No one is talking any more about being surprised by the election results or the possibility of a calming, more inclusive transition to governing after a difficult campaign. President Trump’s immigration plans are now reality. Immigrants are up against a wall.1

Although during his campaign, Donald Trump promised to build a wall, ban Muslims, and deport millions, the Trump Administration had been stymied on its most visible immigration initiatives, at least until the U.S. Supreme Court’s June 26, 2017 decision that partially lifted the second travel and refugee ban. Congress withheld requested funding for the border wall, while courts blocked two successive travel bans and directives to deny federal funding to sanctuary jurisdictions. President Trump backed off campaign promises to end Deferred Action for Childhood Arrivals (DACA), telling DACA recipients they can “rest easy.”

Despite these high profile setbacks, the new administration has dramatically reshaped immigration policy during its first few months in office. The administration successfully engineered a major crackdown, which was framed as new policy to protect public safety, but seems more effective in sowing fear and creating chaos for undocumented immigrants. The climate of fear

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1 This practice advisory updates the earlier advisory, “Up Against A Wall: Post-Election Ethical Challenges for Immigration Lawyers,” January 11, 2017, AILA Document 17011200.
extends to families, communities, employers, and immigrants with valid status. The blocked executive orders that banned travel for nationals from seven and then six Muslim-majority countries under the revised ban, and the recent U.S. Supreme Court decision to lift part of the travel ban from six Muslim-majority countries, may have drawn more attention, but the interior enforcement executive order issued at the same time has impacted immigration policy on the ground by giving immigration agents authority to arrest virtually any undocumented immigrant they encounter. In response, immigration agents have been more aggressively targeting individuals, making collateral arrests, and appearing at sensitive locations for enforcement actions, in front of schools, hospitals, and in state courthouses.

The rate of immigration arrests increased nearly 40% during the first three months of 2017, compared to the same period in 2016. “Between Jan. 22 and April 29, 2017, ICE Enforcement and Removal Operations (ERO) deportation officers administratively arrested 41,318 individuals on civil immigration charges. Between Jan. 24 and April 30, 2016, ERO arrested 30,028.” Any questions about post-election consequences of the campaign’s anti-immigrant rhetoric have been answered.

Facing this new reality, immigration lawyers must continue to be alert to new initiatives that create greater challenges for clients. ICE has been moving to reopen administratively closed cases, expanding fast track deportation methods through greater use of expedited removal, and adding more detention beds. Attorney General Sessions recently announced a change in policy at the Department of Justice to prioritize criminal immigration enforcement of low-level immigration offenses, including for unlawful entry (8 U.S.C. §1325), using false documents, and harboring (8 U.S.C. §1324). The April 18, 2017 “Buy American, Hire American” executive order promises changes to the H-1B program, but, because the administration has been so focused on accusing foreign nationals of taking jobs from U.S. workers, these changes may not be what the program or employers need. Immigration lawyers should make clients aware of the administration’s new extreme vetting procedures that may be applicable to at least 65,000 visa applicants. A new form, DS-5535, asks, inter alia, for address, employment, and travel history during the last fifteen years, including source of funding for travel; social media platforms and identifiers, also known as “handles”, used during the last five years; and phone numbers and email addresses used during the last five years.

2 The Supreme Court granted the Government’s petitions for certiorari and has agreed, in October 2017, to review both the Fourth Circuit in International Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017) and the Ninth Circuit in State of Hawaii v. Trump, 2017 WL 2529640, that upheld the injunctions against President Trump’s second executive order regarding the travel ban. In Trump v. International Refugee Assistance Project, 582 U.S. (2017), the Supreme Court also partially lifted the preliminary injunctions against the travel ban pending its review of these decisions. In narrowing the injunctions to permit the travel bans to be partially implemented, the Court indicated that the executive order may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. Sections of the second executive order on the travel ban are being implemented against citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen. On June 29, 2017, the U.S. Department issued a cable providing guidance to consular posts on how to implement the executive order and USCIS also provided guidance through FAQs that raise additional challenges for affected individuals and immigration lawyers advising their affected clients because of the uncertainty regarding these agency interpretations of the Supreme Court’s exception to the ban based on the credible claim of a bona fide relationship. See “Practice Alert: DHS and DOS Implementation of Executive Order Imposing Travel and Refugee Ban (updated June 29, 2017), AILA Doc. No. 17012670. Lawyers must advise clients who may be subject to the EO about the impact of the Supreme Court’s decision to lift the stay. The lawyer must also analyze what impact the EO has on future entrants to the U.S.


7 http://www.ice.gov/features/100-days.

years. Only clients who keep meticulous records will be able to answer this form accurately. The extraordinary amount of information required by this new visa application poses additional challenges for immigration lawyers.

After the 2016 election, before the inauguration, immigration lawyers who were uncertain what to expect had to acknowledge different possible scenarios when advising clients on post-election strategies. Immigration lawyers now know what to expect. In these rapidly changing, difficult, and fearful times, it is essential that immigration lawyers refresh their understanding of professional conduct rules.

