ABA Section of International Law
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Immigration & Nationality Law News

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

Summer Issue 2016

Editorial Note

Dear Committee Members,

Here is the Summer, 2016 issue of the Immigration and Nationality Law News, published by the Immigration and Naturalization Committee, which contains:

- *Leaders in the Limelight* - **Very informative extracts from when Mo Syed, an active committee member interviewed Noah Klug, a past Co-Chair of our committee.**
- *The Global Corporate Migration Landscape: 2016* **by Stacey Hubbard**
- *U.S. F-1 Start Up Activities* **by Mo Syed**
- *San Diego Family Justice Center Assisting Undocumented Domestic Violence Survivors* **by Yvette Lopez-Cooper**
- *Guidelines Change Result in Refusal of Application to Hire Foreign Worker* **by Sergio R. Karas**

Our sincere gratitude to the authors and interviewer for their contributions. We are also grateful to Noah Klug for his time and for having shared insights about how to get involved in the Immigration and Naturalization Committee.

On behalf of the committee leadership, we will continue to receive submissions for the forthcoming issues in 2016-2017 and they may be sent to Sabrina Damast at sabrinadamast@gmail.com.

Last but not the least - We are proud and honored that the Immigration and Naturalization Committee's newsletter has won the **2016 Outstanding Committee Newsletter Award**. This would not have been possible without the superb material many of you submitted and the desktop publishing support from the team at LawQuest.

Regards,

Poorvi Chothani & Sabrina Damast (*Editors*)

Co—Chair's Note

Dear Committee Members,

Welcome to the last edition of the newsletter for the 2015-16 ABA year! The committee has been very active this year and accomplished a lot so we want to thank all of our Vice Chairs, Steering Group members and committee members who actively participated by joining our monthly calls, writing articles, organizing programs and speaking in our speaker series. Our first ever speaker series was a success and we were able to cover topics ranging from EB-5 investor visa changes to human trafficking and careers in immigration law. And we are very pleased to announce that the committee has just been selected to receive the **2016 Outstanding Committee Newsletter Award** on the basis of our wonderful newsletter. A huge thank you and congratulations to Poorvi Chothani and Sabrina Damast for all their hard work on the newsletter!

We will receive the award at the Section of International Law's Leadership retreat, which will be held August 3 to 5, 2016 at the Ritz-Carlton in Half Moon Bay, California. If you would like more information about the retreat or to register please visit http://www.americanbar.org/groups/international_law/section_retreat.html. The retreat is a great opportunity for new and returning leaders alike to learn more about the Section and network with other leaders.

We are glad that many of you will continue on in leadership positions next year, and we look forward to seeing new faces, too. Margaret ("Peggy") Taylor and I will be the committee co-chairs for next year, with Michelle moving to the position of Deputy for the Vice Chair of the Section as well as Immediate Past Chair for the committee, where we will still have the benefit of her experience and advice. If you were not actively involved in the committee this year, the start of an ABA year is a great time to change that - so please be on the lookout for new opportunities as we move into the next year. As always, if you have any questions please do not hesitate to contact us at audrey@lustgartenglobal.com or mjacobson@fragomen.com.

Sincerely,

Audrey Lustgarten & Michelle Jacobson

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Office Bearers

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Call for Submissions

Members 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 sabrinadamast@gmail.com.

Leaders in the Limelight: Noah Klug

By Mohammad A. Syed

Noah is originally from the East Coast of the United States, Pennsylvania and New York. He went to undergraduate and law school in New York. He started his career with the U.S. Department of Justice, Executive Office for Immigration Review (EOIR) as a participant in the Attorney General's Honors Program. He then took a job with Fragomen in Sydney to head their U.S. immigration and consular practice for the Asia-Pacific region.

He was with Fragomen in Sydney for over a year, then Melbourne for another 3 years continuing his U.S. immigration practice, as well as Australian inbound and global migration work. He then moved to a local, full-service Australian firm called Nevett Ford, where he started the firm's U.S. immigration practice and handled complex inbound migration cases. While at Nevett, he also worked in a few other areas of Australian law, including employment and contracts law. About two years ago, he joined Berry Appleman & Leiden LLP (BAL) in Dallas to do U.S. immigration work and global migration work for them.

Question 1: When did you join the ABA?

Answer: I joined the ABA as a law student in around 2003. I started being active in 2007. In 2008, I joined the Immigration & Naturalization Committee, where I started out on the steering committee, then moved on as vice-chair, co-chair, and now senior advisor. The main thing is just to

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participate. Half of life is just showing up; even just making sure to join all of the committee calls can be highly valued. Back at the time when I first got involved, Lisa Ryan was the co-chair and was always very supportive, giving everyone the opportunity to participate and strongly encouraging them to do so. I was always on the lookout for opportunities to help where needed and I did, such as editing the newsletter, helping with our website, etc. I also spoke on global immigration at a panel in the ABA's spring meeting in New York in 2014.

