member of the I&N Committee and can be reached at arjacobs4@verizon.net.*

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French Citizenship: Stripping Down the Root Issue

By Amanda Z. Quenette

France - home of human rights (see 1789 French Declaration of Rights of Man and of the Citizen), land of equality, liberty, fraternity - has proposed a controversial constitutional amendment that would extend the power to strip native born French citizens of their nationality.

An after the fact "solution," the proposition fails to address the underlying roots of the issues and France's evolving identity. Born in a climate of terror, in the hasty wake of the November 13, 2015 attacks on Paris, the proposal officially submitted to France's lower house of Parliament on December 23, 2015, holds divisive consequences, promising to fuel the alarming numbers of Europeans pursuing jihad.

What is at stake is not voluntary renunciation of citizenship— this is not the United States where tax reasons have led increasing numbers of Americans to voluntarily renounce their allegiance to one nation. France's unique irony is that it is led by a Prime Minister who is himself a naturalized French citizen, a "socialist" government swinging violently right.

At the same time, petitions to confer nationality upon the "righteous" foreign heroes of the attacks (the security guard at the Bataclan and an employee at the Hyper Cacher supermarket) have proliferated.

With the pendulum oscillating and Parliamentary debates set to begin, on the suburban commuter train a sticker clung to the closing door, announcing the *Front National* Party's propaganda: "*Être français : cela s'hérite ou se mérite"* (Being French is inherited or merited). For my three-year-old, born in France, enrolled in French schools (public education starts at age 2.5), holding as many citizenships as his years of life is just a fluke of globalization. Given the interplay of domestic nationality laws, the fluke is becoming increasingly commonplace.

If democracies strive, in principle, to balance fundamental freedoms with security interests, what is the point of punitively *a posteriori* erasing citizenship? Exploring the current state of identity and citizenship under French Law, and decomposing the proposed amendment, will reveal the role of citizenship law in a context of crisis and the (im)pertinence of France's proposed constitutional reform aimed at recasting and removing identity.

Legal Context: Who is French?

The forced removal of nationality as a punitive measure, because identity and citizenship are so intrinsically interwoven, has a dark history. Initially, under an 1848 decree, the power to strip a person of French citizenship was a criminal sanction for involvement in the slave trade. Later, the practice was frequently used against Jews under Vichy.

Under the current state of the law, French citizens who have "acquired" their French citizenship may be "stripped" of it ("*déchéance*") (French Civil Code art. 25), subject to having another nationality (Article 15 of the Universal Declaration of Human Rights forbids rendering a person stateless).

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This forced removal of nationality can stem from conviction for one of the following, either prior to acquiring French citizenship or within ten years from acquisition (increased to fifteen for the first case, below):

1. Attacking the fundamental interests of France or committing an act of terrorism;
2. Committing certain criminal acts (notably upon public administration);
3. Not fulfilling certain military duties;
4. Having carried out, for the interests of a foreign State, acts that are incompatible with being French and which harm the interests of France.

In contrast with acquired citizenship, French citizens who are French at birth may also "lose" their citizenship ("*perte*") (French Civil Code art. 23-7), mainly for voluntarily acting as a citizen of a foreign country.

Following American legal tradition, let us examine a hypothetical:

Firstly, French citizenship law is mainly a law of blood birthright, enshrining the ideal of *jus sanguinis*, passing nationality from parent to child, even for children born outside the Motherland. France recognizes a limited conception of *jus soli*, citizenship flowing from birth on French soil. Notably, a reform under the Sarkozy Administration holds that children born on French soil to two parents, neither of whom are French at the moment of the birth, are not French at birth.

Secondly, applying the law to a fact pattern, as the law stands today, my naturalized French husband and son could both be stripped of their French citizenship because both are cases of "acquired" citizenship, the father through naturalization, the son through derivative citizenship (a subsidiary status on the father's naturalization decree). Today, however, any hypothetical children born, even outside of France, to my now French husband, could not be stripped of their citizenship, because their citizenship would be automatic at birth, not acquired.

Legal (D)evolution: Who Would No Longer be French?

Getting back to the proposed constitutional amendment, what would change? To apply it to our hypothetical, my husband, son, and *even hypothetical future children* could all be stripped of their French nationality. What the proposal threatens to do is to extend the possibility of erasing French citizenship even to people who are born French (if they are sentenced for criminal acts constituting a grave attack upon the life of the nation).

In closing what would appear to be a loophole, the proposed constitutional amendment reinforces a notion of second class citizenship, French by birth versus French by acquisition. The line between the two can be fuzzy, as evidenced by my son's case.

