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Immigration Law Overview with Attorney Farhad Sethna

10:15 am -11:45 am

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Presenter and author: Attorney Farhad Sethna has practiced law for over 20 years. Since 1996, he has been an adjunct professor of Immigration Law at the University of Akron, School of Law, in Akron, Ohio. He is a frequent speaker at Continuing Legal Education and professional development seminars on various immigration-related topics. His practice is limited to immigration and small business. With offices in Cuyahoga Falls, Akron and Dover, Ohio, Attorney Sethna represents clients in all types of immigration cases. Our number is: (330)-384-8000. Please send your general immigration questions to AttorneySethna@immigration-america.com. We will try to answer as many questions as possible.

This is only general legal information. Please consult a qualified immigration attorney for advice on your specific case.

Topics:

1. General overview of immigration law:

1.1.1 Who implements immigration law and makes policy?

Immigration law is multi faceted. Many agencies impact immigration law:

1. Department of Homeland Security;
2. U.S. Department of State;
3. Health and Human Services;
4. Social Security Administration;
5. FBI;
6. State and County agencies;
7. Local agencies including police departments

1.1.2 Immigrant vs. nonimmigrant status:

Immigrants: Individuals coming to live and work permanently in the United States. "Green Card" holders or "Legal Permanent Residents" (LPR's)

Nonimmigrants: Individuals coming to the USA for a defined specific purpose for a temporary defined period. Examples: students, visitors for business or pleasure (tourists), temporary workers, performers, visiting professors or scholars, medical trainees, etc.

1.2.1 Sources of immigration law:

8. Statutes
9. Regulations
10. Case Law

1.2.2 Additional sources of immigration law:

11. BIA decisions;
12. Circuit Court decisions;
13. Administrative Appeals Office of the USCIS;
14. Other federal agencies (e.g.: DOL - BALCA);
15. Policies and memoranda issued by various executive branch agencies;
16. Emerging trend of state laws regulating immigration

1.3.1 Immigration quotas and priority dates:

Section 201 of the Immigration and Nationality Act (INA): Annual minimum family sponsored minimum "floor" of 226,000 persons.

Employment-based preference immigrant limit minimum "floor" 140,000.

1.3.2 Per country limits for immigrants: 7% of the total family-based sponsored and

employment -based limits, ie 25,620.

Dependent area limit is set at 2% of the total number of visas available, or 7,320.

1.3.3 Priority dates:

INA § 2.3 (e) requires that visas be granted to immigrants in the order in which a petition has been filed for each such immigrant. Any spouse or child of a preference immigrant is entitled to the same status if accompanying or "following to join" with immediate immigrant relative.

Certain countries are over subscribed, meaning the number of applicants from that country far exceed the number of visas which may be granted to each country under the per country limit explained above. Four countries are currently over subscribed: China (mainland); India; Mexico; Philippines

1.3.4 "Preference categories" for family-based immigration:

Immediate relatives (not subject to numerical limit - so not on the priority date chart);
(F1) Unmarried sons or daughters of U.S. citizens;
(F2A) Spouses and unmarried children under 21 of permanent residents;
(F2B) Unmarried children (over 21) of permanent residents;
(F3) Married sons and daughters of U.S. citizens;
(F4) Brothers or sisters of U.S. citizens

1.4 Employment-based immigrants and priority dates:

Employment-based immigrant visas are prioritized based not on relationship but on the qualifications of the intending immigrant.

Only 140,000 employment-based immigrant visas are available per year resulting in significant backlog especially for India and China

1.4.2 Preference categories for employment-based immigration:

EB-1: Aliens of Extraordinary Ability; Outstanding Professors or Researchers; and Multinational Executives and Managers

EB-2: Aliens with Advanced Degrees or aliens with Exceptional Ability

EB-3(1): Degreed professionals or aliens with at least two-years of relevant work experience

EB-3(2): Unskilled workers - only 10,000 visas per year

EB-4: Religious workers and special immigrants, including asylees

EB-5: Alien investors: invest a million dollars or more and create upto ten full-time U.S. worker jobs. Pilot programs - reduces investment to $500,000 but still create ten full-time U.S. jobs.

1.5.1 Typical scenarios in a family-based petition:

- What is it? Application for an immigrant visa filed by a qualifying U.S.C. Relative;
- Aunts and uncles cannot sponsor nieces and nephews;
- USC children can sponsor only once 21
- Child must be under age 16 to adopt
- Sponsorship is limited within the relationships and ages described above

1.5.2 Typical stages in a family-based petition

Qualifying USC relative applies for Immigrant visa for immediate relative or sibling family member
Application is filed with USCIS in the USA
Application approved; processing sent to National Visa Center if no immediate visa
If immediate visa, processing for adjustment of status or immigrant visa commenced through Department of State.