Question: 2: Wasn't participating in these activities very challenging to you as a law student? Did you make friends during that time as a law student and did they persuade you to be more active in 2008?

Answer: When I was a law student, I believe I obtained membership for free. To be honest, I think I joined mainly because it was free, but I didn't know how to get involved. Had I known how to get involved, I would have. But I really didn't until around 2008.

Question 3: Were you initially attracted to the immigration committee? Or were you just generally interested in the international section?

Answer: It was the immigration committee because that's what I was (and still am) practicing. The great thing about it is as I always tell my colleagues and especially younger colleagues that AILA is a wonderful organization, but sometimes it can be hard to find a way to get involved and participate because it is so large. The great thing about the ABA Immigration & Naturalization Committee is that it is much smaller and therefore it can be somewhat easier to get involved and participate. And what I did is just put my hand up and said that I want to be involved. You can get on the steering committee and if you stay involved and participating you keep moving up so long as you are willing to help out. One thing I have always wanted to do with the committee is to get some more action on the list serve. I see you often using it, Mo, which is fantastic, and I imagine you are getting some good responses, otherwise you wouldn't continue to use it. It is a great resource and provides such a wonderful knowledge base and I would love to see more users on there. It is a great way for people who want to get involved, just to start posting questions, starting discussions, answering questions, etc.

Question 4: What made you join the Immigration & Naturalization Committee?

Answer: I was a member of the ABA at that time and I just searched through the section and the committees and found the Immigration & Naturalization Committee. I later found out that there are actually a number of immigration-related committees throughout the ABA, but I believe our committee is the largest.

Sometimes it can be hard for an immigration practitioner to find the right group or committee within the ABA because as I said there a number of immigration committees, and I have always wondered if it would be a good thing to actually start an Immigration Section within the ABA. The Section would then have its own committees dealing with different areas of immigration law because there are so many different areas of immigration law: immigration litigation, business immigration, asylum, "crimmigration," etc. There are so many opportunities for growth in terms of the ABA and immigration. I think the ABA has a lot to offer as well because the value of the ABA is that the immigration practitioners have the opportunity to network and associate with attorneys who work in other fields as well. For example, once I was in a webinar on issues related to employing domestic workers and there were some tax lawyers who spoke on the tax issues. I spoke on the immigration side and I am still in close contact with those tax lawyers and we refer clients to each other. It is a great way to make contacts. At the Spring and Fall Meetings, you get to network as well and spend time with a lot of different lawyers around the globe, which is always very useful.

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Question 5: Are you now the Senior Adviser of the immigration committee? What are your current areas of interest?

Answer: One of the thing I mentioned before is the list serve. I would like to do some more work with promoting the list serve. I have been involved a little bit with programming. A colleague of mine has been working on a program that was accepted for the Tokyo meeting. I have been helping her with that.

Question 6: In the ABA committee list I found mixed reactions from different members. My own feeling is that members should use the list serve a lot. Sometimes there are threads that are not interesting and they say please don't reply to all and keep this offline. I tend to be more like pro-use person and some other people that are a little bit restrained and some people keep sending unsubscribe requests. Do you feel the committee leaders should play a moderating rule? What are some things that can be done to improve listserv usage?

Answer: It is unfortunate when people send unsubscribe requests to the entire list serve. It really discourages other members from using the list serve and can frighten them off from using it. It is important that the committee leadership jumps on that type of thing right away and explains to those people sending the unsubscribe requests to the whole list serve that there are controls on the ABA website under your profile where you can set your mailing list preferences. I think it is really inappropriate to send those kinds of unsubscribe emails to the entire list serve. It is just a shame because it discourages people from using it. Maybe one thing we can do is set up some list serve use policies and regularly distribute them to the list serve. Another thing is you can maintain a roster where you can assign people to take turns stimulating discussions on the list serve.

Question 7: You did mention that you had the chance to meet other committee members as well. Are there other ABA international section committees or other ABA sections that you are connected to?

Answer: When I was in Australia, I was in the Asia Pacific Committee and I believe that it where we first met (virtually), Mo – I recall you were the chair of that committee and did a wonderful job with it. I recently got involved in the Business Law Section because the main area of immigration law that I practice is business immigration law, helping companies with their immigration needs, and I am planning to participate more actively in that Section. For example, I'm currently writing an article for their newsletter.

Question 8: Having contact with foreign lawyers that are part of the international law section, is that an asset that the section brings to you?

Answer: Yes. When I first joined, one of the trends I noticed in the immigration committee is that they primarily focused on U.S. immigration. However, over the past couple years, there has been more focus on global migration, which is fantastic, and you see newsletters and programs at conferences on the global aspect. I think there are a lot of opportunities there for foreign lawyers to participate in newsletters, teleconferences, Spring and Fall Meeting programs, etc., through sharing expertise about their country.