Also, why go the route of modifying the Constitution rather than enacting a law? Despite what would appear to be a majority of citizens supporting the initiative, France's highest Constitutional Court could prevent a law from being enacted. Under a particularity of French Law, this means it is easier for the Government to try to push this reform through by modifying the Constitution.

Today they have singled out dual-nationals who have committed acts of terrorism (despite the majority of terrorist acts committed in France having not been committed by dual-nationals). Who will they come for tomorrow?

The proposed constitutional amendment misses the mark. While security concerns rightly push us to consider reconstituting ourselves, the move should be towards unity, how we can resolve educational root issues that provoke the alienation of children understanding they have no place in a society, running away from it, and searching to bring ills upon it.

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***Amanda Zane Quenette**, a member of the Paris and New York Bars, with law degrees from the Sorbonne (Université de Paris 1 – Panthéon-Sorbonne) and University of Maine School of Law, practices immigration, international commerce, tax, customs and VAT law.*

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OPT STEM: Past, Present, Future

By Autumn Misiolek Tertin, Esq.

Wash. Alliance and the 2008 Rule

February 12, 2016. A date made significant by *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*. No. 14-cv-529 (D.D.C. 2015). In *Wash. Alliance*, the court contemplated the validity of an April 2008 Interim Final Rule ("IFR") (the "2008 Rule"), published by the Department of Homeland Security ("DHS"), which extended the period of Optional Practical Training ("OPT") available to certain F-1 students to 29 months. *See* Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions, 73 Fed. Reg. 18,944 (Apr. 8, 2008) (extending the period of OPT available to F-1 students with a degree in a science, technology, mathematics, or engineering ("STEM") field from 12 months to 29 months by way of an additional 17-month extension). As the 2008 Rule was published without adhering to the mandatory federal administrative rulemaking procedures, and without good cause for doing so, the court in *Wash. Alliance* vacated the rule. To allow time for DHS to remedy the situation, the court stayed the vacatur until February 12, 2016. After this date, all F-1 students currently in a period of STEM OPT would cease to have work authorization in the U.S.

The 2015 Rule

Following the *Wash Alliance* decision, DHS published a new proposed rule (the "2015 Rule") on October 19, 2015. Entitled, Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, the 2015 Rule expands upon the 2008 Rule in many ways. Most importantly, if promulgated, the 2015 Rule would allow an F-1 student with a STEM degree to extend their OPT period by 24 months, a timeframe in addition to the standard 12-month OPT period. Hence, F-1 STEM students could receive a maximum of 36 months of OPT, which, if timed correctly, could possibly result in 4 H-1B filing attempts for the students. Even with the H-1B Cap numbers as they stand today, the probability is that most F-1 students would be able to secure an H-1B visa with this higher number of available attempts.

Additional highlights from the 2015 Rule include the eligibility to use a prior accredited U.S. STEM degree as the basis for an OPT STEM extension, an increased unemployment period of 150 days (90 days for initial OPT and 60 days for STEM OPT), more clearly-defined STEM-eligible fields of study, and the implementation of mentoring and training programs by U.S. employers. Furthermore, the 2015 Rule would also make F-1 students enrolled in a subsequent, higher-level academic program eligible for another 24-month STEM OPT extension. This could be a great benefit to F-1 students looking to pursue a higher-level degree in the U.S., and allow them to maximize their allowed OPT time.

The 2015 Rule also maintains several aspects of the 2008 Rule, such as the requirement for employers with F-1 student employees to utilize the U.S. Citizenship and Immigration Services ("USCIS") E-Verify system in order for the employees to be eligible for an OPT STEM extension. Another inclusion is the 2008 Rule's "Cap-Gap" provision, which allows for an automatic extension of a student's F-1 status and current employment

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authorization until October 1st of the same year, pursuant to a timely-filed H-1B petition.

Current State of STEM OPT

On November 18, 2015, the notice and comment period for the 2015 Rule ceased. DHS received over 50,000 comments in response to the proposed rule. To allow sufficient time for completing the remainder of the rulemaking process, on December 22, 2015, DHS requested a 90-day extension of the *Wash. Alliance* vacatur stay, until May 10, 2016. Plaintiffs filed a response in opposition to DHS' request on January 11, 2016, and on January 14, 2016, DHS filed a response to Plaintiffs' opposition. In DHS' latter filing, it requested the court to provide clarification on the effect of the vacatur on F-1 students in current periods of STEM OPT, should the court deny the extension request.

In an order issued January 23, 2016, the court granted DHS' request for a 90-day extension on the vacatur stay. The court based its decision on the extraordinary number of comments received in response to the proposal of the 2015 Rule. Due to the extension, all F-1 students currently in a period of STEM OPT will now continue to have work authorization until May 10, 2016. As for those students currently applying for OPT STEM extensions, USCIS has been approving the requests for the full 17-month period allowed under the 2008 Rule. Based on the extended timeframe for the vacatur stay, USCIS will most likely continue to operate in this manner.

Looking Ahead

Although the vacatur of the 2008 Rule sent shockwaves through the international student community and related organizations, the 2015 Rule has the power to turn it all around. While maintaining important provisions of the previous rule, the proposed rule introduces many new OPT benefits for F-1 STEM students. Furthermore, in addition to its positive student impact, the proposed rule stands to provide U.S. employers with increased opportunities to hire from a talent pool of U.S.-educated foreign workers. Consequently, if promulgated, the 2015 Rule will be a formidable replacement for the 2008 Rule.

Editorial Note:

On March 2, 2016 the much-awaited review of the final OPT STEM Extension rule (Final Rule) was completed by the Office of Information and Regulatory Affairs, and on March 11, 2016 the Final Rule was published. See http://1.usa.gov/1UZdv07.

As per the Final Rule STEM OPT extensions will now be granted for an additional 24 months allowing STEM students to avail of OPT for a total of 36 months.

Autumn Misiolek Tertin, Esq. *has been with GoffWilson, P.A. in New Hampshire since September 2014, where her practice focuses solely on immigration law, both in the employment-based and family-based sectors. Previously, Ms. Tertin practiced in Massachusetts, where she focused primarily on complex PERM issues.*

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Direct EB-5s in the spotlight as EB-5 becomes more expensive for Brazilians

By Renata Castro, Esq.

On December 31st the Brazilian Tax Authority let a tax exemption lapse that allowed Brazilian nationals to transfer funds abroad without incurring a 25% tax imposed at the time of transfer of the funds.

Several categories of transfers benefited from this exemption such as funds transferred from Brazil to pay for educational expenses abroad. In spite of the growing interest in transferring funds abroad,

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the lapse of the exemption comes at a time where the cost of the dollar for those earning reais (the Brazilian Currency) has skyrocketed, making it almost 75% more expensive for a Brazilian national earning reais to invest in the EB-5 program[1].

A current EB-5 investor, Honorable Judge Newton Azevedo[2] [3] is preparing an emergency injuction against the Brazilian government, given his legal interpretation that, in certain cases, the imposition of the transfer tax constitutes double taxation[4].

When Brazil first appeared on the EB-5 map, around 2012, the cost of US$ 1 was approximately R$ 1,79. Currently the cost of US$1 is at R$ 4,40, and financial specialists expect it to reach R$ 5 by the end of 2016.

In spite of the steep increase in cost for Brazilians, the interest in EB-5 investments has grown exponentially. In the past, EB-5 investors from Brazil would move to the USA through a passive EB-5 investment while they received revenue from their business activities in Brazil. As a result of the economic and political crisis in Brazil, Brazilian EB-5 investors are now looking to become Direct EB-5 investors in revenue creating opportunities as a tool to help subsidize their lifestyle in the USA. Franchises and food based opportunities are on the top of the list of industries chosen by Brazilian investors, with Florida being their first preference for location.

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[1] If factoring in the higher cost of the dollar and the impact of the taxation imposed at the time of transferring funds.

[2] Honorable Judge Newton Azevedo invested in the Baptist Hospital Project sponsored by the Sunbelt Regional Center in Alabama.

[3] Honorable Judge Newton Azevedo has retired from the bench,; however, he continues to practice law.

[4] For those who have already been taxed at the source for the income earned.

The Refugee Crisis: Europe's Moment of Truth

By Stefan Müller

The Background

Since 2015, more than one million refugees and migrants have travelled to Europe, taking the Mediterranean route through Italy or the Western Balkan route through Greece. The majority of refugees and migrants – approximately 853,650 – arrived in Greece by crossing the Aegean Sea (Press Release "Mediterranean Migrant Deaths Reach 374; Arrivals in Greece Top 68,000 in 2016" of the International Organization of Migration from February 5, 2016).

Based on the number of refugees and migrants having arrived at Greece's and Italy's shore in January 2016, the International Organization of Migration suggests that the number of maritime arrivals in 2016 may significantly exceed the record number of arrivals in 2015. Furthermore, the flow of refugees will likely not diminish in the near future as the majority arriving in Greece are from conflict-torn countries such as Syria (47 percent), Afghanistan (28 percent) or Iraq (16 percent) (Press Release "Mediterranean Migrant Deaths Reach 374; Arrivals in Greece Top 68,000 in 2016" of the International Organization of Migration from February 5, 2016).

Due to the magnitude of the refugee crisis and the increasing number of refugees and migrants arriving at Europe's borders, Europe is facing one of the largest movements of displaced people since World War II (UNHCR).

The Legal Framework

Internationally, the 1951 Convention Relating to the Status of Refugees and its amendment, the 1967 Protocol, build the cornerstone of the refugee protection. While the Refugee Convention laid down the minimum standards for the treatment of

refugees, the 1967 Protocol gave it universal coverage. 148 countries are party to one or both of these instruments, including all European countries (United Nations Treaty Series, Chapter V – Refugees and Stateless Persons, July 22, 2013). The Refugee Convention obligates signatory countries to protect refugees who are in their territory.

Specifically, countries are banned from imposing penalties upon refugees for entering a country illegally (Article 31). However, this principle only applies when the refugees are "coming from a territory where their life or freedom was threatened." When interpreted narrowly, refugees will only be exempt from penalties in their neighbouring countries. Yet, more generously interpreted, just transiting other countries shall not allow countries to prosecute refugees for the breach of immigration law. Nevertheless, under any interpretation, refugees on a country's territory may not be excluded from protection. Additionally, the "non-refoulement" rule prohibits states from expelling or returning a refugee to an unsafe country (Article 33(1)). It, however, permits the removal of refugees to a safe country. Nonetheless, the Refugee Convention has not defined a safe country.

The relevant legal framework of the European Union (EU) mainly consists of the Schengen Borders Code (Regulation (EC) No. 562/2006 dated March 15, 2006) and the Dublin Regulation (Regulation (EC) No. 604/2013 dated June 26, 2013), the former setting out conditions for crossing the external borders of the EU and the latter aiming at establishing a common asylum policy for the EU.

On the one hand, the Schengen area represents the territory where the free movement of persons is guaranteed and all internal borders are abolished (Article 20). It includes 22 EU member states, with the exclusion of Ireland, the United Kingdom and newer member states such as Bulgaria, Cyprus, Romania and Croatia, as well as Iceland, Norway, Switzerland and Liechtenstein (European Commission, Migration and Home Affairs, Schengen Area as of July 2013). Member states shall ensure control of the external borders of the EU with third-country nationals only allowed to cross these borders when certain entry-conditions are met. Nevertheless, third-country nationals are allowed to cross external borders on humanitarian grounds without fulfilling the entry-conditions (Article 5(4)(c)). Therefore, refugees at the external borders cannot be refused entry. However, a member state may reintroduce border control at its internal borders in exceptional circumstances (Article 23).

On the other hand, the current Dublin Regulation determines the member state responsible for examining an asylum application from a refugee within the EU. The Dublin Regulation applies to all EU member states and four associated states (Switzerland, Norway, Iceland and Liechtenstein) (Office of Refugee Applications Commissioner). The member state, whose borders the migrants and refugees have irregularly crossed having come from a third country, is responsible for processing their applications (Article 13(1)). Yet, the sovereignty clause in Article 17 allows member states to consider asylum claims that are not their responsibility. Moreover, if migrants and refugees cross borders to another member state, they may be returned to the member state at the initial point of entry and this member state is bound to take them back (Article 18(1)(b), Articles 21(1), 23 and 24).

Europe's Reaction

In the wake of the refugee crisis, asylum immigration sentiments and resurrecting anti-applications have risen in all European countries and have caused internal turmoil in many, creating anti- immigration parties. Europe's political leaders not only fear the high number of refugees and migrants arriving in their countries, but also the fact that Islamic radicals could be hiding among them. Hence, several member states have indicated that they do not wish to take Islamic refugees. Events such as the recent terror attacks in Paris or the sexual assaults in Cologne have further fueled this climate of fear. Finally, the high number of refugees and migrants has overwhelmed the Europe's asylum

systems, leading to overcrowded refugee centers all over Europe.

Instead of answering in a coordinated effort, European countries have mainly reacted on their own and in their own interest. The reactions of European countries have been plentiful, ranging from fencing borders in the case of Hungary, enforcing a cap on the admittance of new migrants in the case of Austria, constructing razor wires at borders in the case of Slovenia, or placing advertisements aimed at deterring potential migrants and passing legislation cutting benefits for newly arrived refugees in the case of Denmark. Additionally, several EU member states such as Austria, Sweden and Denmark have temporarily re-introduced stringent border controls at their national borders (Politico, Austria suspends Schengen, January 17, 2016). Finally, countries along the Western Balkan route such as Serbia, Croatia, and the Republic of Macedonia have reacted to the measures taken by other European countries by closing their borders or prohibiting certain refugees and migrants from crossing their borders. All of these efforts have mainly focused on preventing or discouraging people from attempting to reach European territory (Human Rights Watch, Europe's Refugee Crisis: An Agenda for Action, November 16, 2015). Despite the lack of a coordinated effort, only a united European emergency response can address the current refugee crisis. Nevertheless, the cooperation among European countries has only grown in tiny steps and the individual measures have increased tension among European countries creating an atmosphere of mistrust instead of solidarity.

Both Greece and Hungary became overburdened with the asylum applications based on their responsibility as first member states according to the Dublin Regulation. The state of austerity due to the Greek economic crisis and the high numbers of arrivals have led to a collapse of the asylum system in Greece. Besides, many refugees and migrants have also refused to file their applications in either Greece or Hungary, but aimed to travel further to northern European countries. Greece without having the means to respond in accordance with the Dublin Regulation and Hungary unwilling to take the entire burden, the Dublin Regulation has been factually suspended. Moreover, the Dublin Regulation has repeatedly been criticized for overly burdening member states on the EU's external borders instead of imposing a burden-sharing system among all member states. Correspondingly, some member states, most prominently Germany, have suggested imposing a quota system that would allow an equal distribution of the refugees and migrants across the EU as part of the European strategy (European Commission Press Release "State of Play: Measures to Address the Refugee Crisis", November 4, 2015). Yet, this proposition has been met with pertinacious opposition by many member states. For example, Slovakia has filed a lawsuit with the Court of Justice of the EU against the decision by EU's ministers of the interior to relocate 160'000 refugees to member states (Die Welt, Slowakei reicht Klage gegen EU-Flüchtlingsverteilung ein, February 12, 2016). Despite this opposition, the current crisis requires that the Dublin Regulation be replaced by a fair mechanism for the processing of asylum applications and the equal allocation of refugees and migrants taking into account the social capacity and financial situation of each member state. Furthermore, as the second pillar of the European strategy, the EU is negotiating with Turkey for a better protection of its borders in return for a supply of aid for its refugees (Neue Zürcher Zeitung, Merkels Spagat mit der Türkei, January 22, 2016). Additionally, the third pillar of the European strategy is the reinforcement and establishment of the infrastructure at the points of entry such as Greece, Italy and Hungary (Neue Zürcher Zeitung, Europa driftet auseinander, February 4, 2016). These countries shall be provided with staff, financial and technical assistance in order to ensure humane accommodation and medical as well as psychological assistance for the refugees and to implement a system for screening and registration. Finally, mechanisms for the return of those who do not qualify for refugee protection need to be put in place (Joint UNHCR/IOM Press Release, A million refugees and migrants flee to Europe in

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2015, December 22, 2015). However, the implementation of the European strategy has stagnated mostly due to national policies.

Summing up, European countries have an international obligation to protect the refugees arriving at their borders. Furthermore, by refusing to take Islamic refugees, member states will breach international law as both the EU Charter of Rights (Article 21) and the Refugee Convention (Article 3) ban discrimination on grounds of religion. Conclusively, Europe urgently needs to address the refugee crisis in a united and coordinated effort and abandon national policies. Should the European countries not be able to agree on a solution, Europe will disregard its own values and principles and in the process also violate international law and disregard that the refugee crisis is predominantly a matter of humanity and human dignity.

Stefan Mueller, Esq., *MLaw, LL.M. The author is an Attorney and Notary Public from Switzerland, licensed in both Switzerland and the State of New York. He furthered his professional career in the United States by completing the LL.M.-program at Duke University School of Law – Durham and his admittance to the bar in the State of New York. He is an Associate at Wenger & Vieli Ltd., a corporate law firm located in Zurich and Zug, Switzerland and specializes in the fields of immigration and naturalization law as well as employment and corporate law. He can be reached at st.mueller@wengervieli.ch.*

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Temporary Foreign Worker Program (TFWP)

By Jacqueline Bart

Corporations sponsoring foreign workers under Canada's Temporary Foreign Worker Program (TFWP) must meet specific requirements to hire foreign workers and uphold the conditions as set out in the employer immigration compliance rules, which came into force on December 1, 2015, in addition to the legal requirements announced previously in our newsletters. Employers of temporary foreign workers are deemed to be aware, based on current law, of their responsibilities and obligations under the current immigration compliance government rules.