1.6.1 Typical scenarios of an employment-based petition:

Employment-based visas are more complicated than family-based petitions given that there are a number of ways to emigrate through employment. There are also a number of processes available for immigration through employment.

Employment preference categories may be substantially backlogged for certain countries, but are less backlogged than family preferences.

Employer “sponsors” qualified alien

Alien Self-petitions for immigrant visa (aliens of extraordinary/Exceptional ability; EB-5 investors)

1.6.2 Types of employment based immigrant petitions

Extraordinary / exceptional ability
Outstanding professors and researchers
Multinational executives
Schedule “A” - shortage occupations

National Interest waivers
PERM - "Labor Certification"
Investor visas (EB-5)

1.7 Typical problems in family and employment-based cases:

Family-based cases:
- Petitioner relative dies;
- Beneficiary "ages out"
- Petitioner relative lacks funds for sponsorship;
- Beneficiary has criminal/other disqualifiers;
- Alien cannot leave home country due to family or employment considerations;

Employment-based cases:
- Petitioning employer goes out of existence;
- Company cannot pay the "prevailing wage";
- Work stoppage / layoff prevents sponsorship;
- Criminal or other disqualifiers

1.8.1 Affidavit of Support and sponsorship requirements:

- U.S. citizen or permanent resident petitioner must show enough income to ensure that sponsored alien will not become a burden to U.S. taxpayer;
- Petitioner stipulates that he or she makes a certain income (at least 125% of current U.S. poverty income guidelines); and
- Undertakes to be responsible for sponsored alien and his or her family for a minimum of ten years or until the sponsored alien becomes a U.S. citizen, whichever comes first.

1.8.2 Affidavit of support restrictions:

A sponsoring U.S. citizen or permanent resident sponsor remains responsible under the affidavit of support requirements even if the relationship is terminated through divorce or dissolution. If the alien becomes a U.S. citizen however, then the U.S. sponsor is absolved from any further responsibility.

Be aware: Some courts are using affidavit of support information in determining extent of U.S. spouse's assets and calculating alimony to a alien spouse. But these arguments can be countered by citing *Davis v. Davis*, 970 N.E.2d 1151, 2012-Ohio-2088 (Ohio App. 6 Dist. 2012)

In *Davis*, the Court of Appeals of Ohio, Sixth District, Wood County, initially granted the alien spouse support, citing, among other reasons, the Affidavit of Support, though it specifically declined to enforce the affidavit. The appeals court reversed, holding that "the immigration

statutes and related regulations clearly gave the [alien spouse] standing to enforce the Affidavit of Support" and that the trial court had the jurisdiction to enforce the provisions of the affidavit.

However, in a subsequent contempt action for failure to pay spousal support, the *Davis* court reversed. It noted that the alien spouse had previously permitted the trial court to retain jurisdiction of the spousal support issue, including any modifications under the federal immigration affidavit of support provisions. Hence the trial court had the jurisdiction to alter the support obligation.

Importantly, the court rejected the notion that an alien spouse could attempt to enforce a federal affidavit of support in state court. In ¶ 34 of the opinion, the court declared: "Assuming, arguendo, that the state law provisions do apply to enforcement of an Affidavit of Support— ***although we specifically conclude that they do not***— we find they would be of no avail to appellant in this case, because appellant herself requested the ability to seek modification of the Affidavit of Support in accordance with federal law..." (Emphasis added)

Immigration questions related to:

1. divorce

2. custody

3. domestic violence

What is a DV Crime under Immigration Law

Could be a "crime involving moral turpitude" (CIMT)

Could be a felony (mandatory detention possible)

Could lead to mandatory detention even if not felony (threat to the community or to specific persons)

Specific immigration statute makes DV and other family / child crimes and even violation of TPO's removable offenses:

INA 237(a)(2)(E) Crimes of Domestic violence, stalking, or violation of protection order, crimes against children...

237(a)(2)(E)(I) Domestic violence, stalking, and child abuse.--Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

237(a)(2)(E)(ii) [1227(a)(2)(E)(ii)] Violators of protection orders.--Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

4. family law issues

5. Immigration consequences of criminal convictions and minor offenses

5.1 Definition of conviction under Immigration and Nationality Act (INA):

101(a)(48)

101(a)(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where–

> 101(a)(48)(A)(I) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> 101(a)(48)(A)(ii) the judge has ordered some form of punishment, penalty, or restraint on

the alien's liberty to be imposed.

101(a)(48)(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

5.2 Verify that the defendant is a U.S. citizen before entering a guilty plea:

For example- in Ohio- warning ORC §2943.031: "court to advise defendant as to possible deportation, exclusion or denial of naturalization upon guilty or no contest plea."