Question 9: What do you wish to do for the Committee that would add value to its members?

Answer: We did a survey awhile back, asking what members wanted. To be honest, I can't remember the results offhand, but we should either look them up or do a new survey. One thing that comes to mind is we could try to do some in-person committee meetings, and/or an immigration-focused program outside of the Spring and Fall

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Meetings. That might be a good benefit for members.

Question 10: Do you have any ideas on how you wish to improve your leadership skills?

Answer: To do more mentoring and that could be something we can do in the committee like some type of formal mentor program for attorneys who are starting out in immigration law or something like that. Helping them to participate in the ABA. That's one of my favorite things to do.

Question 11: Do you have any future plans that would increase participation and memberships for the ABA and the Committee?

Answer: I always wanted to encourage participation. One thing we did, not long time ago, there used to be a monthly call for just the committee leadership. But a year ago or so, we opened up this monthly call to all members of the committee, which I think was great. I think it helped to increase participation and identify future leaders for the committee. I think maybe doing another survey may be a good idea to find out what people want.

Question 12: Can you draw any comparison in terms of being an ABA member in Australia? How did you benefit while you were there? As compared to ABA members who do have that kind of experience. By being a committee member in another country. Did you have some advantage or did the section bring you some additional advantage perhaps others did not have ?

Answer: Yes. I felt like I had something unique to offer with my expertise in Australian immigration law. I wrote some articles about Australian law for various ABA publications and also spoke on Australian immigration law at a Spring Meeting program. Also, I served as the ABA country representative for Australia. That was a good experience and I was surprised when I found out that there were more than one hundred ABA members in Australia. It was a great way to meet other attorneys in Australia.

Question 13: Do you think that the section and the committee have helped you to build your resume?

Answer: Absolutely. There are a lot of opportunities. In terms of the committees, they are always looking for program proposals and you can submit your own program or team up with a colleague to submit a program together to speak at or moderate a panel. In terms of publications, the committee is always looking for contributors for the newsletter, which is a great way to get published. There is also the Year-in-Review publication in the International Lawyer, which comes out towards the end of each year and is a prestigious publication. The committee is always looking for contributors for that as well.

Question 14: Let's turn to your own practice development. In your firm are attorneys provided some training on how to build up a client base?

Answer: That is actually a good idea for the committee to do. Maybe have a teleconference that focuses on this subject and bring a couple of speakers who have expertise in that area to share some insights and tips from which the committee and the membership can benefit.

Question 15: Do you have a lot of returning clients or mostly new clients?

Answer: Both. Many of my clients have followed me through my career, and it's great to have those long-term relationships and to continue to work with them on an ongoing basis. But I often work with new clients as well.

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Question 16: Is there a particular dominant referral for you? Is it client referral? Internet referral?

Answer: For me large numbers have been through existing client referrals. When you do good work for someone, they naturally sing your praises to others who may need your services.

Question 17: You are aware that the section has put a priority on diversity. How well these goals are being met? Have you seen improvement over years?

Answer: Yes. I have been involved in the committee leadership and it was always a priority of ours in selecting the vice chair and steering group members. I think following diversity requirements and ratios when selecting speakers is very important and helped us a lot. There has been indeed an improvement and our use of the different rules and policies have helped us a lot.

Question 18: How has the ABA membership in general and the committee membership in particular helped you grow both, personally and professionally?

Answer: I really gained a lot from the ABA in general and the Immigration & Naturalization committee in particular. I think I was fortunate that when I first joined it, Lisa Ryan was co-chair at that time and she was very supportive and helped me to grow. Our current co-chairs, Michelle Jacobson and Audrey Lustgarten, are very much in this vein as well and are always very welcoming to anyone who wants to participate. So my advice would be to show up for the calls, and then to help and contribute whenever you see an opportunity to do so. And follow through is very important. When you commit to doing something, make sure to do it.

Transcript of interview with Noah Klug Interviewed by Mohammad A. Syed on June 2, 2016 *(msyed@syedfirm.com)*

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The Global Corporate Migration Landscape: 2016

By Stacey Hubbard

The global corporate migration landscape is in constant flux, influenced by a host of factors including changing government philosophies, economic growth patterns, evolving cultural beliefs, and social insecurities. This article will highlight recent updates to the economic migration programs of key countries across the globe and categorize these countries as insular, progressive, or balanced, based upon their relative difficulty level for employers hiring foreign talent.

COUNTRIES PERCEIVED AS INSULAR

Canada: Increase in Employer Audits

Canada has a value-added employer-led economic migration policy, meaning that it favors migrants with job offers as they contribute to the country's talent pool. In this vein, Canada has implemented several changes during the course of 2015 and to date in 2016 which have made it more challenging for foreign workers and their sponsoring employers to apply for, maintain, and extend temporary work permits.