ESDC/Service Canada has the authority to review the activities of any employer using the TFWP by conducting one of three types of audits:

- an inspection;
- an Employer Compliance Review (ECR); and/or
- a review under Ministerial Instruction.

The purpose of the government employer immigration compliance audits is to hold employers accountable to the following TFWP requirements based on the content of their TFWP application:

- ensuring they meet all of the conditions and requirements of the TFWP, as outlined in documents such as the Labour Market Impact Assessment (LMIA) application, the LMIA decision letter and annexes;
- keeping all records associated to their LMIA application and any other documents that demonstrate their compliance with the program conditions that are set out in the LMIA decision letter and annexes for a period of six years; and
- informing ESDC/Service Canada of any changes or errors relating to an approved LMIA or the temporary foreign worker.

The rules require that the employer ensure and "regularly review the activities related to the employment of temporary foreign workers to ensure they continue to uphold the TFWP conditions."

Inspections are warrantless. During an inspection, ESDC/Service Canada will verify whether

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employers have upheld the conditions set out in the offer of employment, as well as the positive LMIA letter and annexes. These conditions may relate to general TFWP requirements for employers, such as providing the agreed-to wages and making reasonable efforts to provide a workplace free of abuse, or specific agreements negotiated before the LMIA is issued, such as commitments made by the employer to train Canadians.

Inspections may be conducted during a period of six years beginning on the first day of the period of employment for which the work permit is issued to the foreign worker. Once an audit is triggered, an investigation will occur. Auditors may conduct site visits without a warrant, interview the employer and ask any relevant questions based on the conditions set out in the LMIA application, decision letter and annex and interview any person employed by the employer, and ask any relevant questions based on the conditions set out in the LMIA application, letter and annex.

During a warrantless inspection, ESDC/Service Canada investigators "have the authority to: use copying equipment on the premises, by requesting that the employer make copies of documents and remove copies for examination, or if not possible, make copies on the premises, remove the documents to make copies, take photographs and make video or audio recordings to support the findings of the inspection, examine anything on the premises that relates to the conditions set out in the inspection, access the employer's computer or other electronic device in order to examine any relevant information/document contained in it, be accompanied or assisted on the premises during the inspection; and/enter a private household with a warrant or consent".

Based on CIC policy and law, employers found non-compliant as a result of an inspection from a violation that occurred prior to December 1, 2015, could be subject to:

- a ban of two years from using the Program;
- suspension of their participation in the TFWP;
- the publication of their name, address and period of ineligibility on a public website;
- a negative LMIA being issued for any pending applications; and/or
- the revocation of previously-issued LMIAs.

Employers found non-compliant as a result of an inspection from a violation that occurred on or after December 1, 2015, could be subject to:

- warnings and TFWP and other immigration program suspensions;
- administrative monetary penalties ranging from $500 to $100,000 per violation, up to a maximum of $1 million over one year, per employer;
- a ban of one, two, five or ten years, or permanent bans for the most serious violations;
- the publication of their name and address on a public website with details of the violation(s) and/or consequence(s); and/or
- the revocation of previously-issued LMIAs.

Consequences for violations that occur on or after December 1, 2015, are determined based on a points system that considers:

- the type of violation;
- the employer's compliance history;
- the severity of non-compliance;
- the size of the employer's business (for financial penalties only); and
- whether the employer voluntarily disclosed information about potential non-compliance before an inspection was initiated.

Consequences for employer violations under the rules (either before or after December 1, 2015), also include the following:

1. For misrepresentation or aiding and abetting misrepresentation (ie. Stating an

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employee is entering as a visitor when the employee under law needs a work permit): up to five (5) years jail for officers and directors of the corporation/employer and up to $100,000 in fines;

2. For failure to obtain a work permit when required for an employee: up to two (2) years jail for officers and directors of the corporation/employer and up to $50,000 in fines;

3. To the employee for misrepresentation: a five (5) year ban from Canada and other related employment law violations.

The above noted rules apply extraterritorially and employers (inside and outside Canada) are 'deemed' to know the law (ignorance of the law is not a justification).

Jacqueline Rose Bart *is a Certified Immigration Specialist by the Law Society of Upper Canada and the founder of BartLAW Canadian Immigration Barristers and Solicitors, a boutique law firm that provides full service immigration and citizenship law advice to corporations and individuals in addition to representation at hearings, appeals and judicial reviews at the Federal Court of Canada. Contact: bart@bartlaw.ca.*

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Updates from Committee Vice Chairs

Update from Project Vice Chair
Lisette Lavergne, Esq.
(Salmen Navarro & Lavergne, P.C.)

Editorial Note: The Project Vice Chair has focused on facilitating the Immigration & Naturalization Committee's successful speaker series this year. Several sessions have already taken place, including:

December 2, 2015: First Panel - Latest Developments in Immigration Laws around the Globe and its impact on displacement and population control;

February 3, 2016: Second Panel- Hot Topics in EB-5;

March 2, 2016: Third Panel - Human Trafficking, and Speaker Series Teleconference Panel

Fourth Panel - Current Developments in immigration law for same-sex partners, including the U.S. Post-DOMA and other countries around the globe and **Fifth Panel** - The Evolution of Immigration Law Firm Practice, the dates for these will be announced shortly.

December 2, 2015: First Panel - Latest Developments in Immigration Laws around the Globe and its impact on displacement and population control
Program Co-Chairs - Audrey Lustgarten and Betina Schlossberg

The panel addressed the latest developments in Immigration Laws around the globe and its impact on displacement and population control. A diverse panel discussed relevant issues in the European Union, Cuba, and Canada.

Moderator: Betina Schlossberg

Speakers:
The European Union - Professor de Bruycker, Deputy Director of the Migration Policy Centre of the European University Institute and Professor at the Institute for European Studies and the Law Faculty of the Universite Libre de Bruxelles, discussed the asylum crisis in the EU and the issue of border control in the Schengen zone.

Cuba - Aymee Valdivia of Holland & Knight discussed the changes in Cuban immigration towards Cuban citizens on temporary travel and

issues for US citizens going to Cuba for business as a result of the opening of US-Cuban relations.

Canada - Jacqueline Bart of BartLaw discussed the recent extensive changes in Canadian immigration law.

February 3, 2016: Second Panel- Hot Topics in EB-5
Program Co-Chairs - Noah Klug and Qiang Bjornbak

Co-Sponsors: China Committee, Asia/Pacific Committee, International Private Client Committee, and International Family Law Committee

The panelists analyzed Hot Topics in EB-5. The panelists addressed financial risks, currency issues, and procedural challenges. The EB-5 investor green card brought nearly $4 billion to the United States in the fiscal year of 2013 and contributed to the revival of the U.S. economy. The panel addressed key legal issues you need to consider when advising clients who are looking at investing in the United States. Additionally, the panel covered key securities law issues, tax law issues, and immigration law issues relating to foreign investment into the United States and other countries. The panel analyzed the features of a recently debated bill, its influence on regional centers and investors, the alternative routes for EB-5 applicants, and the features of L-1 and EB1-C visas.

Moderator: Noah Klug, Berry Appleman & Leiden LLP

Speakers:
Qiang Bjornbak, Law Offices of Qiang Bjornbak
Michael Homeier, Homeier & Law, P.C.

March 2, 2016: Third Panel - Human Trafficking
Program Chair - Lisette Lavergne
Co-Sponsor: Women's Interest Network (WIN) in Celebration of International Women's Day.

The panel addressed the latest developments in connection with human trafficking, including issues such as whether survivors are being criminalized and recent developments in the fight against human trafficking. The Immigration and Naturalization Committee joined forces with Women's Interest Network (WIN) to Celebrate International Women's Day during the Immigration Committee's monthly call on March 2, 2016.

Topic: International Human Trafficking - Legislative Efforts and Recent Developments in Combating Sexual Exploitation

Human trafficking is a human rights issue affecting millions of men, women, and children. It is estimated that 27 to 30 million men, women, and children are trafficked globally for sexual exploitation and forced labor, with women and children being the primary victims. This crime against humanity is very difficult to combat due to the conspiracies of silence occasioned by threats of death and violence to victims and their families. Although a number of countries are enacting legislation to combat human trafficking, it is trite knowledge that prosecution of traffickers and enforcement of laws remain a complex and challenging matter. This inspiring program exposed an array of issues of global concern with respect to human trafficking. Our distinguished panel of experts conducted an in-depth analysis of the complexities of this modern day form of slavery -reviewing the impact of efforts by the U.S., international organizations and other countries to address this global malaise. It further discussed the latest developments in the law; the intersection of immigration and human trafficking and rule of law issues pertinent to this discussion.

Speaker Series Teleconference Panel - March 2, 2016 from 11:15 am est.-12:15 pm est

Program Chair: Lisette Lavergne, Salmen Navarro & Lavergne, PC

Moderator: Renee Dopplick, ACM Director of Public Policy

Speakers:

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Shelby Quast, Director of Equality Now
Olufunmi Oluyede, Co-Founding Principal, TRLPLAW
Paulina Rudnicka, Senior Legal Analyst, Rule of Law Initiative

Fourth Panel- Date TBD
Current Developments in immigration law for same-sex partners, including the U.S. Post-DOMA and other countries around the globe.

Fifth Panel – Date TBD
Program Chair - Chris
The Evolution of Immigration Law Firm Practice. A panel comprised of a diverse group of practitioners discussing challenges and tips to succeed in today's climate. We would have practitioners from solo practices, big law firms, small law firms, and non-profit organizations.

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Update from Programs Vice Chair

Margaret Kuehne Taylor
(U.S. Department of Justice, Washington, D.C.)

Editorial Note: The Programs Vice Chair would like to remind everyone of the committee's upcoming program at the Section of International Law's Spring Meeting in NYC between 12 – 16 April 2016.

Friday, April 15, 2016, 2:30 pm to 4:00 pm

Has The Board Untangled "Particular Social Group" Asylum Law?

How have different signatories to the UN Refugee Convention interpreted the term "particular social group?" How should they interpret the term when determining what kind of persecution makes a person eligible for asylum? Of the five asylum grounds under the Convention (race, religion, nationality, political opinion, and membership in a particular social group), the "particular social group" ground has always been, and continues to be, the most controversial. The controversy has only increased as some societies become more attuned to differences as they relate to gender identity and sexual orientation. Far beyond semantics, proper resolution of the meaning of the term "particular social group" can make the difference between asylum applicants' access to safety or exposure to harm. Panelists will present an overview of "particular social group" jurisprudence and explore the concomitant legal and societal intricacies, while providing ample opportunities for lively interaction among panelists and audience members.

Committee Sponsor:
Immigration and Naturalization

Committee Co-Sponsors:
Sexual Orientation and Gender Identity Issues Network; Young Lawyers Interest Network

Program Co-Chair:
Margaret Kuehne Taylor
U.S. Department of Justice, Washington, D.C.

Christina J. Martin
U.S. Department of Justice, Washington, D.C.

Moderator:
Margaret Kuehne Taylor
U.S. Department of Justice, Washington, D.C.

Panel Members:
Professor James C. Hathaway
University of Michigan Law School, Ann Arbor, MI

Judge Mimi E. Tsankov
New York Immigration Court, New York, NY

Alice Farmer
Office of United Nations High Commissioner for Refugees, New York, NY

Angela L. Williams
The Law Office of Angela L. Williams, LLC., Kansas City, MO

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Update from Membership Vice Chair

Sergio R. Karas
(Karas Immigration Law)

Editorial Note: The Membership Vice Chair would like to remind everyone of the upcoming program at the Section of International Law's Spring Meeting in NYC between 12 – 16 April 2016.

Till Death Do Us Part....or Not? International Issues in Marriage, Divorce, and Custody

What are the potential problems that can arise in cross- border relationships? What happens when individuals live togehter, marry, divorce and have custody battles that transcend borders? What are the consequences of marriage breakdown when one or both spouses are foreign nationals in the country where they live or work? This program will deal with the difficult and complex family, immigration and custody issues that often result in lengthy, costly and acrimonious battles, paying special attention to cultural and ethical issues. We will also discuss international child abduction and the difficulties it poses in international custody litigation.

Program Chair:
Sergio R. Karas, Karas Immigration Law, Toronto, Canada

Moderator:
Sergio R. Karas, Karas Immigration Law, Toronto, Canada

Speakers:
Graeme D. Kirk, Gross & Co, London, UK
Jeremy D. Morley, New York, The Law Office of Jeremy D. Morley, New York, USA
Daniela Horvitz, Horvitz & Horvitz Abogados, Santiago, Chile
Jessica Sandberg, Advokat Jessica Sandberg AB, Stockholm, Sweden

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Update from YIR Vice Chair

Kevin J. Fandl
(Professor, Temple University)

Editorial Note: The YIR Vice Chair provides an update on this year's YIR issue which is set to be published shortly.

Committee Updates:

The Immigration and Nationality committee's "Year in Review" was finalized in December and is set to be published early in 2016.

The articles that YIR Vice Chair Kevin Fandl received were excellent and required only minimal modifications to conform to the style and tone of the YIR.

In upcoming editions, the YIR would benefit from a greater diversity of submissions, including reviews of current events in the Middle East, Africa, Asia and Latin America.