**Importance of Ethics**

Immigration lawyers need to advocate for their already fearful clients as strongly as possible without crossing ethical lines. Zealous advocacy is required when the stakes are so high for immigrant clients. Ethical lines can be unclear when advising unauthorized immigrants who wish to remain in the United States. The preamble to the ABA Model Rules of Professional Conduct acknowledges the lawyer’s different roles as an advisor, who provides an “informed understanding of the client’s legal rights and obligations” and explains their practical implications, and as an advocate, who “zealously asserts the client’s position under the rules of the adversary system.” The lawyer’s judgment must be guided by certain basic underlying principles that include the “obligation to protect and pursue a client’s legitimate interests, within the bounds of the law.” Lawyers have competing duties because of responsibilities to individual clients and to the judicial system in which they practice.

**Framework for Ethical Practice: Specific Rules to Consider**

The ethics rules highlight conflicting obligations lawyers encounter. Lawyers should consult the specific state rules that apply to their conduct, rather than simply rely on the ABA Model Rules of Professional Conduct, since many state rules contain variations of the model rules. They also need to consider the federal rules for immigration practitioners that include different language or do not have corresponding state rule provisions.10

Immigration lawyers are advising clients who are present without immigration authorization on future paths to legal status during a period when the government is clamping down on undocumented immigrants. Because of the administration’s new enforcement priorities and its new focus on criminal immigration enforcement, immigration lawyers face greater ethical challenges defending clients within a very difficult practice environment. To be effective, immigration lawyers need to understand each ethical rule that impacts their representation.

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9 See State Department Notice in the Federal Register dated May 4, 2017, available at https://www.federalregister.gov/documents/2017/05/04/2017-08975/notice-of-information-collection-under-omb-emergency-review-supplemental-questions-for-visa. Lawyers should also make clients aware that they may be subjected to an intrusive inspection when they arrive at a port of entry, and must advise clients of their rights and to also be truthful. For example, although there have been a few isolated incidents, it is not the policy of the CBP to find travelers inadmissible solely because they have peacefully demonstrated anti-Trump views if they intend to enter the US to pursue activities consistent with their visa. Travelers cannot be forced to give up their passwords on their social media accounts, but the attorney must advise them of consequences depending on whether they are citizens, permanent residents or nonimmigrants. For resources on border searches of electronic data, see https://www.aclu.org/blog/free-future/can-border-agents-search-your-electronic-devices-its-complicated and https://www.cbp.gov/sites/default/files/documents/inspection-electronic-devices-tearsheet.pdf

Communication and Informed Consent:

Rule 1.2 addresses the scope of representation and the allocation of decision-making authority. According to this allocation, the client establishes the objectives, and the lawyer controls the means to pursue them.

Rule 1.4 on communication overlaps with 1.2: “A lawyer shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation.”

Rule 1.0 defines informed consent: “The agreement by a person to the proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

Providing Diligent Representation Within Legal Bounds

Rule 1.3 on diligence emphasizes the lawyer’s commitment to the client. “A lawyer shall act with reasonable diligence and promptness in representing a client.” The first comment to Rule 1.3 expands on this statement. “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”

At the same time, Rule 1.2(d) clarifies that the lawyer’s zeal in advocacy does not extend to being dishonest. “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” As an example, a criminal defense lawyer may not tell a person arrested for a possible DWI not to take a blood test or breathalyzer, which is a crime, but may discuss implications of refusing the test. As Comment 9 explains, Rule 1.2 “does not preclude the lawyer from giving an honest opinion about the actual consequences likely to result from a client’s conduct.”

Other Limits on Advocacy

Rule 3.1 provides that: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law in and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”

This rule is related to Rule 8.4(c), which forbids “conduct that is prejudicial to the administration of justice.”

Rule 3.3 on candor to the tribunal precludes a lawyer from making a false statement of fact of law or offering evidence that the lawyer knows to be false. The rule governs the conduct of a lawyer before a tribunal, which includes a court or administrative body acting in an adjudicative capacity. Rule 3.9 extends the candor required under Rule 3.3 to a lawyer representing a client before an agency in a non-adjudicative capacity. Rule 3.3 imposes a duty to correct the record only when there is “actual knowledge” of falsity.

11 Rule 1.3, cmt. 1.
13 Compare Rule 3.3, which requires “actual knowledge,” and the comparable EOIR practitioner rule at 8 C.F.R. §1003.2, which includes “reckless disregard” as the standard that triggers the duty to correct false information.
Rule 4.1 applies more generally. “In the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

**Maintaining Competence**

Rule 1.1 requires competent representation that includes keeping up with changes in the law and its practice. “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” A lawyer may become competent through necessary study or through association with another lawyer of established competence.14

Rule 5.3 makes lawyers responsible for the conduct of non-lawyer assistants employed by the firm. “A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.”15

**Dreamers Can Continue to Dream (for Now): Advising Clients on DACA**

DACA is still available, even if its future is uncertain. Through March 31, 2017, USCIS approved more than 787,580 initial DACA requests to protect undocumented immigrants from removal and give them authorization to work.16 The approval rate for initial requests was about 92% and about 99% for renewals.17 To apply, the young immigrants who qualify, by being under age 31 and arriving in the U.S. before age 16, must provide USCIS with their personal information, including their addresses, work history, and the names of their parents.18

During the election, candidate Trump vowed to repeal “illegal executive amnesties” on his first day in office.19 When they first applied in 2012, DACA applicants knew that information provided to USCIS could be turned over to ICE to be used against them or their parents. USCIS provided assurances that information in a DACA application would not be disclosed for immigration enforcement purposes unless the requester meets enforcement priority criteria.20 They also knew or should have known that DACA is an exercise of prosecutorial discretion, that individuals granted DACA receive only temporary protection from removal, and they are not given lawful status. This temporary relief created by executive power may be taken away by executive power.

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14 Rule 1.1, cmt. 2.
15 Rule 5.3, cmt. 2.
16 USCIS, Fiscal Year 2017, 2nd Quarter, Date as of March 31, 2017, published June 8, 2017.
18 DHS, Memo, Napolitano, Secretary, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), AILA Doc. No. 14040340.
19 See Donald J. Trump’s 10-Point Plan to Put America First, Immigration, point 5: “Immediately terminate President Obama’s two illegal executive amnesties.”
20 Information provided in a request is protected from disclosure to ICE or CBP for use in enforcement proceedings. “Individuals whose cases are deferred pursuant to DACA will not be referred to ICE.” However, this information sharing policy may be changed at any time without notice, and it does not create any right or benefit enforceable by law. DACA FAQ #19, available at https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.
President Trump has told “DREAMers” to “rest easy,” that they are not the targets of his enforcement efforts. However, a leaked, still unsigned, draft executive order includes language to end the DACA program. On June 15, 2017, the Department of Homeland Security announced that it would continue DACA, but the White House then added to the ambiguity on the future of DACA by explaining the next day that there has been no final determination on DACA, that the administration’s earlier statement was intended only to confirm that DACA recipients would not be immediately affected by the separate action taken on June 15 that officially ended “Deferred Action for Parents of Americans and Lawful Permanent Residents” (DAPA). On June 29, 2017, Texas and ten other states, which successfully challenged DAPA and expanded DACA under the November 20, 2014 memorandum, sent a letter to Attorney General Sessions asking that DACA be phased out, and if not, they would amend the complaint to challenge the DACA program. Congressional leaders had earlier suggested an ameliorative legislative proposal to retain DACA benefits that remains uncertain.

In the meantime, immigration lawyers have been filing new DACA applications and DACA renewals, and getting them approved quickly, despite the President’s earlier promises to repeal the program, which the President on June 15 stated he would not do – at least for the time being. When talking with a potential client who is considering a new DACA application, the lawyer needs to communicate enough information for the client to make an informed decision, explaining the advantages and disadvantages of the proposed course of conduct and discussing the client’s options and alternatives.

To qualify, DACA applicants must be “out of status” and report themselves to immigration officials. Rather than qualifying for permanent residence, as the DREAM Act would have allowed, DACA applicants are only eligible for temporary protection from removal and employment authorization for up to two years at a time.

DACA recipients considering extensions have already disclosed their undocumented status and provided their personal information. They have reason to be concerned about being targeted based on information they provided earlier with their applications. For instance, being arrested on a criminal charge and then being subjected to a pretrial state diversion program rather than pleading guilty may have not been disqualifying in obtaining a DACA first time grant or a renewal. It may be under the Trump administration. They may not have imagined when they first applied that any future administration would consider ending DACA or using grounds to revoke prior DACA approvals or not renew extension requests that would not have been deployed under the prior administration. The benefits of deferred action, in being able to work, get a social security number and driver’s license, or continue their education with protection from removal, outweighed the risks of disclosure at the time they applied.

Lawyers advising DACA recipients about extensions need to comply with Rule 1.2 on the allocation of authority between the client and the lawyer. The decision to extend DACA is for the client to make, but, according to Rule 1.4, the lawyer needs to explain the “matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” The critical factor for the DACA client now considering a renewal may be that disclosure was already made with the initial application. Considering the risks against the potential benefits, the client may decide that an extension
is justified. The lawyer needs to explain the uncertainty, considering both statements made during the campaign and more recent developments. This is especially the case with a DACA candidate who has a prior arrest record, even if there was no conviction.

For some DACA recipients, however, the chance for a limited extension may not overcome their concerns now about remaining in the program after disclosing their status and providing personal information when the interior enforcement executive order has already led to a major crackdown on undocumented immigrants.

DACA clients considering whether to renew their applications need to weigh the legal consequences of any decision not to share current address information against the shift in enforcement priorities that rescinded rules that had prioritized arrests of only the most serious criminals and left others alone. DACA beneficiaries without DACA protection will simply become part of the broad category of the undocumented population who are now legitimate enforcement targets after the change in enforcement priorities under the new administration. Yet, since their information has already been disclosed, the lawyer needs to explain the requirement to register address changes, that the failure to comply with this requirement is both a misdemeanor and a deportable offense.28

Lawyers need to be aware of the ethical line that would be crossed in actually advising DACA clients not to provide an address change notice, as opposed simply to explaining the consequences of the client’s proposed course of action. Lawyers may be legitimately worried about DACA recipients getting tracked down when enforcement priorities have changed, administratively closed cases through prosecutorial discretion are being reopened, and the rate of immigration arrests has sharply increased. At the same time, these individuals face legal consequences of going back underground after being approved for DACA. If the DACA recipient was already in removal proceedings, the client should be aware that any refusal to provide an address change notice to EOIR will most likely lead directly to the individual’s in absentia removal order.

It may, at the very least, be an exercise in futility for the lawyer to advise a client to move to a different residence to avoid detection. If DHS wants to initiate removal proceedings, it may serve the Notice to Appear (NTA) by mail. Undocumented immigrants would be better off getting an NTA at their last known address, rather than not receiving an NTA and risking an in absentia removal order. While an in absentia order may be rescinded for lack of notice, bringing a motion to reopen to challenge an in absentia order is time consuming, stressful, and uncertain.

If a person with a removal order reports that she is being pursued by ICE agents, the lawyer would violate Rules 1.2(d) and 4.1 in advising the person to evade ICE agents by moving to a new address. Remaining in the United States after a removal order is a felony under INA §243 and the lawyer would be advising a client to engage in criminal conduct. The lawyer may, if applicable, advise clients on ways to overcome the removal order, seek a stay of removal, or apply for prosecutorial discretion (PD) through an order of supervision, although the burden is much higher to get PD now with new enforcement priorities. The lawyer would be providing ineffective assistance in advising a client who is facing ongoing removal proceedings to skip a hearing, since that will lead directly to a removal order in absentia.

The most significant differences between a DACA extension and a new application are that new applicants have a better

28 See INA §265, 8 USC §1305; INA §237(a)(3)(A), 8 USC §1227(a)(3)(A). There have been other high-profile cases of more rigorous enforcement action against DACA recipients. For example, in February, 23-year-old Juan Manuel Montes Bojorquez was deported even though his DACA status didn’t expire until 2018. The government claimed that Montes lost DACA status when at one point he left the country without advance parole. Daniela Vargas, a 22-year-old DACA recipient, was arrested after she publicly criticized ICE about raids at a press conference. She was later released.
understanding now, with the new enforcement priorities and the uncertainty of DACA, about the risk of sharing their personal information, and they have not yet shared their information. During the election campaign, the President-elect consistently promised to end executive actions, specifically DACA, that his advisors considered “ill-advised” and “constitutionally dubious.” Since the inauguration, he has made conflicting statements on the future of DACA. Those who qualify for initial DACA may not believe that the benefits of applying for DACA outweigh the risks. However, considering the continued availability of DACA relief and the increase in the rate of immigration arrests, they may decide to apply for DACA for the protection it provides from removal, knowing the risks involved. Rule 1.2(a) “confers upon the client the ultimate authority to determine the purposes to be served by legal representation,” within certain limits imposed by law.

The client must be fully informed about the costs, risks, and benefits of submitting an application. DACA is a form of relief that is based only on an executive power. New applicants, like earlier ones, must understand that the executive power to approve DACA is discretionary, and that it could always be taken away.

Beyond DACA: Advising Undocumented Clients

Beyond DACA, immigration lawyers need to consider options for undocumented immigrants to gain legal status with a path to permanent residence. Many undocumented immigrants have established particularly strong ties to this country, including through their U.S. citizen children. Lawful permanent residents with a criminal record that makes them vulnerable to deportation are asking the same question of how to protect their status and stay in the United States.

What are the lawyer’s ethical obligations when advising a client fearful of increased enforcement under the Trump administration? As indicated, a lawyer is under a duty to provide zealous advocacy for clients. According to Rule 1.3 of the ABA Model Rules of Professional Conduct, “A lawyer shall act with reasonable diligence and promptness in representing a client.” Comment 1 to Rule 1.3 provides, “A lawyer should…take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” At the same time, a lawyer can only represent her client within the bounds of the law. Under Model Rule 1.2(d), “A lawyer shall not counsel a client to engage or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist the client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

The key issue for the lawyer is whether counseling an unauthorized immigrant to remain in the U.S., even indirectly, by advising on future immigration benefits, violates Model Rule 1.2(d) or its analog under state bar ethics rules.

While practitioners must ascertain the precise language of the analog of Model Rule 1.2(d) in their own states, overstaying a visa is neither “criminal” nor “fraudulent” conduct. While an entry without inspection (EWI) might be a misdemeanor under INA §275, it is no longer a continuing criminal violation to remain in the U.S. after the EWI. Although being unlawfully present in the U.S. may be an infraction under civil immigration statutes, it is neither criminal nor fraudulent. Given the paradoxical situation in our immigration system, where an undocumented noncitizen can eternally hope to gain legal status (such as if the individual’s U.S. citizen child turns 21 or if the individual is placed in removal and obtains cancellation of removal), a lawyer ought not to be sanctioned under Model Rule 1.2(d) or its state analog with respect to advising individuals who are not in valid immigration status in the U.S.

29 See “A Pen and A Phone: 79 Immigration Actions the Next President Can Take,” Center for Immigration Studies, April 2016.
The U.S. Supreme Court in *Plyler v. Doe*, 457 US 202 (1982), which held that undocumented children could not be deprived of a public education, clearly recognizes that individuals without legal status and subject to deportation may eventually become legal permanent residents and U.S. citizens:

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in the country, or even become a citizen.

Of course, the most prudent approach for the lawyer is to refrain from expressly advising or encouraging a client to remain in the U.S. in violation of the law. Instead, the lawyer may present the risks and potential benefits of staying without legal status, letting the client decide whether to stay. Lawyers may advise undocumented clients about their rights when they encounter law enforcement, including their right to remain silent, not to say anything about where they were born or how they entered the United States, and refuse to consent to a search without a warrant. Lawyers should refrain from giving express advice to violate the law when the client’s decision to stay in the U.S. constitutes criminal conduct. For instance, failure to depart within 90 days after a removal order pursuant to INA §237(a) under INA §243 renders such conduct a criminal felony. However, even in this case, INA §243(a)(2) provides for an exception: “It is not in violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.” Moreover, a person who received a final removal order may move to reopen, even many years later, if the government consents to reopening and there is available relief against deportation. See 8 C.F.R. § 1003.2(c)(3)(iii); 8 C.F.R. § 1003.23(b)(4)(iv).

The ethical lawyer must also be a competent lawyer who is capable of analyzing the nuances and contours of the applicable statutory and regulatory provisions. Although the DACA program may not have been cancelled, DACA recipients remain understandably concerned about its long-term prospects. One thing to keep in mind is that the employment authorization document (EAD) remains valid, unless the government specifically revokes it pursuant to 8 CFR §274a.14(b), and then only after the EAD recipient has been given an opportunity to respond through a Notice of Intent to Revoke. Thus, a lawyer may ethically advise that an unexpired EAD still authorizes the DACA recipient to continue working in the U.S. Moreover, even if the DACA client’s employment authorization has expired, the lawyer has no obligation to alert the employer of the expired EAD if that employer is not his client. Still, the employer may be subject to sanctions for continuing to employ an unauthorized worker. The DACA client is amenable to deportation if DACA is rescinded, whether working or not.

Lawyers representing DACA clients need to help them consider possible approaches for achieving long-term legal status. Undocumented immigrants may become permanent residents without leaving the country even if they entered without inspection through applications for asylum or cancellation of removal, the Violence Against Women Act (VAWA), Special Immigrant Juvenile Status (SIJS), eligibility for a U or T visa for victims of crime, or through marriage or employer sponsorship for permanent residence if they benefit from 245(i) protection under the Legal Immigrant Family Equity (LIFE) Act. The Trump administration has indicated that it may be against extending the Temporary Protected Status (“TPS”) designation that currently provides humanitarian relief to nationals of countries coping with a severe conflict or natural disaster. As with DACA, immigration lawyers need to consider other options for TPS beneficiaries, including for adjustment of status if they qualify. The administration recently agreed to a six-month extension of TPS for Haiti, but with the understanding that the program would be terminated rather than extended again.

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30 See “Know Your Rights,” National Immigrant Law Center, found at: https://www.nilc.org/get-involved/community-education-resources/know-your-rights/.
Some DACA clients may have married U.S. citizens since first qualifying for DACA relief. If they cannot adjust status to permanent residence in the U.S., because they previously entered without inspection, they may still qualify to leave on advance parole and return without triggering the three-year or ten-year bar. Their return on advance parole would provide a basis for eligibility to adjust status as an immediate relative of a U.S. citizen. They may also have been approved for DACA before reaching age 18, qualifying them for an exception to the unlawful presence statute. Alternatively, they can take advantage of the provisional waiver rule. If they prove extreme hardship to a qualifying relative, they would be able to waive the three or ten-year bars in advance of their departure from the U.S. to pursue an immigrant visa application at the U.S. consulate abroad and then return as a permanent resident. DACA recipients should take time to explore all their options.

A lawful permanent resident with a criminal conviction cannot be immediately removed from the United States without a hearing before an Immigration Judge. Not all criminal conduct results in removal. Even if a permanent resident has a criminal conviction that has been charged in an NTA as a crime involving moral turpitude or an aggravated felony, the characterization of the offense should be closely examined to assess whether it can be contested under the categorical approach. This approach, best exemplified in Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) and Descamps v. United States, 133 S. Ct. 2276 (2013), requires identification of the minimum prosecuted conduct that violates the criminal statute, rather than consideration of the non-citizen’s actual conduct.

Ethical Challenges in Using Asylum as a Temporary Fix to Delay Deportation

While asylum applications may be particularly tempting as a temporary fix, lawyers need to understand the very clear ethical constraints involved in filing for asylum. Already, some lawyers have suggested that the strategy of filing for asylum with cases that are unlikely to be successful may be justified as a way to delay deportation. When immigrants are frightened and vulnerable, they will pursue desperate measures, such as applying for asylum. Filing for asylum enables the individual to remain in the United States and even apply for work authorization if the application has been pending for 150 days or more. If there is a meritorious claim for asylum, a lawyer ought to pursue this relief on behalf of the client, after the client has been informed about and consents to the risks. If not granted at the affirmative level, the asylum claim by an out-of-status client would be referred to an Immigration Judge for removal proceedings. If the client is unable to win before an Immigration Judge, and loses on appeal, the client would end up with a final removal order. If the asylum claim is filed after one year, and the client is unable to qualify for one of the exceptions to filing after the one year deadline, there is an even greater chance that the application will be referred for removal proceedings.

AILA's November 1, 2016 practice advisory, Ethical Considerations Related to Affirmatively Filing an Application for Asylum for the Purpose of Applying for Cancellation of Removal and Adjustment of Status for a Non-Permanent Resident, directly addresses the concerns for the lawyer in filing for asylum on behalf of clients with cases that they are unlikely to win.

32 In Matter of Arajabally and Yerrabelly, 25 I&N Dec. 771 (BIA 2012), the BIA held that a departure under advance parole was not considered a departure under INA §212(a)(9)(B)(i)(I)&(II) for purposes of triggering the 3-year or 10-year bars. As noted earlier, the attorney must caution the client that BIA precedents can be overturned by the Attorney General, and must be constantly vigilant regarding such changes on behalf of the client.
33 Eligibility for adjustment of status under INA §245(a) is predicated on whether the applicant “was inspected and admitted or paroled into the United States.”
34 See 8 CFR §212.7.
The lawyer first needs to consider the rule at 8 C.F.R. §1208.20 against filing a frivolous asylum application that would make the applicant permanently ineligible for any immigration benefit under INA §208(d)(6). Under this rule, an asylum application is frivolous if any of its material elements are deliberately fabricated.

Avoiding this type of frivolous finding is not the only consideration when deciding whether to bring a claim for asylum. The claim also needs to have a basis in law and fact that is both subjectively and objectively reasonable. To determine if an asylum claim is meritorious, the lawyer must ascertain whether the client can provide a detailed statement regarding his claim that has a sufficient nexus to one of the protected grounds. Even if there is a precedent against a particular asylum claim, the lawyer must ask whether there are good faith grounds to seek a reversal of the adverse decision.

The standard for what constitutes a meritorious claim is provided in ABA Rule 3.1:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Thus, even if the ultimate objective of filing an asylum application is to seek cancellation of removal, the asylum claim must still be meritorious.37

**Rushing to Naturalize**

Because permanent residents may still have their status challenged, they may be in a rush to file for naturalization, since citizenship gives them much greater protection than permanent residence.38 However, the lawyer must carefully review the client’s history before filing for naturalization to ensure that nothing arises during the naturalization process that could trigger a ground of removability, such as an improperly obtained green card or a criminal conviction that causes the loss of permanent residence instead of the protection of citizenship. Before applying for naturalization, a client convicted of burglary as a young adult, with a sentence that was not clearly less than a one-year term of imprisonment, may choose to seek post-conviction relief to clarify that the actual sentence imposed did not make him an aggravated felon. A client who entered as a derivative refugee as a young child, who later discovered that the man he thought was his father was actually his uncle, may decide not to pursue naturalization. If the client with a potential problem still wants to take the risk of applying for naturalization, the lawyer must also determine if there are grounds for a waiver in removal proceedings, if needed, and to consider that discretionary waivers have become more difficult under the new administration. Similarly, there is less latitude in exercising prosecutorial discretion not to initiate removal proceedings against an unsuccessful naturalization applicant.

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37 See Nine Ethical Questions to Consider before Filing Asylum Claims to Pursue COR, available on AILA InfoNet at Doc. No. 161111037 (posted November 10, 2016).
38 A naturalized citizen may only lose citizenship by revocation in a formal proceeding brought under INA §340, 8 USC §1451.
Applying the Harboring Doctrine to Lawyers

As noted, Attorney General Sessions announced a policy change at the Department of Justice to prioritize criminal immigration enforcement that specifically includes harboring or any conduct proscribed pursuant to 8 U.S.C. §1324. 39

The Immigration and Nationality Act imposes criminal penalties for illegal entry, harboring, document fraud, and other immigration-related offenses to deter illegal immigration, but criminal prosecution for these low-level immigration offenses had been limited to border regions. The new focus on criminal immigration enforcement applies to all 94 U.S. Attorney offices around the country. The Immigration and Nationality Act imposes criminal penalties on those involved in smuggling noncitizens and related offenses, such as transportation, harboring and encouraging an undocumented individual to enter or reside in the United States illegally. 40

If no relief is available, and a client decides to remain in the U.S., the lawyer would be crossing the line in providing the client with advice on how to avoid detection. Not only would the advice violate ethics rules against counseling a client to engage in conduct the lawyer knows is criminal or fraudulent, the lawyer’s advice to move to a different address to avoid detection would be harmful to the client for the reasons mentioned earlier. If DHS wishes to initiate removal proceedings, the agency will be able to serve the Notice to Appear by mail. Failure to provide an address change notice would then likely lead to an “in absentia” removal order. Willful failure to register is a misdemeanor. If a person with a removal order reports that she is being pursued by ICE agents, a lawyer providing advice on avoiding detection would be helping a client to engage in criminal conduct. It would be clearly unethical for a lawyer to advise a client who is facing ongoing removal proceedings on how to avoid being discovered because it would lead to an in absentia removal order, and the lawyer would be providing ineffective representation.

Besides the ethical issues and the practical problems for the client, the lawyer must also be mindful of potential criminal penalties for providing advice to a person who is unauthorized to remain in the United States. An implementation memo cautions that parents of unaccompanied minors who are illegally in the United States may be prosecuted for alien smuggling of their children. 41 Lawyers who provide advice to parents assisting in smuggling their children into the United States may also be prosecuted under the same policy.

Considering the policy change to prioritize criminal immigration enforcement, immigration lawyers need to consider the scope of a relatively untested provision under INA 274(a)(1)(A)(iv), which criminally penalizes any person who “encourages or induces an alien to come to, enter, or reside in the United States in knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.”

This provision, which involves encouraging someone to reside in the US in violation of law, is a companion to other related criminal provisions such as “brings to” or “smuggling” (INA §274(a)(1)(A)(i)), “transportation” (INA §274(a)(1)(A)(ii)), and “harboring” (INA §274(a)(1)(A)(iii)). While these three provisions relating to smuggling, transportation and harboring are discrete, and Congress intended to cover distinct groups of wrongdoers through each provision, see US v. Lopez, 590 F.3d 1238 (11th Cir. 2009), the broader “encouraging” provision could potentially apply to a person who encourages an

39 Note 5, supra.
undocumented person who is already residing in the United States to do so in violation of the law. In *U.S. v. Oloyede*, 982 F.2d 133 (4th Cir. 1992), a lawyer was convicted under a predecessor of this provision for representing individuals seeking immigration benefits who were sold false social security and employment documents by a co-conspirator.

Although the facts in *U.S. v. Oloyede* are especially egregious, the following extract from the Fourth Circuit decision is worth noting:

> Appellants maintain that Section 1324(a)(1)(D) is solely directed to acts bringing aliens into the country. However, the plain language states, “knowing that [the illegal alien’s] residence is or will be in violation of the law.” (Emphasis supplied). Because the use of the verb “is” clearly connotes the present status of the illegal aliens’ residence in this case within the United States, it can only be understood to apply expressly to actions directed towards illegal aliens already in this country.

While “encouraging” goes beyond bringing in, transporting or concealing unauthorized immigrants, and may provide the authority to prosecute immigration attorneys advising undocumented clients, the egregious actions of the lawyer in *U.S. v. Oloyede* in falsifying citizenship application documents need to be considered. “The selling of fraudulent documents and immigration papers under these circumstances constitutes ‘encourages’ as that word is used in the statute.” *Id.* at 137. The criminal penalties clearly include not only encouragement or inducement to enter, but also encouragement or inducement to reside in the United States. In deciding a similar question on what constitutes encouragement or inducement to remain in the United States for a violation under INA §274(a)(1)(A)(iv), the Third Circuit, in *DelRio-Mocci v. Connolly Properties*, 672 F.3d 241, 248 (3d Cir. 2012), analyzed the scope of the statute’s prohibition against encouraging or inducing “an alien to come to, enter, or reside in the United States” to mean not just general advice, but some more substantial assistance that would make someone lacking lawful status more likely to enter or remain in the United States.

The question remains whether an immigration lawyer advising unauthorized individuals to remain in the U.S. to seek adjustment of status would be within the scope of the prohibition against encouragement or inducement under INA §274(a)(1)(A)(iv). The “encouraging” provision has not been applied to a lawyer giving routine advice about immigration procedures and consequences to an unauthorized immigrant. According to one court, an immigration lawyer’s actions in advising a client about how to pursue entirely legal processes in seeking to adjust her status would not be within the scope of Section 274(a)(1)(A)(iv)’s prohibition. See *U.S. v. Henderson*, 857 F.Supp.2d 191, 204 (D. Mass 2012); *See also United States v. Costello*, 666 F.3d 1040, 1047 (7th Cir.2012) (noting that “generally it is not a crime to be an illegal alien”).

This type of general advice may be given to a person who desires to continue to remain in the United States while hoping for a remedy in the future, such as a U.S. citizen child turning 21 in a few years, that would enable her to adjust status in the United States or that the law may change to her benefit. However, the DOJ may decide to pursue this type of criminal prosecution after the shift in policy to prioritize criminal prosecutions for immigration offenses. In the event of overzealous prosecution, a lawyer who carefully remains within the confines of ABA Model Rule 1.2(d) would have a good defense. Comment 9 to Model Rule 1.2(d) is a golden nugget, which summarizes the delicate balance for the attorney representing a client who may be undocumented, but who may have potential relief in the future:

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course
of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.42

However sympathetic the circumstances may be, the ethical lawyer should never assist in filing an application knowing that it contains a false statement of fact or law. Going beyond the clear ethical rules at ABA Model Rule 3.3 and 8 CFR §1003.103(c) that expressly prohibit such conduct, the lawyer could also be implicated under federal criminal provisions such as 18 USC §1001, 18 USC §371 and 18 USC §1546.

**Ethical Considerations in a Changing Business Immigration Climate**

The administration’s actions have also created uncertainty and ethical challenges for immigration lawyers advising business clients and employees with temporary visa status. A strategy that may be viewed as completely ethical to the lawyer may be perceived in a different way by the Trump administration. The administration has already displayed its disdain for the H-1B visa program, especially with respect to workers who are not paid at the highest wage levels. Moreover, the lawyer must also keep track of watchdog politicians who may not be favorably disposed to a particular visa program.43 For example, Senator Grassley, Chair of the Senate Judiciary Committee, has continuously criticized government agencies such as USCIS and State Department for liberally interpreting the B-1 visa or the H-1B cap exemption. He has also railed against the F-1 STEM degree Optional Practical Training extension. In an era of increased enforcement and hostility towards visa programs that are perceived to be depriving Americans of jobs, an overzealous prosecutor may try to criminalize conduct that the lawyer believes is completely legal. The Buy American, Hire American Executive Order adds further impetus for more restrictive interpretations. This Executive Order states, in relevant part:

Sec. 5. Ensuring the Integrity of the Immigration System in Order to “Hire American.” (a) In order to advance the policy outlined in section 2(b) of this order, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.

42 If an immigration lawyer's advice is sought by a state, city or locality regarding the consequences of refusing to share information about undocumented immigrants with federal authorities, the lawyer would arguably be within ethical bounds to provide such advice based on *Printz v. United States*, 521 U.S. 898 (1997) (holding that certain local law enforcement officers couldn't be forced to perform Brady Bill background checks in the gun-sale context). See also *San Francisco v. Trump*, 3:17-cv-00485-WHO (N.D. Cal.) (applying *Printz* analysis in challenge to EO 13768 regarding cutting off federal funding to sanctuary jurisdictions). Even going beyond *Printz*, since one does not have an affirmative duty to cooperate with federal law enforcement efforts without a subpoena, a lawyer could also ethically advise a private university that chooses not to provide information to ICE on the immigration status of its students. The lawyer would probably be on more ethically slippery ground in advising a church to hide an undocumented person who is being pursued by law enforcement. If, however, a church publicly welcomes an undocumented immigrant to protest federal policy, such activity could be distinguished from actually hiding that individual. For a discussion of the religious sanctuary movement’s free exercise of religion defense in connection with Alabama harboring laws adopted in 2011, see “Criminalizing Love of ‘Ily Immigrant Neighbor? The Conflict Between Religious Exercise and Alabama’s Immigration Laws,” by Joseph Darrow, 26 Georgetown Immigration Law Journal 161 (Fall 2011).

On March 31, 2017, on the eve of the FY 2018 H-1B cap filing season, the USCIS issued a policy memorandum stating that computer programmer positions are not always “specialty occupations.” The guidance also questions whether computer programmers at entry-level wages would qualify as being within an H-1B specialty occupation because, as the OOH suggests, an associate’s degree is sufficient to enter into the field.

The timing for the new guidance, just as employers were submitting new H-1B petitions to reach USCIS on the first day of the filing period on April 3, 2017, caused panic among lawyers preparing H-1B petitions because they were caught unaware of the change in policy and it was too late for them to respond because of the filing deadline. Cases were already prepared to be submitted under the H-1B cap filing period. This H-1B policy change was soon followed by an announcement on the USCIS website entitled “Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse.” The announcement specifically indicated that USCIS would focus its resources on conducting site visits on employers who are dependent on H-1B workers and who place H-1B workers at client sites. It also set up an e-mail for U.S. workers to report alleged H-1B fraud and abuse. The DOJ followed with an announcement cautioning employers who hire H-1B workers not to discriminate against American workers and warning that the DOJ’s Immigrants and Employee Rights Division would vigorously enforce the anti-discrimination provision of the INA, including INA 274B, which prohibits citizenship, immigration status and national origin discrimination in hiring, firing or recruitment or referral for a fee; unfair documentary practices; retaliation and intimidation. Not to be outdone by sister agencies, the DOL also put out a news release on April 4 that it would rigorously use its existing authority to initiate investigations of H-1B violators.

None of these announcements suggest anything new, but they emphasize the need for lawyers to be hyper-vigilant in advising clients who file H-1B visa petitions of the potential for increased enforcement, which could in turn implicate the lawyer. Employers who file H-1B visas for computer programmers with entry level wages must be cautioned about the possibility of denials, and thus the need to justify a specialized degree requirement, as well as the entry level wage. With respect to USCIS’s intention to conduct site visits, the announcement states: “Targeted site visits will allow USCIS to focus resources where fraud and abuse of the H-1B program may be more likely to occur, and determine whether H-1B dependent employers are evading their obligation to make a good faith effort to recruit U.S. workers.” While it is true that H-1B dependent employers are obligated to recruit for US workers before filing H-1B petitions for foreign national workers, this obligation does not apply when a dependent employer files an H-1B petition for an exempt employee— one who is either paid $60,000 or higher or who has a master’s degree or higher in the specialty that is relevant to the position. The USCIS announcement, unfortunately, is somewhat misleading, and a dependent employer who is not obligated to recruit because it has filed an H-1B petition for an exempt employee may be subject to an unwarranted complaint or investigation. The lawyer should be prepared to defend the employer against such investigations. More importantly, the lawyer must also be able to anticipate changing interpretations of the laws and rules. For example, commercial activity that had been considered permissible for B-1 business visitors could be viewed as work in violation of the B-1 visa to circumvent the H-1B cap.

Regardless of whether H-1B employers become subject to specific recruitment procedures, there appears to be a perception that using H-1B visas to displace Americans is “against the spirit and intent and the letter of the law,” according to Senator

46 See https://www.justice.gov/opa/pr/justice-department-cautions-employers-seeking-h-1b-visas-not-discriminate-against-us-workers
47 See https://www.dol.gov/newsroom/releases/eta/eta20170404-0
49 The BIA decision in Matter of Hira, 11 I. & N. Dec. 824, is cited in the Foreign Affairs Manual (FAM) for making the distinction between permissible commercial activity and work. That case involved a tailor measuring suits to be manufactured and shipped from outside the U.S. The B-1 visa now supports commercial activities that are incidental to work that will be performed outside the U.S.
Blumenthal (D-Conn) at a May 24, 2017 Judiciary Committee Hearing. USCIS responded to Senator Grassley’s concerns by indicating it has stepped up site visits and will recommend policies consistent with the “Buy American, Hire American Executive Order.”\(^5^0\) More recently, the Labor Secretary Alexander Acosta stated that the agency will vigorously enforce laws around visa programs: “Entities who engage in visa program fraud and abuse are breaking our laws and are harming American workers, negatively affecting Americans’ ability to provide for themselves and their families. We will enforce vigorously those laws, including heightened use of criminal referrals.”\(^5^1\)

When counseling clients, lawyers must be careful to outline the risks of every strategy, including possible changes in interpretation by the Trump administration that may result in criminal liability, and they must also be careful to avoid being part of a conspiracy or aiding and abetting a client in a criminal scheme.

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\(^5^1\) See [https://www.dol.gov/newsroom/releases/opa/opa20170606](https://www.dol.gov/newsroom/releases/opa/opa20170606)