5.3 Withdrawing a guilty plea:

There must be an underlying issue of law or fact or a constitutional issue that permits the withdrawal of a guilty plea. If a plea is withdrawn purely for immigration purposes it may still count as a conviction for removal or exclusion purposes.

Admission to a diversion program which requires an admission to the elements of the offense can still constitute a conviction for immigration purposes. See the definition of conviction above.

5.4 6th Circuit case: *Barakat v. Holder*, 621 F.3d 398 (2010)

A conviction vacated for rehabilitative or immigration reasons remains valid, while a conviction vacated for substantive or procedural infirmities does not have any immigration consequence.

5.5 Crimes specific to immigration law:

Inadmissible at time of entry or of adjustment of status;

Present in violation of law (violation of LPR status);

Violation of nonimmigrant status or condition of entry;

Termination of conditional permanent residence;

Alien smuggling (special exemption in case of family reunification);

Marriage fraud;

(Waivers authorized in some cases).

5.6 Crimes with immigration consequences:

5.6.1 Crimes involving moral turpitude: Two elements- (1) commission within 5 years after the date of admission and (2) sentence of one year or more may be imposed (ie, max sentence – even if not imposed – is one year or more per the statute)

5.6.2 Multiple criminal convictions: Two or more crimes involving "moral turpitude" not arising out of a single scheme of criminal misconduct – length of sentence not material

5.6.3 Aggravated felonies: as defined under immigration law – see INA § 101(a)(43);

5.6.4 High Speed Flight from a U.S. immigration checkpoint;

5.6.5 Failure to register as a sex offender;

5.6.6 Controlled substance violations: only exception: a single offense for one's own use, of 30 grams or less of marijuana; and

5.6.7 Firearms offenses

5.6.8 Crimes of domestic violence, stalking, violation of a protective order, and crimes against children

5.6.9 Human trafficking;

5.6.10 Failure to register and falsification of documents;

5.6.11 False claim to U.S. citizenship;

5.6.12 Security and related grounds including espionage and terrorism

5.6.13 Removal due to foreign policy issues;

5.6.14 Participation in Nazi persecution, genocide, or any act of torture or extrajudicial killing;

5.6.15 Recipient of Military-Type Training;

5.6.16 Participation in severe violations of religious freedom;

5.6.17 Recruitment or use of child soldiers;

5.6.18 Public charge; and

5.6.19 Unlawful voters

5.7 Important case law:

Recent Supreme Court Decisions Interpreting Availability of Immigration Relief: St. Cyr; Padilla v. Kentucky; Chaidez v. U.S.; Judulang v. Holder

St. Cyr - INS V. St. Cyr, 533 U.S. 289 (2001)

Padilla - Padilla v. Kentucky, 130 S.Ct. 1473 (2010)

Chaidez - Chaidez v. United States, 133 S.Ct. 1103 (2013)

Judulang - Judulang v. Holder, 132 S.Ct. 476 (2011)

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***INS v. St. Cyr*, 533 U.S. 289 (2001)**: The IIRIRA of 1997 foreclosed INA §212(c) relief for pleas entered before April 1, 1997. The Supreme Court reinstated *St. Cyr*, for guilty pleas entered prior to April 1, 1997. In *St. Cyr*, the court stated, the conviction that rendered the petitioner ineligible for § 212(c) relief resulted from a guilty plea and the Supreme Court found that the petitioner "might well have chosen to contest the charge had he known that, under later legislation, his conviction would render him ineligible for an avenue of relief from deportation."

- See application of *St. Cyr* in the 6th Circuit: *Thaqi v. Jenifer*, 377 F.3d 500 (2004): the court noted that *St. Cyr* does not require that a petitioner demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect. All that *St. Cyr* requires, the court noted, is that "petitioner is among a class of aliens whose guilty pleas 'were likely facilitated' by their continued eligibility for § 212(c) relief."

***Padilla v. Kentucky*, 130 S.Ct. 1473 (2010)**: addressed whether defense counsel's failure to provide information regarding the immigration consequences of a guilty plea constitutes ineffective assistance of counsel under Strickland v. Washington and therefore AILA InfoNet renders a guilty plea involuntary.

- See pre-Padilla application of this holding in the 6th Circuit: *Mezo v. Holder*, 615 F.3d 616 (2010) "Given the evidence that Mezo hired an attorney and was lied to by that attorney, combined with her lack of understanding of our Byzantine immigration laws, the likely cause of her delay in moving to reopen was not a lack of due diligence. Viewed in light of all her actions, it seems that, had Mezo been aware of her attorney's misconduct, she would have acted promptly to file her motion to reopen and otherwise diligently pursue her claim, as she did when she finally learned of Sullivan's misconduct."