Most employers need a Labour Market Impact Assessment (LMIA) in order to hire a temporary foreign worker in Canada under the Temporary Foreign Worker Program (TFWP). The TFWP allows employers to hire foreign workers to fill temporary labor and skill shortages, and a positive LMIA will show that there is a need for the foreign worker to fill the offered position because there is no Canadian worker available to do so. The TFWP underwent a revamp in 2015, and one of the significant changes was that an employer must file a Transition Plan with its LMIA applications which outlines in detail

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how it will transition the position from a foreign national to a Canadian.

Another noticeable change was an increase in employer audits. One in four employers using the TFWP program is audited annually. Employers are closely scrutinized during these audits to ensure compliance with the terms of the approved LMIA, and a non-compliant employer may be placed on a published list and barred from utilizing the TFWP for a period of time.

In late 2015, Canada also launched its Employer Portal which is a secure gateway that allows employers to submit information and applications electronically. It was designed to improve the application process for LMIA-exempt work permits filed through the International Mobility Program (IMP); however, the Canadian authorities are also using it to audit employers who use the program.

United Kingdom: Efforts to Limit Net Non-EU Migration

In a similar vein to Canada, the immigration policies of the United Kingdom have favored high value non-EU migrants through a revamp of the Tier 1 (entrepreneur) and Tier 2 (skilled worker) points-based categories. The government recently commissioned the Migration Advisory Committee (MAC) to make recommendations on migration policy issues; however, the Committee was largely seen as being charged to formulate reforms which would limit net migration.

On the MAC's recommendation, starting April 6, 2016, minimum salary thresholds were introduced for all Tier 2 applications. MAC has also recommended that business leaders help select those entrepreneurs granted visas under Tier 1 (entrepreneur) in order to curtail the establishment of low-quality businesses. The reforms are expected to make it significantly more difficult and expensive to employ foreign talent in the UK.

The United Kingdom has also tightened its compliance regulations for foreign nationals outside the workplace. Effective February 1, 2016, across all of England, landlords who are renting, subletting, or taking in lodgers must check the papers of adult tenants to confirm they have the right to live in the UK. For those employers who rent on behalf of foreign employees, they can agree to a "tenancy in principle" before the employee arrives in the UK and then the landlord would have to conduct a right to rent check on the employee's arrival.

Singapore: Localization of the Workforce

As a result of its size, Singapore traditionally depended on external resources to meet its workforce and talent needs. The government had focused on becoming a "talent capital" in the global economy which led to regulations that conferred greater benefits on highly skilled employees holding employment passes (EPs), such as EPs for dependents and a path to citizenship. However, widespread political disapproval of these policies has now led to a tightening of the regulations in favor of a localized workforce.

We are seeing increasing levies on EPs, specifically the S-Pass, and a heightened level of employer scrutiny in an effort to assess a company's Singaporean core. Companies with foreign workers on EPs will be scrutinized on three criteria in addition to the individual criteria the EP holder must meet. Companies found to be "triple weak," meaning they have (1) a weak Singaporean core; (2) a weak commitment to nurturing their Singaporean core in the future; and (3) a weak relevancy to the Singaporean economy and society, will be notified and required to improve their recruitment practices. Companies that on subsequent evaluation do not make progress may have their EP privileges suspended or new and renewal EP applications denied.

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COUNTRIES PERCEIVED AS PROGRESSIVE

Brazil: Efforts to Streamline Processes

In Brazil, a country known for its highly bureaucratic and complex immigration processes, we are seeing changes to the immigration landscape which support a trend towards opening up to foreign workers. Brazil has joined the Hague Apostille Convention, which means that starting August 14, 2016, it will accept foreign documents that are apostilled instead of requiring document legalization procedures. Under the current rules, foreign workers applying for a visa or immigration benefit must follow complicated and lengthy procedures to legalize personal documents like marriage and birth certificates. The legalization process for the documents from some countries are prohibitive as a result of their complicated nature or long processing times. As a result, they deter Brazilian companies from hiring foreign talent.

Other notable changes include the implementation of an online application system and a significant increase in the list of documents accepted in support of a foreign worker's professional experience. Previously, applicants were required to contact foreign employers to obtain a proof of experience document that then had to be translated and legalized by a Brazilian consulate. It is also expected that Brazil will join the Global Entry Program this year, making it easier for frequent business travelers to enter the country.

COUNTRIES PERCEIVED AS BALANCED

South Africa: Corporate Account Status and Overstay Sanctions

Despite violent setbacks while trying to develop a socially accepted immigration policy in the post-Apartheid era, the South African government is implementing measures to address perceived deficiencies in its immigration programs. Last year, the South African Department of Home Affairs launched a Premium Visa Application Service for qualifying corporate companies and businesses. Businesses and companies must qualify for this service based on a points system, with select entities given "Corporate Account" status which allows them to benefit from a streamlined visa service.

South Africa balances its desire to attract foreign talent for the benefit of the economy with its clear position on overstays. In the past, sanctions for overstays consisted of a mere fine on departure. This year, the government will change this such that overstay sanctions will consist of a compulsory and non-discretionary declaration of undesirability and a ban on any such foreigner returning to South Africa for up to five years.

China: Streamlining Processes and Efforts to Attract Talent in the Science Technology Engineering and Math (STEM) Fields

In July 2013, China's "Exit and Entry Administration Law" came into effect in an effort to combat illegal entry, residence, and work. Generally the trend had been towards stricter monitoring and control; however, one of China's long-term objectives is to attract more skilled foreigners without prior ties to China.

On March 8, 2016, China launched a new online visa and permit application service for foreign nationals in Beijing which is intended help streamline the application process. New rules have also been introduced in Shanghai to attract foreign STEM talent, experts, and entrepreneurs. These rules aim to eliminate some bureaucratic layers in obtaining work and residence permits in Shanghai. Along with these pro-migration changes comes the strict implementation of regulations preventing illegal working activities.

Australia: Efforts to Protect Local Workers and Attract STEM/ICT Talent

In Australia, its Subclass 457 Program (skilled workers sponsored by Australian employers), is set for an overhaul in order for the government to

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ensure that companies are using the visa to address genuine skill shortages, not to avoid hiring qualified, but more expensive, local workers. The overhaul also seeks to curtail the abuse of foreign labor. The 457 visa allows skilled workers to enter Australia and work for an approved business for up to four years. Dependents are also permitted to enter and work or study in Australia under this program. Thirty-three recommendations for change were made by a Senate committee in March 2016 which includes prohibiting employers to hire a 457 visa holder in place of a local worker.

Australia has also announced the creation of a new Entrepreneur visa aimed at attracting foreign innovators and making it easier for post-graduates in STEM or information and communication technologies (ICT) fields to reside in Australia. This has been introduced as part of a broader effort to promote and invest in innovation in Australia.

What Does This All Mean?

If this article had been written just five years ago, the global corporate migration landscape would have looked very different. Businesses that employ foreign talent are counseled to regularly assess the risks associated with hiring foreign talent, factoring in recent changes, and to plan ahead for trends which can be utilized to their advantage. What this means will be different depending on the country in which your client is doing business and should always be a significant consideration in business planning, as early as possible in the onboarding lifecycle.

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U.S. F-1 Start-Up Activities

By Mo Syed

Permissible Work for the Immigrant Student Entrepreneur

You are one of those sorts of people who are great at multi tasking. You are also a foreign student on a F-1 student visa. You should really be studying for mid terms, but your mind is preoccupied elsewhere. You have been burning the midnight oil, planning your first Start Up. You are not doing this alone of course, because your U.S. born roommate is planning the new business venture with you. This is convenient because you are together a lot of the time in the evening, which gives you plenty of opportunity to compile your Start Up business plan.

It's not you, but your roommate, who suddenly questions the legality of setting up a Start Up if you are on a student visa and whether you have checked to see if you are allowed to do this. Because you had been so wrapped up finding your niche in the business world you hadn't really thought whether what you were contemplating doing was legal or not. You had noticed that the information supplied with the foreign student I-20, F-1, or I-94 visas stated that authorization from the Government was required if you wished to work.

Fear creeps over you at the thought of all that time you had spent planning a lucrative Start Up and it could all be for nothing. No time is wasted. The next morning you go into the Foreign Student office and ask the question as to whether you are permitted to work while on an F1 visa. You get the answer you dreaded as you are told in no uncertain words that you must not work until you have graduated and then you will be eligible for OPT. Here is what an immigration lawyer could have told you.

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A Comment from an Immigration Lawyer

Anyone in the know who is on a F-1 student visa is fully aware that he or she cannot work unless authorized to do so by the government through the USCIS. If caught working in unauthorized employment you are breaching your F-1 status, which could jeopardize your stay in the U.S. and you may even be deported. This could shame your family and affect your long term career and earning potential. Is it worth the risk?

What is unauthorized employment?

Unauthorized employment is by definition "any services or labor performed by an alien for an employer within the U.S. that is not authorized." As with many laws, there are often gray areas that are difficult to clarify when it comes to do's and don'ts and F-I visas. However the outline below should help you better understand your position.

First of all, if you are investing and managing your own business and this is what you spend most of your time doing, this is employment that will definitely be considered illegal and unauthorized. A recent example of this was an F-1 student who bought a fleet of hot dog vans which he leased to hot dog sellers and made money by collecting rent from a percentage of the sales of hot dogs.

The student on the F-1 visa took part in daily activities of the hot dog business by purchasing the hot dogs and other stock for the vans and now and again participated in selling. This is definitely classed as "unauthorized employment".

However, the simple act of owning a business is not considered to be employment and some start up activities are definitely allowed and do not compromise an F-1 visa status. These include incorporating a company, conducting market and feasibility research, holding and attending start up business meetings, and the development of goods, products and services. You are also even allowed to participate in fund raising activities such as putting on presentations and negotiating with Angel Investors, VCs and attorneys in an effort to source funding for your business. These are considered to be passive activities, which are permissible while day-day active business related duties are not.

When it comes to what is allowed is not so much based on getting paid but more whether the relationship you have is an employee-employer relationship or not when it comes to business activities.

Passive or active is the key to an authorized F-1 activity

Running a business by employing workers is not authorized as this is considered active participation. However, the role as a Board member and major shareholder means you can select an officer who can hire workers on your behalf. Additionally, any important decisions regarding the daily running of the business could be directed to the board by your U.S. elected officer.

The following business activities should not negatively affect your F-1 visa status:

- activities that aren't considered employment e.g. taking orders for goods produced overseas;
- negotiating contracts;
- consulting with your business associates;
- litigating;
- taking part in conferences or seminars that are scientific, educational, professional, or business related;
- undertaking independent research;
- membership of a U.S. company's board of directors;
- seeking to invest in the U.S., which would qualify for E-2 investor status.

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Curricular Practical Training (CPT) or Optional Practical Training (OPT)

CPT may be possible if practical training employment makes up some of your academic program or OPT if the employment is related directly to a major part of your study. Generally, OPT and CPT are available for 12 months only after completing your studies. The designated school official has to authorize this, whether the employment is during your study or after.

Changing to an H-1B Specialty Worker

This is hard to do, especially if you are trying to transfer based on your own business, as no one has direct control over you.

Other Visa Categories Post Study

After completing your studies you may be eligible to apply for an H-1B Specialty Occupation visa, an O-1 Outstanding Ability visa, an E-2 Treaty Investor visa, a NAFTA "TN" Professional Visa (applies to Canadian and Mexican citizens) or an H-3 "training visa."

Mo Syed *is the founder of The Syed Law Firm, PLLC, a law firm founded in 2011, which has developed a thriving immigration, litigation and international business practice. He can be reached at msyed@syedfirm.com.*

San Diego Family Justice Center Assisting Undocumented Domestic Violence Survivors

By Yvette Lopez-Cooper

In 2000, the United States Congress signed the Trafficking Victims Protection Act creating a path of legalization for victims of crime that cooperate with law enforcement officials in investigating crimes. In creating this law, U.S. legislators recognized the important role that undocumented victims of crime play in making communities safer while acknowledging that undocumented individuals are often reluctant to report crimes due to a valid fear of deportation. Increasingly this law has protected numerous domestic violence survivors, children and their families.

The U visa allows victims of crimes to come out of the shadows and live and work in the U.S. permanently. The legislative purpose was to assist law enforcement agencies in investigating and prosecuting cases; and to offer protection to vulnerable victims. Victims of certain enumerated crimes such as sexual assault, domestic violence and kidnapping who have suffered substantial and physical hardship and whom have cooperated with law enforcement in the investigation of crimes may qualify for U visa status.

Traditionally, families and children suffering domestic violence have run into roadblocks in seeking protection. Too often the abuser – who may or may not have legal status – uses the victims' immigration status as a sword, threatening to report them to the immigration authorities should they report the abuse. This fear often becomes reality. For several years, rumors of police departments turning undocumented individuals over to immigration authorities were rampant in immigrant communities. Indeed this was the case in several cities like San Francisco. Local efforts were created to establish "safe or sanctuary communities" for undocumented immigrants.

Recently, local communities, such as the San Diego, have seen the benefits of working with battered immigrant women and children to help make communities safer and establish independent, safe lives for these families.

The city of San Diego has launched a public safety initiative that assists domestic violence victims including those from immigrant communities. The

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San Diego Family Justice Center, an arm of the San Diego Police Department, has partnered with a wide array of community service organizations - from legal to counseling to medical assistance – to help meet the needs of the victims of domestic violence. In offering a one-stop location for families of domestic violence and their children, the police department has benefitted from victims being willing to help investigate and prosecute crimes.

While a good start in assisting immigrants, obtaining the U visa does not come without challenges. One vital requirement to obtain U visa status is to obtain certification from a law enforcement agency that the victim was helpful in the detection, investigation or prosecution of the case. Too often there are discrepancies throughout the various law enforcement agencies regarding who they certify as being "helpful." What constitutes "helpful" in some jurisdictions may not be considered cooperation in other cities. As is often the case, local rules and procedures differ in different jurisdictions. Historically, obtaining a successful law enforcement certification has depended on whether the crime occurred in San Diego or Los Angeles as local law enforcement offices created their own procedures and policy. While obtaining a signed certification is crucial to the U visa eligibility, it is only one requirement that must be met for this immigration benefit.

Nonetheless there are solutions to these challenges. Among them is California Senate Bill 674 that was signed by the California Governor Jerry Brown in October 2015. This law attempts to create uniformity in the helpfulness requirement by creating a rebuttable presumption that a victim is helpful, has been helpful, or is likely to be helpful to the detection or investigation or prosecution of the qualifying criminal activity, if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement. The law also creates a timeline within which law enforcement agencies must respond to U visa certification requests, and requires law enforcement agencies within the state to sign certifications for helpful victims. While it remains to be seen how each police department will interpret this law, it is a good first step in continuing to provide survivor support for vulnerable women and children.

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Guidelines Change Result in Refusal of Application to Hire Foreign Worker

By Sergio R. Karas

Recent changes to the Temporary Foreign Worker Program (TFWP) have caused considerable difficulties to employers looking to hire temporary foreign workers. In June 2014, the Federal government implemented significant modifications to the program and replaced Labour Market Opinions (LMOs) with a more complex regime of Labour Market Impact Assessments (LMIAs). The changes include a strict interpretation of advertising and compliance guidelines that employers must follow in order to avail themselves of the TFWP, increased scrutiny on reasonable efforts to hire Canadians, monitoring of wages and working conditions, and a consideration of proposed transition plans to eventually replace foreign workers with Canadians or permanent residents. The new TFWP regime has been the subject of recent litigation dealing with the interpretation of these guidelines.

In *Ahmed v. Canada (Minister of Public Safety and Emergency Preparedness)*[1], the Federal Court was called upon to decide the issue of when and under what conditions a Canadian employer can engage a

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temporary foreign worker for a vacant position. Specifically, when a labour market shortage exists in that position and the wages and working conditions meet the minimum standard, what reasonable efforts must be made by an employer to find a Canadian worker?

In *Ahmed*[1], the employer applicant, acting as manager for the company, sought to hire a temporary foreign worker in the position of Marketing Consultant. The employer submitted an application for a LMO to the Department of Employment and Social Development Canada (ESDC), on June 19, 2014. The employer was advised by the TFWP on July 11, 2014, that the application was rejected as an incorrect form was used, some fields were not completed, and the application lacked required documents. As the government implemented significant changes to the TFWP on June 20, 2014, replacing the LMO with the LMIA, the employer submitted a second application in July 2014. However, shortly after, a TFWP officer informed them by email that their second application was rejected because it was incomplete. In addition, the required employer transition plan was apparently missing. The employer filed a subsequent LMIA application in October 2014, together with the employer's representative's submission advising the TFWP that the employer was publishing another Job Bank advertisement, with a modified wage. A program officer conducted two telephone interviews with the employer and eventually refused the application, on the grounds that it did not demonstrate that the employer had made sufficient efforts to hire Canadians for the position, and that the employment of the foreign national was not likely to result in the filling of a labour shortage. Further, the officer found that there was no demonstrable shortage of workers in the occupation for the geographical region indicated in the application, apparently relying on other evidence of research not disclosed to the applicant.

The employer sought judicial review of the decision. The employer argued that the application should have been processed in accordance with the law and regulations at the time it was submitted[2], and that the applicants had a "legitimate expectation"[3] that it would be processed under the earlier version of the guidelines. Further, the employer contended that the conduct of the TFWP officer gave rise to promissory estoppel[4], as it was unfair for ESDC to change the guidelines and instructions on a continuing basis, specifically indicating that the prevailing wage for the occupation was increased after the application was submitted. The employer also objected to the application being refused because the advertisements were no longer available at the time of assessment, and because the officer apparently relied on extrinsic evidence concerning availability of labour without providing the applicant with an opportunity to refute it.

ESDC submitted that there was no procedural unfairness in applying published guidelines to assess the application. ESDC argued that the TFWP is a program of last resort to be used where no qualified Canadian or permanent resident is available to work, and the requirement for an employer to advertise for the position throughout the entire period during which the application is being assessed is justified. The objective in the guidelines is that a search for a qualified Canadian needs to continue until such time as the application is finally adjudicated. Therefore, since the officer applied the guidelines, the requirement of procedural fairness was met. Further, it was incumbent on the applicant to verify the prevailing wage for the position prior to publishing the advertisements. ESDC also argued that the employer did not demonstrate that it had made significant efforts to hire Canadians; did not demonstrate the degree to which the extensive qualifications sought were in fact necessary for the position; that there were inconsistencies regarding the required qualifications as published in the advertisements and those stated by the employer during the telephone interviews; and that there was no shortage of Marketing Consultants in the geographical area where the employer was located.

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The Federal Court held that the applicable standard of review to determine whether the program officer had breached a procedural duty of fairness was an issue of law reviewable on a standard of correctness.[5]

The court determined that the essential issues to be determined were whether the officer relied on policy requirements which were not in place at the time of the submission of the application, and whether the officer failed to provide an opportunity to reply to extrinsic documentary evidence.

The court cited with approval the decision in *Frankie's Burgers Lougheed Inc. v Canada (Minister of Employment and Social Development)*[6] where the Chief Justice of the Federal Court held:

> "In the context of applications by employers for LMOs, a consideration of the relevant factors that should be assessed in determining those requirements suggests that those requirements are relatively low. This is because, (i) the structure of the LMO assessment process is far from judicial in nature, (ii) unsuccessful applicants can simply submit another application (Maysch v Canada (Citizenship and Immigration), 2010 FC 1253, at para 30; Li v Canada (Citizenship and Immigration), 2012 FC 484, at para 31 [Li]), and (iii) refusals of LMO requests do not have a substantial adverse impact on employers, in the sense of carrying "grave," "permanent," or "profound" consequences." [7]

The court held that, in assessing an LMIA, the degree of procedural fairness owed to an applicant is relatively low.

The court also held that, notwithstanding the fact that the program officer employed "standard language" in its decision to refuse the application, the officer found that the applicants did not demonstrate sufficient efforts to hire Canadians and that the employment of the foreign national was not going to result in filling a labour shortage. Although the applicant argued that the reasons for refusal were confusing, the "adequacy" of reasons is not a stand-alone basis by which to quash a decision[8].

The court also held that the argument presented by the applicant that procedural fairness was breached by continually changing the guidelines and forms had no merit. The applicant failed to demonstrate how those changes impacted the assessment by the officer. The court held that it was impossible to find that there was a breach of procedural fairness if the applicant did not, at the very least, indicate how those changes had tangible consequences in the circumstances of the case.

With regards to the discrepancy in the prevailing wage, which had changed between the dates of the initial LMO application and the last LMIA application, the court cited with approval the comments made in *Frankie's Burgers*[9], where it was held that:

> "The Guidelines make it very clear that employers are expected to at least meet the minimum recruitment efforts required for lower skilled occupations before they apply for an LMO. This is an entirely reasonable position, as ESDC officers need to be able to assess requests for LMOs at a point in time. There is nothing unreasonable about taking the position that such time is when the application is submitted. The fact that ongoing recruitment efforts are also required simply ensures that employers will continue to endeavour to find Canadian citizens or permanent residents to fill the vacant positions until a positive LMO is issued. [emphasis added]"

Since the employer had the obligation to demonstrate that they had made sufficient efforts to hire Canadian citizens or permanent residents for

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the position up until the time in which a positive LMIA would be issued, it would be contrary to the regulatory intent to find that a LMIA applicant would not have to ensure that the wage advertised met the prevailing wage for the occupation. Although the court recognized that the timeline with respect to the prevailing wage changes was problematic in this case, a number of other factors led the decision-maker to a finding of a lack of credibility, and that outweighed the issue of procedural fairness. Even if the matter would have been remitted back to the TFWP by the court, the ultimate decision would not have changed. Therefore, the application for judicial review was dismissed.

The facts of this case highlight the many difficulties encountered by employers when attempting to hire foreign workers and when applying for LMIAs. Policy and application form changes have become the norm rather than the exception in the program. It is imperative that employers obtain the advice of experienced immigration counsel to navigate this cumbersome system, and that they document their efforts to advertise the position and attempt to hire Canadian citizens or permanent residents in a very thorough and deliberate manner, paying close attention to changes in wages, working conditions and ensuring that the advertising of all positions is consistent and extensive in the labour market.

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[1] 2016 FC 197
[2] Kanes v Canada (Minister of Citizenship and Immigration), [1993] F.C.J. No. 1472
[3] Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817; Canada (Minister of Citizenship and Immigration) v Bendahmane, 8 Imm LR (2d) 20 (FCA)
[4] Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services), [2001] 2 SCR 281, 2001 SCC 41
[5] Frankie's Burgers Lougheed Inc. v Canada (Minister of Employment and Social Development), 2015 FC 27 at para 23; Dunsmuir v Nouveau-Brunswick, [2008] 1 SCR 190, 2008 SCC 9 at paras 79 and 87; Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12, [2009] 1 SCR 339 at para 43)
[6] Supra, at para. 73
[7] Baker v Canada, supra, at para. 23-25
[8] Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62 at para. 14
[9] Supra, at para. 45