Padilla update: The Supreme Court heard and decided *Chaidez v. US* as to whether Padilla should be applied retroactively: the Supreme Court decided it should not. Only convictions that became final on or after March 31, 2010 would benefit from the protections afforded by *Padilla*.

***Chaidez v. U.S.*, 133 S.Ct. 1103 (2013)**: In *Chaidez*, the Supreme Court decided that *Padilla* had indeed created a new rule, by requiring that counsel must advise their clients of the immigration consequences of a plea or conviction. The Court held that *Padilla* imposed a new obligation on counsel and thus created a new rule.

- That being said however, *Chaidez* limited *Padilla* to any cases that became final convictions on or after the *Padilla* decision was issued which would be March 31, 2010. Therefore, for those aliens who had immigration consequences arising out of criminal convictions that became final

before March 31, 2010, *Padilla* does not apply. They cannot attack the criminal conviction on the basis of ineffective assistance of counsel - at least under the *Padilla-Chaidez* reasoning. If however, their conviction became final after March 31, 2010, they may attack their underlying conviction using *Padilla-Chaidez*.

- Implications and complications of the *Chaidez* decision:

A conviction is typically treated as "final" when either: (1) all available avenues for appeal have been exhausted; or (2) the time for appeal has lapsed and no appeal has been filed. *Chaidez* therefore becomes a last hope for an alien who faces removal especially if the alien can prove that his or her counsel did not provide any advice about the immigration consequences of the conviction, and that the conviction became final after on or after March 31, 2010.

But here's another problem - even if the client is successful in having his or her plea vacated and the conviction overturned, the underlying charges have not been dismissed. It's only the plea or the conviction that was vacated. The alien still stands accused of the crime. The original indictment is still active. The case returns to the prosecutor. Now a criminal defense attorney has to consider what the prosecutor may do in that circumstance - negotiate a lower plea that would not have any immigration consequences or insist on retrying the client on all the initial charges with no plea agreement. Therefore, before filing for relief under *Padilla* and *Chaidez*, or filing any motions with the respective state or local courts, it would be prudent for defense counsel to seek the prosecutor's position on negotiating a new plea for the client.

***Judulang v. Holder*, 132 S.Ct. 476 (2011)**: The Government had argued- in the context of relief under INA §212(c)- that such relief was available only for crimes that were either drug offenses or crimes involving moral turpitude. No convictions for other crimes qualified for 212(c) relief. The Supreme Court struck down the BIA's reasoning, holding: The BIA's policy for applying §212(c) in deportation cases is "arbitrary and capricious" under the Administrative Procedure Act, 5 U.S.C. §706(2)(A); "By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner." (Syllabus)

6. The process of applying for a USCIS K-1 Fiancé (or fiancée) Visa

MUST have had actual visit (face to face) within two years prior to filing application except if impossible due to religious or political/safety limitations

File form I-129F with USCIS along with supporting evidence (see form instructions; always check filing fee and filing address at USCIS.gov)

Once I-129F is approved, file docs with National Visa Center

Consular processing for Fiancee visa at US consulate in appropriate country

Entry to USA - valid for 90 days

Must marry within 90 days

File for Adjustment of Status (Green Card) after marriage

Conditional Permanent residence - if marriage took place less than 2 years after "Green Card" is approved, the alien has permanent residency for only 2 years. This "conditional" residency can be made permanent by a joint filing (alien-US Citizen spouse) with USCIS. Exceptions apply for battered spouses or divorce.

7. The effects of a DUI on Immigration status and ability to work/teach, etc.

DUI - severe effect - including on Prosecutorial Discretion.

Resources: DHS Secretary Jeh Johnson - Memos of November 20, 2014:

a. Prosecutorial Discretion memo

b. Removal priorities memo

No bond by ICE, IJ's

Very difficult to defend in immigration court esp. if prior case has already concluded.

8. Resources:

Many are already using:

Kurzban's Immigration Law Sourcebook

Immigration Law and Defense

U.S. Immigration Step by Step

ALSO consider using AILF website: www.americanimmigrationcouncil.org

Encourage members who are thinking of or have recurring immigration law questions to join the American Immigration Lawyer's Association (AILA). AILA.org has up to date and breaking news.

USCIS.gov

State.gov (for breaking dipomatic and visa news, visa bulletins, country condition reports)

My own blog page - I try to keep it up to date with breaking information and news:

www.immigration-america.com

You can also check out my "Linked-in" page where I have uploaded several recent presentations and additional information

And my YouTube video channel where I have recorded many helpful, short videos (channel: US Immigration Guide)

9. Wrap-up and Q&A

Your notes and comments: