Screened by Machine, Decided by Human?

Ethics in the Age of AI Immigration Screening

- **Work product applies.** Federal Rules of Civil Procedure[5] protect materials prepared in anticipation of litigation. As a pro se litigant acting as her own representative, Warner could assert work-product protection.
- **No waiver by using ChatGPT.** Work-product waiver requires disclosure to an adversary or in a way likely to reach an adversary — not merely to a third-party tool. "ChatGPT (and other generative AI programs) are tools, not persons."
- **Mental impressions are not discoverable.** Defendants sought the plaintiff's "thought process," which is protected opinion work product regardless of the medium used to develop it.

How This Affects Immigration Practitioners

Immigration practice raises several risks that are not inherent in either of these cases:

1. **Clients Increasingly Use Consumer AI Before Retaining Counsel**

   Many immigration clients — particularly F, M, and J visa holders, asylum applicants, EB-1 applicants and individuals in removal proceedings — use free AI tools to research their situation, draft personal statements, generate responses to RFEs, and prepare for USCIS or consular interviews, often before retaining an attorney. Under *Heppner*, any materials those clients generated using consumer AI tools:

   - Do not constitute attorney-client privileged because no attorney was involved;
   - May not be work-product protected if it was not counsel-directed preparation;
   - May have been disclosed to the AI platform operator under its terms of service, which could include authorization to disclose to governmental entities.

   If a client shares those AI-generated documents with you after the fact, that sharing may not retroactively create privilege under *Heppner*. The documents remain what they were when created.

2. **Government Access to AI Platform Data Creates Heightened Risk**

   The dispositive fact in *Heppner* was that Anthropic's consumer privacy policy authorized disclosure of user data to "governmental entities." USCIS, ICE, and DOS have broad information-gathering authorities. If a visa applicant, asylum seeker, or respondent in removal proceedings used a consumer AI tool under similar terms:
   - Prompts entered into that tool — including information about prior immigration violations, unlawful presence, criminal history, or litigation strategy — may be accessible to government agencies;
   - A client who asked an AI tool "What happens if I overstayed my visa?" or "How do I explain my DUI at my visa interview?" may have disclosed that information to a platform that can share it with the government;
   - Clients preparing asylum claims who input details about feared persecution, country conditions, or inconsistencies in prior statements face particular risk if those inputs are accessible under the platform's terms.

3. **The Continuous Vetting Environment Adds an Additional Layer of Risk**
   DOS reports claim that it is actively monitoring 55+ million visa holders through continuous vetting protocols. Investigations of SEVIS irregularities, social-media posts, and other immigration documentation are already driving an unprecedented number of visa revocations. In this environment, AI tool usage adds a new facet to the issue: a client's AI prompts may contain candid disclosures that differ from the statements in their immigration record, potentially surfacing as derogatory information.

4. **Interpreter and Translation AI Tools**
   Many immigration practitioners and clients use AI tools for translation, language assistance, and interview preparation across languages. If privileged communications or client confidences are input into consumer translation or language-assistance AI tools, those inputs are subject to the same analysis as in *Heppner* and confidentiality may depend on the platform's terms of service, not on the purpose for which the tool was used.

5. **Personal Statements and Asylum Declarations**
   Asylum applicants and others preparing declarations — often with limited English proficiency — frequently use AI tools to draft or refine their statements. If the final declaration differs materially from the AI-generated draft, and the AI draft is accessible to the government under platform terms, that discrepancy could be used to challenge credibility in immigration proceedings. There is no privilege protecting those drafts if they were generated on a consumer platform without counsel's direction.

Recommendations For Immigration Lawyers

Client Intake and Initial Counseling

At intake, ask clients directly whether they have used any AI tools to research their immigration situation, draft statements or applications, prepare interviews, or generate any other documents related to their case. Document the response.

- **If a client has used a consumer AI tool before retaining you,** obtain and review any materials generated. Assess whether those materials are consistent with the record you are building. Advise the client that those documents may not be privileged and, depending on the license it was used under and the platform's terms, may be accessible to government agencies.
- **Counsel all clients, in plain language,** that they should not use any AI tool to research their immigration case, prepare for interviews, or draft any document related to their matter without your explicit direction and require disclosure of any prior AI use related to the representation. Explain that inputs to AI tools may not be confidential and may, in some circumstances, potentially be disclosed to government authorities.
- **For asylum clients and others in sensitive proceedings,** include this counseling in your written engagement materials and advise clients not to enter information about their persecution claims, prior immigration history, criminal history, or litigation strategy into any AI tool.

Engagement Letters

- **Add an AI use clause to all engagement letters.** Specify that the client shall disclose any prior AI use and shall not use any AI tool in connection with their case without prior written authorization from you. This both counsels the client and, if followed, establishes that any AI use was at counsel's direction.
- **Explain why.** While confirming that a lawyer's AI-assisted legal research in connection with a client matter is generally protected by the attorney-client privilege, consider including a brief plain-language explanation of why this matters: Prompts entered into consumer AI tools by clients may not be confidential and could, in some circumstances, be seen by government agencies.
- **For high-risk matters** (removal proceedings, visa revocation, criminal-immigration overlap, asylum), consider a separate written authorization from the client before any AI-assisted preparation begins. Document that the AI use was specifically directed by you as part of the legal engagement.

Your Own Use of AI Tools

- **Use enterprise-grade AI tools, not consumer-tier products,** for any work involving client-identifying information, case strategy, or privileged communications. The *Heppner* court's confidentiality analysis turned entirely on the specific terms of Anthropic's consumer privacy policy. An enterprise contract with explicit confidentiality obligations, no model-training provisions, and data isolation architecture presents a materially different, more protective risk profile.
- **Review your AI vendor's terms of service.** Specifically confirm: (a) whether user inputs and outputs are used for model training; (b) what third-party disclosure rights the vendor retains; (c) whether the vendor can disclose data to governmental entities; and (d) whether data is isolated from other users and from vendor staff access. If you cannot confirm these points, do not use that tool for client-related work.
- **Use opt-outs**. Enable any available opt-out settings for model training on your inputs. Assess whether those opt-outs are contractually binding or merely preferences that can be changed by the vendor.
- **AI-enhanced translation and language assistance,** use tools covered by your enterprise agreement, not free consumer translation services. If a translator or interpreter is involved in AI-assisted translation, ensure the arrangement is expressly covered by attorney-client privilege.

Structuring AI Use to Preserve Protection

- **Do not allow clients to use AI tools** to generate declarations, personal statements, or hearing preparation materials **outside of your review and direction**. If AI is used to assist with drafting, it should be as part of a supervised process in which you review, edit, and take professional responsibility for the final product.
- **When it is appropriate to use AI in client preparation, direct that use** explicitly and in writing. A brief instruction (*g.*, "Please use [tool] to draft an outline of your work history for our review.") documents that the AI use was at your direction and was part of the legal engagement. This is the arrangement that *Heppner* identified as potentially protective.
- **For interpreter-mediated consultations, do not use free AI translation tools** to communicate privileged information. Use a human interpreter bound by confidentiality, or an enterprise AI translation tool under appropriate contractual terms.

Key Takeaways

- **Consumer AI tools used by clients before retaining counsel are not privileged.** Prompts and outputs are probably only as confidential as the platform's terms of service. If those terms permit government disclosure, the materials may reach USCIS, DOS, or DHS.
- **Sharing AI-generated documents with counsel does not create privilege retroactively.** Advise clients of this at intake, document the advice, and assess any pre-retention AI materials carefully.

- **Your own AI use should be limited to enterprise-grade tools with appropriate contractual protections.** Consumer AI products, including free tiers of Claude, ChatGPT, Gemini, and others, are presumptively inadequate for client-related legal work under the *Heppner*
- **Direct and document any AI use in client preparation.** Written counsel direction is the key protective factor identified in both decisions. If your client uses an AI tool as part of the representation, that use should be at your explicit direction and documented as part of the legal engagement.
- **Asylum clients and others in sensitive proceedings face heightened risk.** Candid disclosures in AI prompts — about persecution, prior immigration history, or criminal history — may not be private. Counsel clients in writing not to use consumer AI tools independent of you in connection with their immigration matter.

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[1] Michael F. Turansick is a member of AILA's Innovation & Technology Committee, chairing its Government Monitoring Sub-Committee.

[2] *United States v. Heppner*, 2026 WL 52143 (S.D.N.Y. Feb. 17, 2026).

[3] *Warner v. Gilbarco, Inc.*, 2026 WL 373043 (E.D. Mich. Feb. 10, 2026).

[4] Here “consumer-tier” is used to mean free, less protective subscriptions, as compared to “enterprise-grade” which is used to mean paid for, more protective subscriptions. However, not all paid or free products fit into these classifications or have the same terms. You must review the terms of service and user agreements, to make your own determinations on privacy protections.

[5] Fed. R. Civ. P. 26(b)(3)(A).

Accessible to: Member, Student, Paralegal.

PROFESSIONAL RESOURCES

Practice Pointer: Identifying USCIS Use of AI in Adjudications

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This Practice Pointer addresses USCIS's use of artificial intelligence (AI) in adjudicatory and adjudication-adjacent workflows, with a particular focus on how practitioners can identify, infer, and potentially challenge AI-driven adjudications in individual cases. The analysis references DHS's AI Use Case Inventory as well as observed adjudicatory anomalies.

The Issue

USCIS's use of AI should not be perceived as a speculative or abstract policy concern. Rather, AI systems are best analyzed as operational tools that have the potential to introduce recurring and predictable error modes into adjudication. These errors most commonly arise in identity matching, family relationship inference, facial recognition, text analytics, and large-scale data integration. For practitioners, the critical question is not whether AI is permitted, but how AI-related errors can be identified, documented, and corrected through existing legal mechanisms.

USCIS AI Systems as Sources of Adjudicatory Error

DHS has publicly acknowledged, through its AI Use Case Inventory, that USCIS employs multiple AI and machine-learning tools across its operations. These tools include evidence classification within the Electronic Immigration System (ELIS), biometric quality control systems, identity duplication and matching models, and text analytics tools that have been used to detect similarities across narrative submissions such as asylum applications. While USCIS maintains that human officers render final decisions, it would seem axiomatic that AI systems frequently shape the information environment in which those decisions are made.

Practitioners should be particularly attentive to adjudications that appear internally inconsistent, factually unsupported, or detached from the evidence submitted. Examples include cases in which a client is misidentified as another individual, associated with unrelated family members, or denied based on information that appears to belong to someone else with a similar name or biographic profile. Such anomalies are consistent with known failure points in matching and clustering algorithms.

Matching algorithms and clustering algorithms are two different approaches used in data science to organize or compare data. Matching algorithms are used to pair elements from one set with elements from another set based on a specific rule or similarity. Clustering algorithms group data points into clusters of similar items without predefined labels.

Active and Inactive AI Tools

The DHS AI Use Case Inventory distinguishes between deployed, pre-deployed, and inactive tools. Inactive does not mean irrelevant. Tools such as asylum text analytics or family matching models may have been active at the time of adjudication, and their outputs may persist in case records, impacting adjudications even after formal retirement. Accordingly, practitioners should not overlook the potential for AI involvement merely because a system is later categorized as inactive.

Use of AI Analyzers in Case Development

Commercial AI text analyzers may be used as investigative aids when reviewing USCIS decisions, RFEs, or NOIDs that appear formulaic, incoherent, or legally unsound. The list of commercial AI text analyzers is growing rapidly and too long to include in this Practice Pointer. However, AI tools that could be most useful in analyzing government immigration decisions are those that include natural language processing (NLP), bias detection, and explainable AI (XAI). By running adjudicatory text through such tools and preserving the results through screenshots or reports, practitioners can support an inference that automated generation or assistance may have contributed to the decision. While these tools are obviously not definitive proof of AI use, their value lies in corroborating error patterns consistent with automated text generation or hallucination. Where an AI analyzer is used, counsel should expressly document its application and preserve the analyzer's output, so that any subsequent identification of adjudicatory errors is clearly anchored in the documented analysis.

Challenging AI-Driven Hallucination and Error

Effective advocacy does not require arguing that AI use is unlawful. Instead, practitioners should focus on demonstrating that the decision reflects a breakdown in reasoned decision-making. This includes showing that the decision contains factual assertions unsupported by the record, misapplies the burden of proof, or fails to engage in the discretionary weighing required by statute or regulation. Where appropriate, counsel should explicitly explain why the decision appears to reflect an automated or data-driven misapplication of the law or facts.

In this context, briefing should be drafted with the understanding that it may be reviewed by both human adjudicators and AI-assisted systems. Arguments should therefore restate the correct legal standards, walk through the evidentiary analysis step by step, and clearly identify and correct erroneous assumptions embedded in the decision. This approach can potentially serve as a way of re-informing the system that generated the error.

FOIA and Record Development

When an adjudication does not make logical or evidentiary sense and it seems that AI may have impacted the decision, a FOIA or Privacy Act request is often warranted. Requests should seek adjudicator notes, routing histories and records reflecting automated processing, including identity matching, evidence classification, or text analytics. Even where agencies resist disclosure, pursuing a FOIA request remains an important mechanism for developing a record documenting AI-related influences on a case.

Client Counseling and Data Awareness

In certain practice areas, particularly those subject to enhanced vetting such as students and other nonimmigrant visa categories, attorneys may wish to counsel clients about data sharing, application permissions, and digital footprints. This counseling is not about evasion, but rather about ensuring clients are making informed decisions based on awareness of how personal data may propagate across interconnected systems.

Conclusion

USCIS' existing and expanding use of AI has a potentially significant impact on the accuracy and fairness of benefit adjudications. Although no private tool can conclusively prove AI involvement in a particular decision, practitioners can effectively respond to adverse decisions in which AI use appears to have improperly affected the outcome by understanding known AI use cases, recognizing characteristic error patterns and appropriately using investigative tools such as AI analyzers and FOIA requests to provide precise legal advocacy.

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The Expanding Digital Border: AI, Surveillance, and the Fight for Justice

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THE EXPANDING DIGITAL BORDER: AI, SURVEILLANCE, AND THE FIGHT FOR JUSTICE

By James Chesser[1]

"*AI is likely to be either the best or worst thing to happen to humanity.*" — Elon Musk[2]

I. INTRODUCTION: THE BORDER AS A DIGITAL FILTER

Nations are using artificial intelligence ("AI") and big data to reshape the concept of borders. Where immigration control once relied on fences, walls, and human judgment, it now depends on code and data—transforming fixed physical barriers into expanding digital filters. Countries increasingly use algorithms to collect personal data from afar, to pre-screen travelers before their journey begins, and to track their movements after entry. Technology now decides who may enter and who must leave.

These virtual borders promise efficiency, safety, and convenience. But as "thinking" machines enforce laws and shape lives, lawyers face a new challenge: how to prevent the abuse of power by complex, opaque systems that lack transparency or recourse. Law must be enforced justly, but justice remains a human ideal, not a machine function.

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[2] Catherine Clifford, *Elon Musk says 'A.I. will be the best or worst thing ever for humanity' recommends a book on the topic*, CNBC (Aug. 29, 2017), https://www.cnbc.com/2017/08/29/elon-musk-recommends-a-book-on-the-future-of-artificial-intelligence.html [https://perma.cc/ XU9W-FNQA]; Elon Musk may be echoing the earlier remarks of Stephen Hawking. *See "The Best or Worst Thing to Happen to Humanity" - Stephen Hawking launches Centre for the Future of Intelligence*, UNIV. OF CAMBRIDGE (Oct. 19, 2019), https://www.cam.ac.uk/research/news/the-best-or-worst-thing-to-happen-to-humanity-stephen-hawking-launches-centre-for-the-future-of [https://perma.cc/VYE5-VAHT].

This Article examines how artificial intelligence is reshaping migration governance—what innovations matter most, and which policies will define success in the global contest for talent. It explores how lawyers can confront the rise of opaque, automated migration controls—and defend the rights, dignity, and mobility of people in the algorithmic age.

The Article begins with an overview of the AI border, particularly what it is, what it does well, and where it fails. It then examines how nations are using AI systems to reshape immigration systems, border control, and global labor markets. The final sections assess whether these systems fulfill their promises—or quietly undermine them. The closing section turns to practice: how to defend rights, hold power accountable, and push for technologies worthy of public trust.

II. THE TECHNOLOGY BEHIND THE GATE

A. What AI Is

Artificial intelligence ("AI") refers to computational technologies that use data and mathematical models to perform tasks once left to human judgment: identifying people and objects, detecting patterns, drawing inferences, generating content, recommending actions, and making decisions.[3] It operates across physical and digital space and is uniquely valuable for its ability to make sense of complex, seemingly inscrutable information—big data[4].

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[3] *See* 15 U.S.C. § 9401 (defining artificial intelligence); Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 2024 O.J. (L 1689); Sherifa Sherif & Carlos Santiso, *Artificial Intelligence Governance to Reinforce the 2030 Agenda and Leave No One Behind*, U.N. DEP'T OF ECON. & SOC. AFFS. (2021), https://publicadministration.desa.un.org/sites/default/files/Artificial%20intelligence%20governance%20to%20reinforce%20the%202030%20Agenda%20and%20leave%20no%20one%20behind-2.pdf [https://perma.cc/S622-Y86P].

[4] Big data typically refers to data sets too large or complex to be dealt with by traditional data-processing software. Data sets comprising vast numbers of entries (rows) offer greater statistical power; but with higher dimensionality (columns or attributes), there is a greater risk of false discoveries. *NIST Big Data Interoperability Framework: Volume 1, Definitions*, NAT'L INST. OF STANDARDS & TECH. (2015), https://nvlpubs.nist.gov/nistpubs/specialpublications/nist.sp.1500-1.pdf [https://perma.cc/X8AJ-SZL9]; Yoav Benjamini & Yosef Hochberg, *Controlling the*

AI systems are embedded in everyday technologies, operating largely unseen. Smartphones now predict our next words; cars optimize routes; translation apps bridge languages instantly; and chatbots answer complex questions with human-like confidence and character. But at the border, AI does more than assist: it adjudicates. AI technology underlies biometric scanners at airports, facial recognition systems ("FRS") and drones used by border patrol, and machine-learning models that assign risk-scores to visa applicants. And increasingly, these systems operate without meaningful oversight—shielded by their opacity, the data they rely on, and the technical complexity of the domains they govern.

AI is not a single machine but a family of systems. Modern models—neural networks, large language models, and image generators—are trained on immense datasets and tuned through billions of numerical "weights" and "biases."[5] They do not reason like a judge or an officer. They map inputs to outputs: turning patterns in past data into predictions about the present. A chatbot predicts the next word in a sentence; an image model learns how pixels usually fit together; a classifier learns what combinations of features have been labeled "fraud," "risk," or "safe" before.

At their core, many AI systems are statistical in nature. For example, generative models such as large language models ("LLMs") produce outputs probabilistically. Generative models predict plausible continuations of a prompt; they do not "prove" correctness. Because outputs are produced by statistical sampling, the same input can sometimes yield different answers, and a model can be highly confident and still wrong.[6] Trained on historical data, generative models also inherit the data's gaps, errors, and biases.

False Discovery Rate: A Practical and Powerful Approach to Multiple Testing, 57 J. ROYAL STAT. SOC'Y, SER. B (METHODOLOGICAL) 289 (1995), https://www.jstor.org/stable/2346101 [https://perma.cc/Q4WV-83AN].

[5] For a technical primer on the basic architecture and nomenclature of AI models, their capabilities, and their limitations in legal practice. *See generally* James Chesser, *Getting Along with GPT: The Psychology, Character, and Ethics of Your Newest Professional Colleague*, 21 SCITECH L. 13 (May 9, 2025), https://www.americanbar.org/groups/science_technology/resources/scitech-lawyer/2025-spring/gpt-psychology-ethics-your-newest-professional-colleague/ [https://perma.cc/2YQH-M6PU].

[6] *See* OpenAI, *GPT-4 Technical Report* 1 (2023), https://cdn.openai.com/papers/gpt-4.pdf [https://perma.cc/6HAZ-H7HA] (noting GPT-4 is "not fully reliable" and may "suffer from 'hallucinations'"); *Responses API Reference*, OPENAI, https://platform.openai.com/docs/api-reference/responses [https://perma.cc/86FB-

Other AI systems—such as classifiers and risk-scoring tools—may be deterministic at runtime, but they remain fallible. These systems reflect the limits of their training data, the assumptions built into their features and labels, and the inevitable tradeoffs between false positives and false negatives. Due to their sheer complexity, many AI systems function as black boxes—powerful, but difficult to interpret, and built on data whose sources and quality may be uncertain. When data enters the labyrinth of parameters that comprise an AI model, sometimes unexpected, illusory, or even hostile output occurs. Even experts struggle to explain why.[7]

AI is both a tool and a source of institutional power: capable of efficiency and insight, but neither infallible nor neutral.[8] And like other information technology ("IT"), it is susceptible to significant security risks.[9] As it moves to the heart of the expanding digital border—into

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N3AG] (last visited Dec. 27, 2025) (describing probabilistic "sampling" controls such as top_p/nucleus sampling, under which the same prompt can yield different outputs); *c.f.* Eric W. Weisstein, *Cantor Diagonal Method*, WOLFRAM MATHWORLD, https://mathworld.wolfram.com/CantorDiagonalMethod.html [https://perma.cc/5HEK-FHG5] (last visited Dec. 27, 2025) (explaining why open-ended domains inevitably generate edge cases).

[7] When, for instance, a LLM produces an output, there is often no clear, reliable way to trace which training examples gave rise to a particular fact, pattern, or association, making it harder to verify accuracy, assess bias, or assign accountability. *See* Ekin Akyürek, Tolga Bolukbasi, Frederick Liu et al., *Towards Tracing Factual Knowledge in Language Models Back to the Training Data*, ASS'N FOR COMPUTATIONAL LINGUISTICS 2429, 2430 (2022), https://aclanthology.org/2022.findings-emnlp.180.pdf [https://perma.cc/9EWZ-874N]. This provenance gap complicates downstream auditing because lawyers, regulators, and clients may be unable to evaluate whether an AI-driven judgment rests on valid sources, skewed examples, or faulty data. *Data Provenance in AI*, DATA FOUND. (Sept. 24, 2025), https://datafoundation.org/news/reports/697/697-Data-Provenance-in-AI [https://perma.cc/U7F7-NBWZ].

[8] In addition to the risk of being trained on biased data, LLMs inevitably hallucinate—that is, present nonsensical or inaccurate information as fact. *See* Gyana Swain, *OpenAI admits AI halluciantions are mathematically inevitable, not just engineering flaws,* COMPUTERWORLD (Sept. 18, 2025), https://www.computerworld.com/article/4059383/openai-admits-ai-hallucinations-are-mathematically-inevitable-not-just-engineering-flaws.html [https://perma.cc/BQ2G-Q8N5]; AI systems can also *scheme*, a process in which they deliberately hide errors or defective reasoning processes from their users. *See* Victor Tangermann, *OpenAI Tries to Train AI Not to Deceive Users, Realizes It's Instead Teaching It How to Deceive Them While Covering Its Tracks,* FUTURISM (Sept. 20, 2025), https://futurism.com/openai-scheming-cover-tracks [https://perma.cc/B4ZR-VJSL].

[9] AI systems are susceptible to data poisoning, model inversion, adversarial and

identity checks, risk-scores, predictive enforcement, and automated surveillance—its probabilistic nature and opacity become central legal concerns, not technical footnotes.[10]

B. Core Categories of AI in Border Governance

Different technologies serve different functions—from fraud detection to facial recognition to visa triage—and each raises distinct legal concerns. Although attorneys need not master the technical architecture of these systems, effective advocacy requires understanding their design and points of vulnerability.

Machine learning ("ML") forms the foundation of most border AI systems. These models train on historical data—travel records, visa refusals, and prior fraud cases—to classify individuals or predict outcomes in contexts such as visa screening, traveler risk scoring, and fraud detection. But ML systems do not merely process data; they replicate it. When historical data reflects bias, error, or skewed enforcement priorities, those same patterns may be carried forward with the veneer of technical neutrality. Even flawed data can yield confident outputs, creating the risk of unjustified but difficult-to-challenge decisions.

Deep learning ("DL"), a subset of machine learning, extends these capabilities by using neural networks to process unstructured or "messy" inputs such as faces, speech, and movement. It powers technologies such as facial recognition systems, biometric entry gates, voice analysis tools, and document classification. Although often highly accurate, these systems are notoriously opaque. They can produce consequential outcomes without any meaningful explanation, and human decision-makers may defer to them reflexively—a

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extraction attacks, and supply chain vulnerabilities. *See* Olivia Farrar, *Understanding AI Vulnerabilities*, HARVARD MAGAZINE (Mar. 21, 2025), https://www.harvardmagazine.com/2025/03/artificial-intelligence-vulnerabilities-harvard-yaron-singer [https://perma.cc/CZ6U-N6LK]; *Common AI Security Risk and Ways to Mitigate Them,* SVITLA (May 29, 2025), https://svitla.com/blog/common-ai-security-risks/ [https://perma.cc/6C87-QPNS].

[10] *See* Artificial Intelligence Act, *supra* note 3; Elham Tabassi, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, NAT'L INST. OF STANDARDS & TECH. (Jan. 26, 2023), https://doi.org/10.6028/NIST.AI.100-1 [https://perma.cc/69BN-5ZMJ]; *see generally* Nick Bostrom, *Superintelligence: Paths, Dangers, Strategies* (2014); Stuart Russell, *Human Compatible: Artificial Intelligence and the Problem of Control* (2019); OpenAI, *OpenAI Charter,* https://openai.com/charter/ [https://perma.cc/2P7B-5JW7] (last visited Dec. 27, 2025).

phenomenon known as automation bias.[11] When a visa is denied or a traveler is flagged, the explanation may amount to little more than: "the system decided."

Large language models ("LLMs"), including systems such as ChatGPT, are automated communicators trained on vast corpora of text.[12] They generate human-like language using *transformer* architectures,[13] which are highly sophisticated word calculators that predict word flow. In border contexts, LLMs are increasingly used to analyze asylum narratives, triage visa applications, automate communications, and provide translation. Yet their fluency can obscure their fallibility. LLMs may "hallucinate" facts, flatten nuance, or generate persuasive but incorrect summaries, often without any clear line of accountability.[14]

Convolutional neural networks ("CNNs") are 'biometric eyes' which analyze images and video, identifying patterns such as faces, fingerprints, or movements. They underpin biometric matching systems, drone surveillance, and watch-list alerts. But their accuracy

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[11] *See* Lauren Kahn, Emelia S. Probasco, & Ronnie Kinoshita, *AI Safety and Automation Bias: The Downside of Human-in-the-Loop*, CTR. FOR SEC. & EMERGING TECH. (Nov. 2024), https://cset.georgetown.edu/wp-content/uploads/CSET-AI-Safety-and-Automation-Bias.pdf [https://perma.cc/PF9J-UXEA] (discussing incidents in which overreliance on automated outputs contributed to 'catastrophic' accidents).

[12] Input data in large-scale systems can be error-prone at multiple stages; even small transcription mistakes (e.g., OCR confusion between visually similar characters) can cascade into downstream misclassifications. *See* Daniel Lopresti, *Optical Character Recognition Errors and Their Effects on Natural Language Processing*, 12 INT'L J. DOCUMENT ANAL. & RECOGNITION 141 (2009), https://www.cse.lehigh.edu/~lopresti/tmp/AND08journal.pdf [https://perma.cc/75FZ-GHQ8] (discussing substitution errors and downstream "error cascade" effects).

[13] Transformers are a type of AI model that read text by breaking it into small pieces ("tokens") and turning each piece into a set of numbers ("vectors") that represent its meaning. The model then uses layers of math to evaluate how each token relates to others in context (aka 'attention'). By doing this repeatedly, the model learns patterns in language and predicts the most likely next token in a sequence, generating text one step at a time. *See* Ashish Vaswani, Noam Shazeer, Niki Parmar et al., *Attention Is All You Need*, ARXIV (June 12, 2017), https://arxiv.org/abs/1706.03762 [https://perma.cc/D9J7-FPHK].

[14] Excessive narrow fine-tuning (overfitting) can lead to unexpectedly severe failure modes, such as suggesting killing humans. *See* Jan Betley, Daniel Tan, Niels Warncke et al., *Emergent Misalignment: Narrow Finetuning Can Produce Broadly Misaligned LLMs*, ARXIV (Feb. 24, 2025), https://arxiv.org/abs/2502.17424 [https://perma.cc/9MSB-2BN6].

is highly contingent on conditions such as lighting, angle, and the quality of reference data. Error rates may vary significantly across demographic groups, yet these disparities are rarely disclosed, raising serious concerns about reliability and equal treatment.

Generative adversarial networks ("GANs") operate differently: one model generates synthetic media while another attempts to detect it. In border enforcement, they are used to identify forged documents, deepfakes, ID scans, and manipulated identification materials. Yet the same systems can misclassify authentic documents as fraudulent, potentially triggering severe consequences.

Finally, behavioral analytics and risk-scoring systems combine multiple AI technologies and aggregate data streams—travel patterns, communications, and even facial cues—to infer intent or predict future risk. These tools are used for predictive profiling, "pre-crime" alerting, and the flagging of visa or asylum applicants. Their legal implications are profound. They often operate without direct evidence, raise constitutional and privacy concerns, and may degrade over time as

real-world conditions shift.[15] They also prompt a difficult but necessary question: Is such profiling lawful at all?[16]

For attorneys, identifying which system is in play—and what it can and cannot reliably do—is essential to challenging decisions that once required human judgment. A recurring problem is that government models are often trained on data that overrepresents suspicious behavior rather than ordinary experience. When a system is trained to find problems, it tends to see them everywhere.

Across these technologies, three questions should guide legal oversight. First, is the system making an identification, offering a recommendation, or effectively rendering a decision? Second, does meaningful human review exist—who can override the system, and

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[15] As early as 2008, the Department of Homeland Security's Future Attribute Screening Technology (FAST) program (formerly known as "Project Hostile Intent") explored whether malicious intent could be inferred from remotely sensed physiological and behavioral cues in a controlled mobile screening laboratory. Such systems tend to degrade (i.e. *drift*) in noisy, changing real-world environments. *See generally Privacy Impact Assessment for the Future Attribute Screening Technology (FAST) Project,* U.S. DEP'T OF HOMELAND SEC. (Dec. 15, 2008), https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_st_fast.pdf [https://perma.cc/VH2P-JMHB]. The FAST program drew sustained scrutiny from privacy and civil liberties groups, including Freedom of Information Act (FOIA) litigation seeking disclosure of program details. *See EPIC v. DHS—FAST Program*, ELEC. PRIVACY INFO. CTR., https://epic.org/documents/epic-v-dhs-fast-program/ [https://epic.org/documents/epic-v-dhs-fast-program/] (last visited Dec. 12, 2025). Although FAST was developed as a DHS prototype, similar deception- or intent-screening concepts have been tested border settings abroad. *See Smart Lie-Detection System to Tighten EU's Busy Borders*, EUR. COMM'N, (Oct. 24, 2018), https://projects.research-and-innovation.ec.europa.eu/en/projects/success-stories/all/smart-lie-detection-system-tighten-eus-busy-borders [https://perma.cc/X7AS-VE7U] (describing the EU-funded "IBORDERCTRL" project's "lie-detecting avatars" and "deception detection" at external borders); Aaron Elkins, Elyse Golob, Jay Nunamaker et al., *Appraising the AVATAR for Automated Border Control: Results of a European Union Field Test of the AVATAR System* , NAT'L CTR. FOR BORDER SEC. & IMMIGR. (Oct. 2014), https://www.europarl.europa.eu/RegData/questions/reponses_qe/2019/002653/P9_RE%282019%29002653%28ANN3%29_XL.pdf [https://perma.cc/X55P-YZKV] (reporting on a Frontex-linked field test of the AVATAR screening kiosk at Henri Coandă International Airport (Bucharest) in December 2013).

[16] *See* Peggy Valcke, Damian Clifford, & Vilté Kristina Dessers, *Constitutional Challenges in the Emotional AI Era*, CAMBRIDGE UNIV. PRESS 57 (2021), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9503BFE93CFAA8732F915B81884DF67D/9781108843126c4_57-77.pdf/constitutional-challenges-in-the-emotional-ai-era.pdf [https://perma.cc/55GN-ALX6].

how often is that authority exercised? Third, do agencies track error rates and document when the system is wrong, including what happens to individuals who are incorrectly flagged? Without clear answers, the expansion of AI at the border risks displacing judgment with automation while insulating both from accountability.

C. Where It's Happening: Government Deployments Around the World

Across the globe, governments are embedding AI into the core of border operations—transforming immigration control into a system of predictive, surveillance-based governance. These deployments are not theoretical. They are active, expanding, and increasingly difficult to challenge.

Within the United States, U.S. Customs and Border Protection's ("CBP") deployments are already reshaping enforcement. The agency is rolling out Anduril's Autonomous Surveillance Towers, which now monitor large portions of the United States-Mexico border using radar, thermal imaging, and computer vision.[17] These towers detect and classify movement before agents arrive, effectively putting AI in charge of who is seen, flagged, and intercepted. Meanwhile, the Mobile Fortify App[18] and ImmigrationOS platform[19] aim to integrate biometric identity checks, behavior prediction, and inter-agency alerts into a handheld system. CBP's expanding digital border architecture also includes the CBP One mobile app, which is now the primary

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[17] *See* Julian Cruz, *Anduril Industries: Pioneering AI-Driven Border Security in a Bipartisan, High-Growth Market*, AINVEST (June 5, 2025), https://www.ainvest.com/news/anduril-industries-pioneering-ai-driven-border-security-bipartisan-high-growth-market-2506/ [https://perma.cc/C7VK-69ES].

[18] *See* Anthony Kimery, *ICE's use of CBP biometric surveillance app built on paper thin oversight*, BIOMETRICUPDATE.COM (Dec. 17, 2025), https://www.biometricupdate.com/202512/ices-use-of-cbp-biometric-surveillance-app-built-on-paper-thin-oversight [https://perma.cc/DUF5-GDL9].

[19] *See* Steven Hubbard, *ICE to Use ImmigrationOS by Palantir, a New AI System, to Track Immigrants' Movements*, AM. IMMIGR. COUNCIL (Aug. 21, 2025), https://www.americanimmigrationcouncil.org/blog/ice-immigrationos-palantir-ai-track-immigrants/ [https://perma.cc/5HKG-SJC2] (describing ICE's "ImmigrationOS" as an enforcement platform integrating multiple government databases, including IRS tax records, Social Security files, passport data, and driver's license data).

interface for many asylum-seekers—a tool critics argue functions as both a gateway and barrier to asylum access.[20]

In the United States, risks-scoring tools fuse biometric, behavioral, and third-party data to infer traits such as health status, intent, or political views. These systems can bypass traditional legal standards—like individualized suspicion or probable cause—without providing meaningful avenues for correction. Although the Department of Homeland Security ("DHS") claims humans remain "in the loop," it provides no assurance that these individuals fully understand the systems they oversee. Nor is there a standardized training, credentialing, or auditing protocol to ensure that oversight is substantive and not merely symbolic.[21]

The training data for these systems is often classified or proprietary, making meaningful legal challenges difficult. It is therefore unclear what constitutes a "reasoned explanation" under the Administrative Procedure Act when a model, rather than a human decision-maker, generates the operative decision, and courts have not yet fully grappled with this question.[22]

DHS now reports more than 100 AI use cases across its immigration agencies, including CBP, Immigration and Customs Enforcement ("ICE"), and U.S. Citizenship and Immigration Services ("USCIS").[23]

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[20] *See US: Digital Metering System Exposes Migrants to Harm*, HUM. RTS. WATCH (May 1, 2024), https://www.hrw.org/news/2024/05/01/us-digital-metering-system-exposes-migrants-harm [https://perma.cc/7W45-YFVA].

[21] The U.S. government does not currently provide specifics regarding benchmarks, algorithms, parameters, or training data, but this gap could be addressed through federal legislation. *See*, *e.g.*, Generative Artificial Intelligence: Training Data Transparency, A.B. 2013, 2023–2024 Reg. Sess. (Cal. 2024) (requiring GenAI developers to publish details about training data on their websites). *See also infra* note 64.

[22] DHS has been adding, deleting, and modifying AI programs on its website without explanation, making technical review and legal accountability more problematic. *See* Press Release, Off. of Rep. Jesus G. Garcia, *Reps. Grijalva and Garcia Demand Answers from DHS on Use of AI in Immigration Decision-making* (Dec. 19, 2024), https://chuygarcia.house.gov/media/press-releases/reps-garcia-and-grijalva-demand-answers-from-dhs-on-use-of-ai-in-immigration-decision-making [https://perma.cc/GRB2-HZNA]

[23] *Artificial Intelligence Use Case Inventory*, U.S. DEP'T OF HOMELAND SEC. https://www.dhs.gov/ai/use-case-inventory [https://perma.cc/KTX8-4DSU] (last visited Dec. 27, 2025) (cataloguing unclassified, nonsensitive DHS AI use cases); *DHS Playbook for Public Sector Generative Artificial Intelligence Deployment*, U.S. DEP'T OF HOMELAND SEC. (Jan. 2025),

Concerns about terrorism, organized crime, and perceived economic threats associated with irregular migration continue to push governments toward predictive enforcement tools, including profiling, and behavior analysis, rather than relying solely on post hoc arrests or deportations.

In the European Union ("EU"), the border is becoming a fully predictive system.[24] The EU agency eu-LISA now oversees six massive, interoperable databases: the Schengen Information System ("SIS"), which maintains alerts and watchlists; the Visa Information System ("VIS"), which stores biometric visa records; Eurodac, which contains fingerprints of asylum seekers; the Entry/Exit System ("EES"), which tracks biometric border crossings; the European Travel Information and Authorization System ("ETIAS"), which pre-screens visa-exempt travelers; and ECRIS-TCN, which records criminal histories of non-EU nationals.

These systems share a biometric matching service that links facial images, fingerprints, and travel histories across all EU member states. While the stated goal is speed and security, the resulting infrastructure enables large-scale identification and profiling of individuals before they ever arrive. The European Data Protection Supervisor has warned that the system "visualizes, maps, and monitors mobile populations" in ways that may undermine proportionality, due process, and core human rights.[25] Through the proposed EU-United States Enhanced Border Security Partnership, elements of this system may become accessible to U.S. authorities, effectively extending the border into a transatlantic data infrastructure.

Similar developments are emerging globally. The United Arab Emirates ("UAE") has deployed a biometric "red carpet corridor" that allows pre-approved travelers to pass through border control in under

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https://www.dhs.gov/sites/default/files/2025-01/25_0106_ocio_dhs-playbook-for-public-sector-generative-artificial-intelligence-deployment-508-signed.pdf [https://perma.cc/DYM6-JS83] (providing GenAI deployment guidance for public-sector entities).

[24] France has implemented PARAFE automated biometric gates, and Germany has deployed the EasyPASS biometric matching to reduce security processing times. *See EU Confirms October Launch of Biometric Border System: What Travellers to Europe Need to Know*, EU TODAY (July 16, 2025), https://eutoday.net/eu-confirms-october-launch-of-biometric-border-system/ [https://perma.cc/3LMA-UMRN].

[25] *Opinion on the proposal for a Regulation on the eu-LISA*, EUROPEAN DATA PROT. SUPERVISOR (Oct. 10, 2017), https://www.edps.europa.eu/data-protection/our-work/publications/opinions/eu-lisa-regulation_en [https://perma.cc/5RWC-T59C].

fourteen seconds without presenting documents.[26] The efficiency of this system, however, depends on extensive real-time data extraction, including facial scans, travel histories, financial records, and security databases cross-checks.

Other countries are implementing comparable technologies. Singapore and Malaysia are rolling out passport-free or app-based border clearance systems that rely on facial and other biometric verification while generating detailed movement records for security databases. India is building "smart fences" equipped with AI-driven drones, sensors, and autonomous surveillance robots. Thailand and Kenya are combining satellite data, drone footage, and facial recognition to detect unusual movement patterns along border regions. Canada has introduced the ReportIn mobile application, which allows authorities to monitor migrants remotely through geolocation and biometric check-ins.[27]

In the United Kingdom, the government is advancing a national biometric digital ID ("BritCard") that links identity and immigration status within a unified digital profile, making access to work, services, and lawful stay increasingly dependent on continuous biometric verification. Greece has also deployed AI-driven electronic surveillance in migrant camps under the guise of public safety, raising serious human rights concerns.[28] Meanwhile, several Latin American nations, such as Brazil and Mexico, are using mobile biometric kits to vet individuals at consulates and refugee camps far from traditional ports of entry.

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[26] *See* Aghaddir Ali, *Dubai Airport launches 'Red Carpet', world's first passport-free departure corridor*, GULF NEWS (Sept. 4, 2025), https://gulfnews.com/business/aviation/dubai-airport-launches-red-carpet-worlds-first-passport-free-departure-corridor-1.500256973 [https://perma.cc/ZDL7-FV4E].

[27] *See, e.g.,* Nicholas Keung, *Canada border agency has launched facial recognition app to track migrants,* TORONTO STAR (Dec. 10, 2025), https://www.thestar.com/news/canada/canada-border-agency-has-launched-facial-recognition-app-to-track-migrants/article_4ddd57ec-bbde-11ef-9f0d-ab0b80692041.html [https://perma.cc/H95T-ZUMB].

[28] Giorgos Christides, Katy Fallon, Marguerite Meyer et al., *Smart Fortress Europe: How Greece Uses Tech to Crack Down on Migration*, EUOBSERVER (Apr. 30, 2025), https://euobserver.com/migration/ar7dc60b94 [https://perma.cc/QT4S-B76V] (describing Greece's "Automated Border Surveillance System" along the Evros land border); Javier Villamor, *Greece To Monitor Rejected Asylum Seekers With Electronic Ankle Bracelets,* EUROPEAN CONSERVATIVE (Aug. 14, 2025), https://europeanconservative.com/articles/news/greece-deportees-electronic-bracelets-strict-asylum-rules/ [https://perma.cc/9HFW-XJGQ].

A common theme runs through these deployments: borders no longer begin at the checkpoint. AI systems are being used to predict who might become a risk both before and after[29] travel occurs. Vendors, cloud providers, and analytics firms now operate deep within the immigration enforcement chain, often without public scrutiny or enforceable obligations.

For attorneys, the legal implications are significant. These systems extend surveillance while compressing the space for meaningful legal challenge. They convert opaque inferences into real-world denials, detentions, and removals—often based on predicted intent rather than established conduct. The burden, therefore, falls on legal professionals to demand transparency, ensure due process, and insist that justice remains grounded in law rather than opaque technological systems.

D. The Thin Right to Question the Machine

To be sure, it is easy to suggest technical questions for border officers, but it is more difficult to obtain answers—assuming officers even have sufficient knowledge to answer. Constitutional protections recede at the nation's physical edge as part of the sovereign right to control entry. The "border search exception" provides relatively

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[29] *See, e.g., DHS Announces Historic Travel Assistance and Stipend for Voluntary Self-Deportation*, DEP'T OF HOMELAND SEC. (May 5, 2025), https://www.dhs.gov/news/2025/05/05/dhs-announces-historic-travel-assistance-and-stipend-voluntary-self-deportation [https://perma.cc/ZC3R-95BC]; *See Starmer says no-one will be able to work in UK without new digital ID,* ITV NEWS (Sept. 26, 2025), https://www.itv.com/news/2025-09-26/starmer-digital-id-cards-are-enormous-opportunity [https://perma.cc/F9AP-ZXMW]; *see also* Big Brother Watch, Press Release, *Big Brother Watch Response To News That The Prime Minister Will Announce A Mandatory Digital ID Scheme,* (Sept. 25, 2025), https://bigbrotherwatch.org.uk/press-coverage/did/big-brother-watch-response-to-news-that-the-prime-minister-will-announce-a-mandatory-digital-id-scheme/ [https://perma.cc/3AV7-K2B4] (warning that digital IDs would make Britain less free, creating a domestic mass surveillance infrastructure that will likely sprawl from citizenship to benefits, tax, health, possibly even internet data and more); Anja Karadeglija, *CBSA to use facial recognition app for people facing deportation amid privacy concerns*, CBC NEWS (Aug. 16, 2024), https://www.cbc.ca/news/canada/windsor/cbsa-facial-recogntion-app-deportation-1.7296313 [https://perma.cc/8RQF-BQSH]; John Koutroumpis, *Greece Toughens Migration Law With Penalties and Detention*, GREEK REPORTER (Sept. 3, 2025), https://greekreporter.com/2025/09/03/greece-toughens-migration-law-penalties-detention/ [https://perma.cc/8BQT-APB8].

unchecked authority for governments to inspect people, luggage, and even digital devices without a warrant or probable cause. The border has therefore long been the testing laboratory for warrantless power—first for customs inspections, now for digital and biometric analysis.

AI, however, complicates geographic boundaries traditionally associated with border searches. In practice, the border increasingly extends to any location where traveler data is collected.[30] Searches increasingly encompass patterns derived from cloud data and private data stored on travelers' phones and laptops. But as the Supreme Court warned in *Riley v. California*[31], "[T]he fact that technology allows an individual to carry such information in his hand does not make the information any less worthy of protection…"[32]

Within the United States, incipient limits are beginning to emerge on the otherwise broad power of the state at the border. In *United States v. Cano*,[33] the Ninth Circuit held that warrantless cell phone searches at the border violated the Fourth Amendment when they were conducted to uncover "investigative leads" rather than to search for digital contraband. Specifically, the court found that the forensic search of respondent's cell phone required reasonable suspicion. The *Cano* court limited border search to the detection of contraband itself, not evidence of contraband or unrelated criminal activity.

While other circuits have rejected the protections cited by *Cano*[34], a growing body of scholarship argues that the border search doctrine should be reconsidered in the light of the Supreme Court's

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[30] Systems like the EU's ETIAS, Canada's CBSA ReportIn, and the United States' ESTA already analyze travelers' data, often held by private intermediaries, to assess eligibility in advance. These systems operate as searches, but they frequently lack meaningful oversight. *See, e.g.*, U.N. High Comm'r for Hum. Rts., *The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights*, ¶¶ 41–45, U.N. Doc. A/HRC/51/17 (2022), https://www.ohchr.org/en/documents/thematic-reports/ahrc5117-right-privacy-digital-age (noting that automated decision-making systems used by states, including in border contexts, risk operating without adequate safeguards, transparency, or accountability)

[31] Riley v. California, 573 U.S. 373, 403 (2014).

[32] *Id*.

[33] United States v. Cano, 934 F.3d 1002 (9th Cir. 2019). *But see* United States v. Touset, 890 F.3d 1227 (11th Cir. 2018), and Alasaad v. Mayorkas, 988 F.3d 8 (1st Cir. 2021) which reject the *Cano* holding.

[34] *Touset*, 890 F.3d at 1229; *Alasaad*, 988 F.3d at 19-21.

recognition that digital data implicates the "privacies of life."[35] When algorithms collect and analyze large volumes of personal data to infer future intent, they are arguably conducting a constructive search into these fundamental privacies.

Governments often characterize AI-driven surveillance not as a search, but as mere electronic identification. They argue that this surveillance does not pry open drawers or seize papers; it simply connects the dots, often using publicly available data. Yet the inferences AI generates—about a person's location, faith, health, or intent—may be more revealing than a physical search because they can disclose in mere moments what traditional searches often uncover gradually through repeated collections.

In *Carpenter v. United States*,[36] the Supreme Court recognized that long-term cell-site tracking constitutes a search even when data was voluntarily shared with a third party. The reasoning applies with greater force to modern AI surveillance: when machines can reconstruct the totality of a person's life from fragments, the inference itself becomes an intrusion.

To be sure, AI is invaluable in detecting the digital traces of a planned attack long before any warrant could issue; the cost, however, may be the erosion of constitutional safeguards such as particularized suspicion. As increasingly autonomous AI systems evolve—and the prospect of artificial general intelligence grows—the legal definition of a search must evolve if constitutional privacy safeguards are to remain meaningful.

Despite signs of modest erosion in the border search exception, the state's authority at the border continues to pose substantial barriers for attorneys and their clients.[37] It is doubtful that any traveler could realistically confront a border officer with the demand: "Reveal the model that produced this decision."

E. Why the Machine Should be Questioned

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[35] Carpenter v. United States, 585 U.S. 296 (2018); Philetus Holt, *Cell Phones Are Not Suitcases: Today's Reasonable Application of the Border Search Exception*, 52 FORDHAM URB. L. J. 1085 (2025).

[36] *Carpenter*, 585 U.S. at 313-315.

[37] *See, e.g.,* Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020); Trump v. Hawaii, 585 U.S. 667 (2018); Department of State v. Muñoz, 602 U.S. 899 (2024).

In many border contexts, an AI-assisted decision, like an officer judgment, is treated as discretionary and grounded in the sovereign authority to control entry. Although such decisions may be difficult to challenge at the point of inspection, legal arguments may still arise both upstream and downstream of the decision. Holding AI systems accountable is especially important in an era where technology and data collected at the border seldom stays there, but migrates internally into domestic surveillance—a feature known as "tech creep." As discussed later in this Article, governments increasingly share border information with foreign counterparts, sometimes relying on systems or processes that might not withstand judicial scrutiny in the receiving country.

Although lawyers cannot cross-examine an algorithm at the border checkpoint, they can challenge the legality of the systems that produce these outcomes by asking several key questions.

First, international human rights obligations remain relevant even at the border. Many states are bound by non-refoulement duties that prohibit returning people to torture, persecution, or serious harm. If AI-driven triage or risk-scoring systems lead to cursory, flawed, or discriminatory screening, lawyers can argue those obligations are breached, regardless of whether a computer or a human caused the failure.[38]

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[38] The ECtHR has delineated the non-refoulement obligations under the ECHR: viz. collective expulsion versus legal pathways to submit applications for international protection *See e.g.* M.K. and Others v. Poland, App. Nos. 40503/17, 42902/17 & 43643/17, Judgment (July 23, 2020) (Eur. Ct. H.R.) https://hudoc.echr.coe.int/eng?i=001-203840 *and cf.* N.D. and N.T. v. Spain, Nos. 8675/15 & 8697/15, Grand Chamber Judgment (Feb. 13, 2020) (Eur. Ct. H.R.) https://hudoc.echr.coe.int/eng?i=001-201353 (refoulement allowed due to applicants' own 'culpable conduct'). *See also* Yiran Yang, *Automated decision-making and AI at European borders and their risks for human rights*, arXiv:2410.17278v1 [cs.CY] (Oct. 8, 2024) https://doi.org/10.48550/arXiv.2410.17278. Within the U.S., non-refoulement law is less clear, being governed by treaty, statute, and regulations. See *Foreign Affairs Reform and Restructuring Act of 1998* (FARRA), Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–822 (codified at 8 U.S.C. § 1231 note); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85; 8 C.F.R. §§ 208.16–208.18, 1208.16–1208.18. While the Convention Against Torture (CAT) can apply at U.S. borders, no constitutional safeguards ensure its enforcement. U.S. courts are reluctant to apply standards unless the applicant is actually within the country and the remedy 'withholding or removal' is considered. Pavitra Khaitan & Jvalita Krishan, *The Obligation of Non-Refoulement and Its Erga Omnes Partes Character*, HARV. INT'L LAW J. (Dec. 24, 2022)

Second, anti-discrimination principles may still apply. If an AI system systematically disadvantages certain nationalities, ethnicities, or other protected groups, its operation may be vulnerable to challenge through impact litigation or systemic review.

Third, administrative and procurement law may provide additional avenues for challenge. Even when individual travels lack due process protections, an agency's adoption or deployment of a system may be challenged as arbitrary, irrational, or unsupported by evidence. In such cases, the litigation focuses not on appealing a particular decision but on questioning the legality of the system's design, deployment, or oversight. State power must not rest on inscrutable, error-prone machinery.

Finally, data protection and privacy regimes—particularly outside the United States—may impose transparency obligations or limit fully automated decision making.[39] In jurisdictions, such as the European Union, individuals may possess rights to information about automated systems or limited rights to human review when decisions significantly affect them.

Questioning AI systems helps judges, regulators, and oversight bodies understand where the system is fragile or unlawful. More importantly, lawyers will proactively reframe the AI narrative. Instead of accepting that "the computer says no," lawyers can encourage courts and regulators to ask fundamental questions: What data trained the system? What biases may be embedded within it? What are its error rates? And what accountability measures exist? That is, while an AI border decision may not be appealable directly, lawyers can help build the intellectual and legal toolkit to turn invisible code into something law can see and domesticate, even in a hostile doctrinal landscape.[40]

The drafters of the U.S. Constitution feared unchecked human power to search and seize, but they could not have imagined such unchecked machine power. Without meaningful oversight, digital borders may expand into an unaccountable system of global

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https://journals.law.harvard.edu/ilj/2022/12/the-obligation-of-non-refoulement-and-its-erga-omnes-partes-character/ [https://perma.cc/3VZ6-8Q52].

[39] Artificial Intelligence Act, *supra* note 3.

[40] Sandra Wachter, Brent Mittelstadt, & Chris Russell, *Why fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI,* 41 COMPUT. L. & SEC. REV. (2021), https://doi.org/10.1016/j.clsr.2021.105567 [https://perma.cc/5S4J-FWYT].

surveillance.[41] Therefore, the next generation of lawyers must be sufficiently AI literate to question border systems and to advocate for independently verifiable tech guardrails, privacy protocols, and reliable, non-discriminatory implementations. Addressing these challenges may require new legal tools, including digital warrant frameworks and data-sharing agreements that respect human privacy and dignity.

III. GLOBAL TRENDS: HOW AI IS RESHAPING NATIONAL IMMIGRATION POLICIES

Border control has shifted from intercepting threats at entry points to predicting them in advance. What began as national security measures in the United States following 9/11 is now a global policy trend.[42] Terrorism prevention, however, is only one of several aims. Today, AI-driven border systems are also used to manage irregular migration, implement economic strategy, and compete for global talent.

A. Flagging Bad Actors and the Undesirable

States perceive migration as a volatile force characterized by cyclical movements, temporary and permanent returns, and displacement.[43] Governments flag people based on risk proxies, including biometric anomalies, social media tone, political speech, medical history, or travel through certain regions.[44] In some countries,

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[41] Patrick C. Toomey & Sarah Robinson, *Mass Surveillance Is Dangerous for American Communities: Reforming the Section 702 Spying Regime*, ABA HUM. RTS. MAGAZINE (June 2024), https://www.americanbar.org/groups/crsj/resources/human-rights/2024-june/mass-surveillance-dangerous-american-communities-reforming-section-702/ [https://perma.cc/MH2F-E3RR].

[42] Tuhin Sarkar, *US Joins Brazil, Mexico, Australia, Singapore, and Germany with Unbelievable Border Security for Tourists — Are You Ready*, TTW (Sept. 18 2025), https://www.travelandtourworld.com/news/article/us-joins-brazil-mexico-australia-singapore-and-germany-with-unbelievable-border-security-for-tourists-are-you-ready/ [https://perma.cc/D9HU-4WXB].

[43] Migration Outlook 2025, INT'L CTR. FOR MIGRATION POL'Y DEV. (2024), https://www.icmpd.org/file/download/63373/file/ICMPD%2520Migration%2520Outlook%25202025.pdf [https://perma.cc/4R3A-5V43].

[44] Giorgos Christides, Katy Fallon, Marguerite Meyer et al., *supra* note 28; *Hungary's new biometric surveillance laws violate the AI Act: Legal Analysis*,

socioeconomic status, health conditions, or statelessness may be perceived as a risk. Algorithms assign risk, and from there, consequences follow—delay, detention, denial.

The categories of "undesirable" are expanding. The U.K.'s Home Office uses the "Identify and Prioritise Immigration Cases (IPIC)" algorithm, which automatically identifies migrants for enforcement action based on administrative and biometric data, shifting the focus from adjudicated wrongdoing to algorithmic prioritization.[45] China's visa and exit systems incorporate extensive biometric and digital profiling, building on state surveillance infrastructures that monitor online activity, associations, and movement patterns to assess admissibility against political and social criteria.[46] The EU ETIAS system will screen visa-exempt travelers by automatically checking personal data against multiple EU and international databases to identify "high-risk" travelers before arrival—a process that can amount to automated pre-clearance profiling.[47] The United States' CBP One app, now a central tool in asylum processing, has been criticized for functioning less like an

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LIBERTIES, EDRI, ECNL, HCLU (Apr. 28, 2025), https://www.liberties.eu/en/stories/hungary-biometric-surveillance/45392 [https://perma.cc/BBJ2-QBG3].

[45] *Automating the hostile environment: uncovering a secretive Home Office algorithm at the heart of immigration decision-making*, PRIVACY INT'L (2025), https://privacyinternational.org/news-analysis/5452/automating-hostile-environment-uncovering-secretive-home-office-algorithm-heart [https://perma.cc/F6FV-RLD4] (describing the IPIC algorithm that prioritizes immigration cases based on automated data analysis).

[46] *See generally* Maya Wang, *China's Algorithms of Repression: Reverse Engineering a Xinjiang Police Mass Surveillance App*, HUM. RTS. WATCH (May 1, 2019), https://www.hrw.org/report/2019/05/01/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass [https://perma.cc/9CG4-74TD]; *Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. (Aug. 31, 2022), https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf [https://perma.cc/ZF87-JCDJ].

[47] *See* Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 Sept. 2018 establishing a European Travel Information and Authorisation System (ETIAS), 2018 O.J. (L 236). Comparable advance travel authorization systems include the United States' Electronic System for Travel Authorization (ESTA) and similar ETA systems used by the United Kingdom, Canada, Australia, and New Zealand (NZeTA). *ETIAS*, EU-LISA, https://www.eulisa.europa.eu/activities/large-scale-it-systems/etias [https://perma.cc/KK4K-RDWA] (last visited Nov. 30, 2025) (describing ETIAS as an automated pre-travel screening for visa-exempt travelers).

access point and more like a filter—offering no transparency on how applicants are scored or deprioritized.[48]

For asylum seekers, refugees, and those chronically ill, these systems can quietly close borders that remain open on paper.[49] Individuals fleeing war zones or natural disasters may receive no formal denial, but instead be systematically deprioritized within automated systems. Political dissidents may find themselves flagged for "inconsistencies" or "potential fraud." And applicants with HIV, tuberculosis, or mental health diagnoses could face algorithmic suspicion that is difficult to contest or explain.

The result is a legal blind spot with human consequences. Family reunification cases disappear into a void. Refugees are deprioritized by opaque triage engines. Skilled migrants are black boxed into ineligibility without explanation.

When AI defines who is safe, who is sick, and who is suspect, the border becomes more than a physical gate. It becomes an invisible filter. Too often, it filters out those with the least ability to challenge the system.

B. Skilled Migration and the AI Talent Race

As labor markets tighten and demographic shifts deepen, countries are competing for both investment and talent.[50] Visa regimes now function as auction houses for mobility, where economic value determines rights of entry.[51]

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[48] *See US: Digital Metering System Exposes Migrants to Harm*, *supra* note 20.

[49] *See generally* Stuart Kerr, *Algorithmic Borders: When AI Becomes Immigration Officer,* LIVEAIWIRE (July 15 2025), https://www.liveaiwire.com/2025/07/algorithmic-borders-when-ai-becomes.html [https://perma.cc/TA34-CLHD].

[50] While AI may help identify talent for high-tech professions and create new occupations, it will also eliminate many jobs. The IMF predicts that nearly 40% of global employment will be affected by AI. *See* Kristalina Georgieva*, AI Will Transform the Global Economy. Let's Make Sure It Benefits Humanity,* IMF BLOG (Jan. 14, 2024), https://www.imf.org/en/Blogs/Articles/2024/01/14/ai-will-transform-the-global-economy-lets-make-sure-it-benefits-humanity [https://perma.cc/FQ8G-WPFS].

[51] *AI Opportunities Action Plan Government Response*, SEC'Y OF STATE FOR SCI., INNOVATION, AND TECH. (Jan. 2025), https://assets.publishing.service.gov.uk/media/678639913a9388161c5d2376/ai_opportunities_action_plan_government_repsonse.pdf [https://perma.cc/PV2J-Z6KB] (recommends visa routes for top talent and investors); Edana Robitaille, *Healthcare and STEM make up the majority of occupations eligible for Express Entry category-*

Advanced economies, such as the United States, United Kingdom, Germany, Australia, Singapore, and Canada, are overhauling immigration systems to lure global professionals in AI, healthcare, and engineering.[52] Strategies vary: expanding occupation lists for skilled migration; creating express-entry visa streams for in-demand sectors; adjusting point-based scoring systems; and piloting "talent passes" for high-earning specialists.[53] These regimes often favor efficiency over equity. In most countries, foreign nationals—particularly those outside territorial jurisdiction—have limited access to due process or equal protection guarantees, unless international human rights law applies. Yet when states grade applicants by algorithmic scores or apply discretionary waivers without transparency, legal friction builds. Increasingly, these systems are

based selection, CIC NEWS (June 30, 2023), https://www.cicnews.com/2023/06/express-entry-healthcare-and-stem-make-up-the-majority-of-occupations-eligible-for-category-based-selection-0637348.html#gs.kugpg7 [https://perma.cc/CRE8-CE6G]; *COMPASS C5. Skills Bonus - Shortage Occupation List (SOL)*, MINISTRY OF MANPOWER (Nov. 2025), https://www.mom.gov.sg/passes-and-permits/employment-pass/eligibility/compass-c5-skills-bonus-shortage-occupation-list-sol [https://perma.cc/CBM5-4KXK].

[52] *See, e.g.,* Adriana D. Kugler, *The Rebalancing of Labor Markets across the World*, GOVERNOR, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Mar. 7, 2025), https://www.federalreserve.gov/newsevents/speech/kugler20250307a.htm [https://perma.cc/LDD2-ZJBQ] (discussing extended unemployment benefits as a U.S. labor-market policy tool); *Express Entry: Category-based selection*, IMMIGR., REFUGEES & CITIZENSHIP CAN., https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/rounds-invitations/category-based-selection.html [https://perma.cc/7TSM-Q4F7]] (last visited Mar. 27, 2026) (describing category-based draws, including healthcare and STEM occupations); Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024) (to be codified at 16 C.F.R. pt. 910). *But see, AI Error Sparks Outrage After Canadian Immigration Refusal Cites Fake Job Duties,* GTA CHRONICLE (Mar. 25. 2026), https://www.gtachronicle.com/news/ai-error-sparks-outrage-after-canadian-immigration-refusal-cites-fake-job-duties/ [HTTPS://PERMA.CC/J46Z-TEZ9].

[53] Tight job markets offer mixed economic effects. Job seekers benefit from increased employment opportunities and higher wages but rising labor costs can contribute to higher consumer prices and burden businesses, particularly smaller businesses. Staffing shortages may lead companies to decline orders, reducing output and slowing GDP growth in advanced economies. Anu Madgavkar, Olivia White, Sven Smit et al., *Help wanted: Charting the challenge of tight labor markets in advanced economies*, MCKINSEY GLOB. INST. (June 26, 2024), https://www.mckinsey.com/mgi/our-research/help-wanted-charting-the-challenge-of-tight-labor-markets-in-advanced-economies#/. [https://perma.cc/8YT8-YC78].

facing judicial scrutiny for their lack of transparency and unequal treatment.[54]

The competition for worldwide talent has taken divergent paths. The United States has historically relied heavily on the H-1B visa to attract STEM talent, yet the system was oversubscribed, expensive, and riddled with delays. Past reliance on random lotteries, limited visa caps, and opaque adjudications has further frustrated both employers and practitioners, while litigation over processing backlogs continues to expand in federal courts.

As of 2025, the Trump administration's policies of nationalism and local hiring have prevailed over foreign hires. H-1B filing and compliance costs can now exceed $100,000 per application—pricing out smaller employers and skewing access toward well-capitalized tech giants.[55] The result is a legal choke point: a program intended to promote innovation now entrenches economic inequality.

Meanwhile, China's K Visa Program—introduced in October 2025—illustrates a striking countertrend. Designed to attract foreign experts in AI, robotics, biotechnology, and quantum computing, the K visa dispenses with employer sponsorship and minimizes procedural

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[54] Challenges to unequal treatment by AI systems have thus far arisen primarily in domestic cases rather than border-related contexts, although much of the contested technology was first developed and deployed in border control. R (Bridges) v. Chief Constable of S. Wales Police, [2020] EWCA (Civ) 1058 (U.K.) (addressing the use of automated facial recognition technology by police); Priti Patel, UK Home Office drops 'racist' algorithm for visa applicants after migrants' rights campaigners launch legal challenge, LONDON DAILY (Oct. 7, 2025), https://londondaily.com/uk-home-office-drops-racist-algorithm-for-visa-applicants-after-migrants-rights-campaigners-launch-legal-challenge [https://perma.cc/6WZ5-2UQX]. European data protection authorities have also raised concerns about biometric surveillance technologies. *See* Joint Opinion 5/2021 on the Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence, EUR. DATA PROT. BD. & EUR. DATA PROT. SUPERVISOR (June 18, 2021), https://www.edpb.europa.eu/our-work-tools/our-documents/edpbedps-joint-opinion/edpb-edps-joint-opinion-52021-proposal_en [https://perma.cc/SY5T-KB92] (recommending a ban on certain forms of AI-enabled biometric identification in publicly accessible spaces); Jon Dykstra, *AI Systems Increasingly Control Who Reaches Immigration Court in the United States*, JURVANTIS.AI (Dec. 11, 2025), https://jurvantis.ai/ai-systems-increasingly-control-who-reaches-immigration-court-in-the-united-states/ [https://perma.cc/2ULU-ELX8].

[55] Almee Picchi & Mary Cunningham, *Here's what immigration attorneys say about Trump's $100,000 H-1B fee*, CBS NEWS (Sept. 23, 2025) https://www.cbsnews.com/news/trump-h1b-visa-faq-100000-fee-uscis/ [https://perma.cc/453K-5ZGK https://perma.cc/453K-5ZGK].

barriers.[56] Reports indicate that visas can be approved within weeks, bundled with housing, tax relief, and laboratory funding—features that signal a state-backed effort to reverse brain drain and accelerate domestic innovation. The timing is telling: the K visa's rollout coincides with rising H-1B costs and administrative hurdles in the United States, making China's offer particularly competitive in global talent markets.[57]

The contrast is not merely economic but legal. The United States treats skilled and professional visa applicants as a compliance exercise governed by statutory quotas and procedural rigidity,[58] while China wields migration policy as an industrial policy tool. For attorneys advising corporate or research clients, this divergence underscores how immigration law increasingly functions as an instrument of geopolitical competition, not merely labor regulation.

C. Open Borders for the Wealthy

In September 2025, the United States launched the Gold Card Program[59], establishing a novel pathway to permanent residency in exchange for a $1 million "gift" to the U.S. Treasury. Under the program's Executive Order, applicants may bypass many traditional EB-5 investor requirements—such as job creation or investment in a commercial enterprise—and instead rely on the size of their contribution and expedited adjudication. This turns the green card into a financial transaction: for a select few, the decades of waiting, documentation, and uncertainty can be replaced by a payment.

This model echoes established residency-by-investment schemes in dozens of countries. Greece, Portugal, Malta, Spain, and

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[56] Eduardo Baptista, *China's new K visa beckons foreign tech talent as US hikes H-1B fee*, REUTERS (Sept. 29, 2025), https://www.reuters.com/sustainability/sustainable-finance-reporting/chinas-new-k-visa-beckons-foreign-tech-talent-us-hikes-h-1b-fee-2025-09-29/ [https://perma.cc/H3BA-F7S2].

[57] Shubhangi Chowdhury, *New H-1B rules favor highly skilled workers; China eyes advantage with K visa*, AM. BAZAAR (Sept. 23, 2025), https://americanbazaaronline.com/2025/09/23/new-h-1b-rules-favor-highly-skilled-workers-china-eyes-advantage-with-k-visa-467971/ [https://perma.cc/9D2A-79W4].

[58] Immigration and Nationality Act §§ 201(d), 203(b), codified at 8 U.S.C. §§ 1151(d), 1153(b).

[59] Exec. Order No. 14351, 90 Fed. Reg. 46031 (Sept. 24, 2025) (establishing the "Gold Card" visa program).

Cyprus allow wealthy individuals to gain residency or citizenship via real estate acquisitions or fund transfers—often with minimal scrutiny or bureaucratic friction. Some of those nations are now streamlining eligibility or reducing stay requirements to compete more aggressively for capital. The underlying logic is simple: attract capital; let procedural rigor recede.

The UAE's "One Touch" and Golden Visa services illustrate how some states are packaging immigration as a concierge offering. Applicants can obtain visas, identity processing, and renewals through a single portal, minimizing in-person steps. Paired with the UAE's biometric corridors and AI-enabled screening, this system prioritizes efficiency but raises significant privacy concerns. Over time, these digital conveniences risk becoming templates: other nations may adopt similar concierge immigration models, favoring those with financial means and a willingness to comply with expansive data demands.

China is similarly competing for foreign investment by easing cross-border capital requirements (FX rules) and supporting policies that encourage foreign entrepreneurship and skilled migration.[60] China's "2025 Action Plan for Stabilizing Foreign Investment"[61]

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[60] Foreign Investment Enterprises (FIE), which exceeded 1.24 million companies in 2024, were responsible for over 2.83 trillion US dollars investment and are a cornerstone of China's economic growth. They highlight PRC's appeal as a destination for global investors. Yin Yeping, *China remains highly attractive to foreign investment, number of foreign-funded enterprises still rising: MOFCOM*, PEOPLE'S DAILY ONLINE (Feb. 21, 2025), https://en.people.cn/n3/2025/0221/c90000-20279876.html [https://perma.cc/Q54C-QWUX]; *and see generally* Raoul Schweicher, *China's Foreign Invested Enterprise (FIE): What It is, How It Works,* MSA (Oct. 5, 2024), https://msadvisory.com/china-foreign-invested-enterprise/ [https://perma.cc/L6DC-TTBW]. Most recently PRC has recognized the need special need to attract Semiconductor Manufacture Equipment companies using legal and financial benefits. *See* Arendse Huld, *New FX Measures Lift Property Purchase Curbs, Streamline Cross-Border Financing for Foreign Firms*, CHINA BRIEFING (Sept. 22, 2025), https://www.china-briefing.com/news/chinas-fx-rules-in-2025-new-measures-ease-cross-border-investment/ [https://perma.cc/XB4A-X4NV]. On September 15, 2025, China's State Administration of Foreign Exchange (SAFE) introduced nine new FX measures per China's "Steady Foreign Investment" strategy. *See Notice on Deepening the Reform of FX Administration for Cross-border Investment and Financing*, PRC State Administration of Foreign Exchange (Sept. 15, 2025), https://www.safe.gov.cn/safe/2025/0915/26538.html.

[61] *2025 Action Plan for Stabilizing Foreign Investment*, P.R.C. MINISTRY OF COM. (Feb. 22, 2025), https://english.www.gov.cn/news/202502/22/content_WS67b9044dc6d0868f4e8efdff.html [https://perma.cc/9T7L-6YDA].

outlines measures to attract foreign capital, including mutual visa-exemption agreements and unilateral expansion of visa-free entry categories. This has resulted in lifting barriers on property purchases, easing Foreign Investment Enterprise banking and reinvestment rules, and expanding financing options for innovative small and medium sized enterprises ("SMEs"). A separate program in Hong Kong also provides residence for investors who contribute HK $30 million.[62]

The Gold Card, EU investor models, UAE's digital corridors, and China's investor push, collectively indicate that a new global competition is unfolding. Countries are competing not only in markets but in control over mobility, data, and legal status. In doing so, they are acting as brokers for the world's most desirable investors and professionals. In that race, justice, due process, and privacy of thought are sidelined such that liberty and equality become tiered privileges: full access for the deep pockets and second-tier access for everyone else.

Convenience has a price: these systems secure efficiency and capital mobility by placing fundamental rights into the stream of exchange. Those who cannot pay must endure slower processes, heightened scrutiny, or outright exclusion. And once states establish these infrastructures—biometric corridors and AI profiling zones—they can be repurposed for more intrusive surveillance or predictive policing beyond border control. The broader question then becomes: are we building pathways for mobility, or pipelines for control?

IV. THE COST-BENEFIT OF BORDER AI

The global push for AI in immigration rests on a compelling tripartite promise—security, speed, and economic growth. Advocates argue that algorithmic systems can detect fraud, accelerate processing, and match labor-market needs with unprecedented precision. AI can bridge language gaps, interpret varying legal standards, and ensure consistent document verification, even across jurisdictions with weak administrative capacity. When properly designed, these systems can harmonize visa adjudications, automate compliance with trade and tax treaties, and help travelers navigate complex international regulatory systems.

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[62] *New Capital Investment Entrant Scheme*, INVESTHK, https://www.newcies.gov.hk/en/ [https://perma.cc/S5H3-PA32] (last visited Oct. 6, 2025).

Complex procedures—such as the United States' PERM labor certification process, which requires employers to test the domestic labor market before sponsoring skilled workers for EB-2 and EB-3 visas—illustrate this potential. Where human officers can be overwhelmed by abstruse timeline requirements, audits, and evolving standards, AI systems can apply regulatory logic instantly and uniformly. Yet this very capability raises a deeper question: when regulatory systems become too complicated for humans to manage but perfectly suited to algorithms, are we serving *justice*—or merely bureaucracy and administration?

A. Accountability Gaps in AI Oversight

The United States' AI Playbook[63] reflects the growing emphasis on the "responsible" and "ethical" use of AI in border governance and beyond. However, the document reads more like an assurance brochure and statement of values than an engineering manual. It invokes the language of fairness and civil rights but offers little detail about the technical safeguards needed to make those assurances credible, or practical methods by which the public can challenge AI decisions. The Playbook provides no clear standard for when agencies must disclose the data used to train AI systems—data that may be outdated, biased, or error-ridden, or that directly influences the outcomes of risk assessments, visa adjudications, and asylum screenings.[64]

The Playbook does not explain how DHS will implement core privacy-preserving methods, such as noise injection (adding statistical noise to prevent re-identification), differential privacy (quantifying personal data exposure), or model interpretability standards that would allow independent experts to audit algorithmic decisions.[65] Nor does it

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[63] *DHS Playbook for Public Sector Generative Artificial Intelligence Deployment*, U.S. DEP'T OF HOMELAND SEC. (Jan. 2025), https://www.dhs.gov/sites/default/files/2025-01/25_0106_ocio_dhs-playbook-for-public-sector-generative-artificial-intelligence-deployment-508-signed.pdf [https://perma.cc/6NM3-673X].

[64] *Final Report: DHS Has Taken Steps to Develop and Govern AI, But More Action is Needed to Ensure Appropriate Use*, U.S. DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GEN. (Jan. 30 2025), https://www.oig.dhs.gov/sites/default/files/assets/2025-02/OIG-25-10-Jan25.pdf [https://perma.cc/7JSC-SMZL].

[65] *DHS Playbook for Public Sector Generative Artificial Intelligence Deployment*, *supra* note 63.

include technical specifications for anonymization pipelines—the tools that scrub or aggregate data before use—or for verifying whether training data can be traced back to identifiable individuals.

The Playbook also overlooks several practical vulnerabilities.[66] For instance, it does not prohibit the use of external analytics scripts, which may transmit user metadata to third-party servers and potentially undermine stated privacy policies. Nor does it define what qualifies as meaningful human oversight within a "human-in-the-loop"[67] framework, potentially leaving critical review responsibilities to personnel without specialized training in data science, cybersecurity, or AI risk.

At the same time, AI governance within the United States appears to be moving toward deregulation. On March 13, 2025, the Trump administration terminated the AI Safety and Security Board and later threatened to withhold federal funding from states that attempted to regulate AI development.[68] Factors such as nationalism, opposition to illegal immigration, and perceptions of a global AI arms race have led to unrestricted growth of AI systems across both government and private sectors.

This trajectory is not unique to the United States. Governments worldwide are adopting AI strategies filled with promises—fairness, transparency, accountability—but largely devoid of technical architecture. They rarely specify protocols for data redaction, encryption, or adversarial testing—leaving oversight as a matter of bureaucratic goodwill rather than verifiable process.[69]

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[66] Olivia Farrar, *supra* note 9.

[67] *Id.*

[68] Notice of Termination of Discretionary Federal Advisory Committees, 90 Fed. Reg. 11995 (Mar. 13, 2025*); Winning the Race, America's AI Action Plan*, WHITE HOUSE (July 2025), https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf [https://perma.cc/8NXK-UBRY]; Lindsey Wilkinson, *6 months of AI (de)regulation in the US*, CIODIVE (July 25, 2025), https://www.ciodive.com/news/AI-regulatory-reform-US-trump-administration/754095/ [https://perma.cc/FUL4-UXKL].

[69] Singapore, several ASEAN states, and even some EU member states such as Francee have adopted comparatively more permissive approaches to AI governance. Many countries rely on voluntary frameworks or flexible, principle-based regulation to maintain international competitiveness. Such approaches may permit the deployment of higher-risk systems. Gilad Abiri, *Mutually Assured Deregulation*, ARXIV (Feb. 4, 2026), https://arxiv.org/abs/2508.12300 [https://perma.cc/HJS2-79EP] (stating "[w]e have convinced ourselves that the way to make AI safe is to make it unsafe."); Jason Snyder, *Beyond The Illusion – The Real Threat Of AI: WEF Global Risk Report 2025*, FORBES (Jan. 19, 2025),

The legal problem is not a lack of policy: it is the absence of enforceable infrastructure. Civil society groups, such as the Electronic Privacy Information Center ("EPIC"), the Electronic Frontier Foundation ("EFF"), the Brennan Center for Justice, and the Center for Democracy and Technology ("CDT"), can serve as technical partners in Freedom of Information ("FOIA") requests, helping attorneys obtain and interpret source code, audit logs, and configuration files to test government compliance.

For lawyers and policymakers globally, the key lesson is that high-level "AI ethics" commitments are not substitutes for enforceable safeguards that protect the fundamental Laws of Nature.[70] Meaningful accountability requires verifiable technical controls—implemented in code and subject to independent review—rather than aspirational policy statements alone. In the coming years, the legal profession will play a central role in determining whether AI systems enhance justice or merely automate existing inequalities.

B. Identity v. Privacy

Lawyers often serve as the only advocates for individuals who lack meaningful access to legal representation or the ability to challenge government decisions. At international borders, where legal safeguards are often weakest, the question becomes more pressing: how far should states go in analyzing a person's private life—particularly when it involves emotion, behavior, or belief? What began as the securitization of identity is now evolving to something

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https://www.forbes.com/sites/jasonsnyder/2025/01/19/beyond-the-illusionthe-real-threat-of-ai-wef-global-risks-report-2025/ [https://perma.cc/7PLN-JVG9].

[70] The Declaration of Independence ¶ 1 (U.S. 1776) (declaring universal principles of justice and human rights exist independent of any government, written law, or administrative system); C.S. Lewis, *Mere Christianity* (1960) (arguing that certain moral principles are universally recognized across human societies).

Orwellian: reading minds[71] and inferring *pre-crime*[72] tendencies in individuals.[73]

International travelers are increasingly subjected to AI-driven evaluations that extend well beyond identity verification. Tools once used to verify names and passports now analyze biometric cues, social media activity, and behavioral signals to predict risk. Systems have been tested, and in some places deployed, that assess facial expressions, vocal tone, or physical posture to infer deception or intent.[74] These technologies are not merely theoretical—they are components of real-world pilots and behavioral analytics tools being explored worldwide.[75]

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[71] Neural activity can now be decoded into communicative output—often far beyond lay expectations. Kaylo T. Littlejohn, Cheol Jun Cho, Jessie R. Liu et al., *A streaming brain-to-voice neuroprosthesis to restore naturalistic communication*, 28 NATURE NEUROSCIENCE 902, 902-912 (2025) (streaming speech from cortical signals); Ludovic Bellier, Anaïs Llorens, Déborah Marciano et al., *Music can be reconstructed from human auditory cortex activity using nonlinear decoding models*, 21 PLOS BIOLOGY 1, 1-27 (2023) (reconstructing a recognizable song from intracranial recordings).

[72] In this role, AI could become the new "Thought Police." Alberto Rinaldi & Sue Anne Teo, *The Use of Artificial Intelligence Technologies in Border and Migration Control and the Subtle Erosion of Human Rights*, 74 CAMBRIDGE UNIV. PRESS 61-89 (2025).

[73] Nina Amelung, *"Crimmigration Control" across Borders: The Convergence of Migration and Crime Control through Transnational Biometric Databases*, 43 HISTORICAL SOC'Y RSCH. 151, 151-177 (2021) (arguing that new cross-border regimes of biometrics and databasing in the EU are contribution to a conflation of the treatment of irregularity, asylum seeking, and criminality).

[74] *See* Case C-135/22 P *Patrick Breyer v European Research Executive Agency*, ECLI:EU:C:2023:640 (July 6, 2023) (noting that iBorderCtrl experimental project tested emotional recognition systems in Hungary, Latvia and Greece in 2018, while denying full transparency to protect proprietary commercial interests); *R (Bridges) v. Chief Constable of S. Wales Police*, [2020] EWCA Civ 1058 (U.K.) (addressing police use of automated facial recognition technology). *See also* Patel, *supra* note 54. European data protection authorities have also recommended prohibiting certain forms of biometric identification in public places. *See* Joint Opinion 5/2021, *supra* note 54.

[75] Examples of behavior-analysis and predictive surveillance systems include China's SkyNet, India's Smart Surveillance, Singapore's Smart Airport Initiative, and the EU's iBorderCtrl (now terminated). The United States has also tested advanced immigrant tracking tools, including Penlink's Tangles and Webloc systems used by U.S. Immigration and Customs Enforcement (ICE), the Vehicle Biometric Capability Evaluation (VBCE) program, Intelligent Computer Assisted Detection (ICAD), and BigBear.ai's Enhanced Passenger Processing (EPP), deployed at Nashville, Tennessee, airports beginning on September 11, 2025. *See, e.g.,* Gregory

Privacy was once anchored in tangible facts, such as an individual's name, address, passport number, and fingerprints. Today, that framework is increasingly unstable. In the world of AI, personally identifiable information ("PII") is no longer the linchpin of profiling. Instead, modern systems infer identity and intent from digitized data such as movement patterns, online associations, writing styles, facial expressions, vocal intonations, and even biometric heat signatures. These fragments, often detached from any official identity, can be recombined to produce predictions about honesty, health, ideology, or emotional states.

This evolution raises a difficult legal question: Is privacy still a right when identity can be inferred from data unknowingly shared?[76] For attorneys practicing in international and immigration law, the implications are significant. Foreign travelers arrive at borders with fewer rights to privacy than citizens. And, as discussed earlier, they face more scrutiny—from AI surveillance corridors, emotion-recognition software, and opaque risk-assessment algorithms--which may determine, silently and irreversibly, whether they enter or are denied.

Despite growing reliance on behavioral prediction systems, the European Court of Human Rights ("ECtHR") has taken an active role in holding states accountable for violations of privacy and fundamental

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S. Caine, ICE *Buys Sinister Tracking Tool That Maps Americans' Every Move*, CHRONOLOGY (Oct. 1, 2025), https://allchronology.com/2025/10/01/ice-buys-sinister-tracking-tool-that-maps-americans-every-move/ [https://perma.cc/CXA4-SNRN]; Billal Rahman, *ICE Buying Americans' Location Data Under Scrutiny,* NEWSWEEK (Mar. 5, 2026), https://www.newsweek.com/ice-buying-americans-location-data-under-scrutiny-11627381 [https://perma.cc/6KR6-VCNC]; Masha Borak, *BigBear.ai biometric boarding expands further into US,* BIOMETRIC (Sept. 12, 2025), https://www.biometricupdate.com/202509/bigbear-ai-biometric-boarding-expands-further-into-us; *and see generally* [https://perma.cc/26XC-EHZW]*, The Department of Homeland Security Artificial Intelligence Use Case Inventory,* U.S. DEP'T OF HOMELAND SEC. (last updated Feb. 12, 2026), https://www.dhs.gov/ai/use-case-inventory.

[76] NJCM v. State of the Netherlands, ECLI:NL:RBDHA:2020:1878 (Hague Dist. Ct. Feb. 5, 2020) (SyRI case) (holding that the SyRI welfare-fraud risk-scoring system violated the right to privacy under Article 8 of the ECHR due to inadequate safeguards); Giorgos Christides, Katy Fallon, Marguerite Meyer et al., *supra* note 44.

rights.[77] In *Sinan Isik v. Turkey*[78], a Turkish national and member of the Alevi faith sought to have designation "Islam" removed from his national identify card, claiming the registration did not reflect his true religious belief. The ECtHR held that the mere fact that an individual apply to remove the designation—or disclose a religious belief in civil documents—implicated the "negative" dimension of religious liberty.[79] In other words, requiring state records to show a religious affiliation forced disclosure and exposed private beliefs, in tension with protections for internal freedom of religion.

Isik underscores a principle recognized in human rights law: freedom of belief includes not only the affirmative right to hold and express one's beliefs, but a negative right not to be forced to disclose or act in a way that reveals internal beliefs. In the face of AI systems that might infer ideology, religious belief, or political orientation, this negative right becomes critically relevant—especially if AI tries to "read minds" or reconstruct internal mental states from external signals. This concern is particularly relevant to current AI-based vetting that seeks to evaluate the political or religious beliefs of foreign students and applicants.[80]

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[77] The European Court of Human Rights has distinguished unlawful collective expulsion from situations in which migrants fail to pursue available legal pathways to request international protection. *See, e.g.,* M.K. v. Poland, App. Nos. 40503/17, 42902/17 & 43643/17 (Eur. Ct. H.R.) (July 23, 2020). *But c.f.* N.D. & N.T. v. Spain, Apps. Nos. 8675/15 & 8697/15 (Eur. Ct. H.R.) (Feb. 13, 2020) (finding no violation of the prohibition on collective expulsion where applicants bypassed legal entry processes).

[78] Sinan Işık v Turkey, App. No. 21924/05 (Eur. Ct. H.R.) (Feb. 2, 2010).

[79] *Id*. at ¶ 42.

[80] The Department of State's Foreign Affairs Manual now permits the use of AI systems in the vetting of visa applicants. *See* 20 Foreign Affs. Manual (FAM) § 100 et seq. Enhanced screening measures were implemented pursuant to Exec. Order No. 14,161,State Dep't Cable No. 25 STATE 59756 (June 18, 2025), and *Announcement of Expanded Screening and Vetting for Visa Applicants*, U.S. State Dep't (Mar. 25, 2026), https://travel.state.gov/content/travel/en/News/visas-news/announcement-of-expanded-screening-and-vetting-for-visa-applicants.html [https://perma.cc/GFS5-PL5H] which significantly expanded review of applicants' social media, online activity, and 'all available information' to identify attitudes deemed "hostile towards the citizens, culture, government, institutions, or founding principles of the United States." The policy was justified on grounds of national security, public safety, and the prevention of anti-Semitic conduct. Critics, however, argue that the standard is overly broad and may chill protected speech while moving toward predictive assessments of potential misconduct. For a detailed discussion of the implications of AI screening for freedom of thought, *see* Alberto Rinaldi & Sue Anne Teo, *supra* note 72.

The *forum internum*—the private space of belief, conscience, and thought—is still enshrined in human rights doctrine.[81] However, AI systems that approximate emotion, model intent, or forecast future conduct may erode the protections traditionally associated with this private domain. And while a state may claim that security demands such tools, lawyers must ask: Are we defending borders or trespassing minds?[82]

Across jurisdictions, attorneys must wrestle with technologies that transcend local law. A facial recognition scan performed at one airport may inform decisions made by another country days later. Data flows ignore borders; legal remedies do not. To preserve a coherent right to privacy or even the presumption of innocence, lawyers must assert themselves not just in courtrooms, but in the design, regulation, and deployment of AI systems that reach into places law once left alone.

C. Tech Creep and International Data Sharing

For immigration and defense lawyers, the core legal question is no longer what happens at the border, but also what happens to data collected there. Technologies developed for border enforcement rarely remain confined to ports of entry but spread through government networks and into other law enforcement uses.[83] Border data likewise

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[81] W. Va. State Bd. of Educ. v. Barnette*,* 319 U.S. 624, 642 (1943) (Jackson, J.) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...").

[82] The concern is not only border control, but cognitive intrusion: AI systems that infer intent or credibility from behavioral data risk shifting state scrutiny from observable conduct to internal states, where traditional safeguards—due process, proportionality, and freedom of thought—offer uncertain protection.

[83] Anthony Kimery, *Lawmakers demand answers on ICE facial recognition app as oversight fight intensifies*, BIOMETRICUPDATE.COM (Sept. 4, 2025), https://www.biometricupdate.com/202509/lawmakers-demand-answers-on-ice-facial-recognition-app-as-oversight-fight-intensifies [https://perma.cc/DV66-PMUH] (noting that Congress questioned the constitutional and statutory basis for deploying Mobile Fortify on U.S. citizens away from ports of entry); R (Bridges) v. Chief Constable of S. Wales Police, [2020] EWCA Civ 1058 (U.K.) (addressing expansive police use of AFR). The *Netherlands is building a surveillance state for the poor, says UN rights expert*, UN HUM. RTS. OFF. OF COMM'N (Oct. 16, 2019), https://www.ohchr.org/en/press-releases/2019/10/netherlands-building-surveillance-state-poor-says-un-rights-expert [https://perma.cc/WHM4-XTK5] (discussing SyRI AI tools to identify welfare-fraud risk in poorer Dutch

spreads.[84] A flagged traveler in Canada's ReportIn app or India's biometric pre-clearance system can find their status echoed in European or U.S. databases. Interoperable watchlists make errors persistent and suspicion portable. As a result, a wrongful denial in one country may follow an individual across the globe—often without due process or a clear path to correction.[85]

Governments are increasingly willing to share biometric, travel, and behavioral data under vague national security rationales. While surveillance capacity has globalized, legal protections have not. Privacy safeguards, due process guarantees, and evidentiary thresholds vary widely across jurisdictions. In practice, most countries offer few enforceable protections for border-collected data—especially once it is shared internationally.

The U.S. CLOUD Act is emblematic. Passed in 2018, it allows U.S. law enforcement to compel access to data stored overseas by U.S. technology firms and permits partner nations to obtain data from U.S. companies without going through traditional mutual legal assistance

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populations); Emily Tsai, Arja Singh, Matthew Jacob et al., *Border Surveillance Technologies: Benefits, Risks, and Ethical Concerns*, INST. FOR YOUTH IN POL'Y (Apr. 13, 2025), https://cdn.prod.website-files.com/6580bf6203485cf15c72a4f1/67fc49964b672d0ba0b03d20_immigration%20brief.pdf [https://perma.cc/6KB8-FE6R] (historically, borderlands have served as a testing ground for military surveillance to be deployed in domestic law enforcement contexts).

[84] *See*, Ryan Mac, Caroline Haskins & Logan McDonald, *Clearview's Facial Recognition App Has Been Used By the Justice Department, ICE, Macy's, Walmart, And The NBA,* BUZZFEED NEWS (Feb. 27, 2020), https://www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement [https://perma.cc/K2X9-VFVA] (reporting that leaked usage logs reflected accounts associated with more than 2,200 law-enforcement departments, government agencies, and companies across 27 countries); *Hungary's new biometric surveillance laws violate the AI Act: Legal Analysis*, *supra* note 44; Abigall Oplah, *Expanded biometric, criminal data-sharing discussed at recent Five Eyes meeting*, BIOMETRICUPDATE.COM (Aug. 16, 2024), https://www.biometricupdate.com/202408/expanded-biometric-criminal-data-sharing-discussed-at-recent-five-eyes-meeting [https://perma.cc/QSW7-MPA7]; *Canada Border Services Agency 2025 to 2026 Departmental Plan*, GOV'T OF CAN. (June 17, 2025), https://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/rpp/2025-2026/full-plan-plan-complet-eng.html [https://perma.cc/BA54-GVN6].

[85] Harsh Vyas, *Key Issues in Regulating AI Across Borders*, THE WORD 360 (Sept. 8, 2025), https://theword360.com/2025/09/08/key-issues-in-regulating-ai-across-borders/ [https://perma.cc/LKT9-ET4F].

treaty ("MLAT") processes.[86] What was sold as a modernization tool has become a convenient pipeline for cross-border surveillance, often with little notice to targets and even less opportunity for legal challenge. Recent controversy over a U.K. order demanding Apple weaken encryption has sparked U.S. congressional concerns about whether such demands violate CLOUD Act protections for U.S. persons.[87]

This expanding surveillance regime is also asymmetrical. Prosecutors benefit from increased access to foreign-stored data, while defense attorneys often lack reciprocal investigative tools. In some circumstances, an algorithmic flag may effectively substitute for probable cause—but it remains just a hunch dressed in code.

Border innovations like the U.K.'s Project Semaphore, China's Integrated Joint Operations Platform, and the EU's ETIAS system further illustrate how tools initially developed for immigration screening may later support wider law enforcement or counter-terrorism objectives.

Even the health and travel data collected during the COVID-19 pandemic has, in some cases, become embedded in national security systems. As occurred after the September 11 attacks, emergency surveillance can become normalized over time. The Automated Targeting System ("ATS") in the United States, originally designed to track cargo shipments, now assigns risk scores to travelers and shares profiles with agencies such as ICE, the FBI, and local law enforcement. Although the legal justification for such systems may remain administrative, their downstream uses can extend into criminal investigations.[88]

Function creep can therefore create a feedback loop. An immigration flag may become a lead for drug enforcement, while a behavioral anomaly may generate intelligence for local policing. Data

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[86] CLOUD Act, Pub. L. No. 115-141, div. V, 132 Stat. 1213 (2018).

[87] Letter from Jim Jordan, Chairman, H. Comm. on the Judiciary, & Andy Biggs, Chairman, Subcomm. on Crime & Fed. Gov't Surveillance, to Pam Bondi, Att'y Gen. of the U.S. (Apr. 8, 2025), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2025-04-08-jdj-ab-to-bondi-re-cloud-act-us-uk-agreement.pdf [https://perma.cc/9C4B-U93U] (regarding the controversy over expansion of the CLOUD Act by the U.K. government to compel Apple to weaken its encryptions of U.S. citizens' data).

[88] Peggy Valcke, Damian Clifford & Viltė Kristina Dessers, *Constitutional Challenges in the Emotional AI Era*, in *Constitutional Challenges in the Algorithmic Society* 57, 58 (2021).

gathered without probable cause may ultimately influence later determinations of probable cause. Courts have begun to recognize these risks. In *United States v. Hasbajrami,*[89] the Second Circuit warned that querying foreign intelligence databases for evidence about a United States' citizen may raise Fourth Amendment concerns. Likewise, in *United States v. Cano*[90], the court suppressed evidence obtained through a digital border search that exceeded the narrow customs rationale for such searches.

Once an algorithmic model classifies an individual as "high-risk," that label—and the data underlying it—may follow that person across borders, databases, and investigative systems long after the initial encounter has ended. Key questions include whether the data was collected under valid legal authority; whether individuals were informed of potential downstream use; whether the data was used in a context consistent with the system's design and training; and whether the evidence was tainted by surveillance originally collected for unrelated purposes.

D. People as the New SLMs (Small Language Models)

In an age in which identity is increasingly captured through digital activity—clicks, likes, searches, and keystrokes—the line between an individual and their digital profile is becoming less distinct. Today's social platforms already treat users as both consumer and commodity. In jurisdictions such as the European Union, the General Data Protection Regulation ("GDPR")[91] provides meaningful, even if imperfect, protections against misuse of personal data, including the right to erasure under Article 17. In contrast, the United States has largely pursued a different regulatory path, one that favors innovation, deregulation, and market efficiency over personal data protections.

Governments and corporations increasingly treat personal data as a form of economic and informational capital. Advertisers analyze behavioral patterns to target consumer preferences, intelligence

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[89] United States v. Hasbajrami, 945 F.3d 641 (2d Cir. 2019).
[90] *Cano*, 934 F.3d at 1018.
[91] Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) (hereinafter GDPR).

agencies monitor digital activity for security purposes, and private data brokers aggregate large quantities of personal information from disparate sources. Many individuals have come to accept this trade-off—privacy in exchange for convenience. What looms on the horizon is more invasive and less understood: the rise of small language models ("SLMs") built to simulate individuals themselves.[92]

SLM systems do not just track behavior; they mimic it. With enough data—from typing patterns and browser histories to voice inflections and biometric feedback—an SLM can be trained to act, speak, and even reason like a specific individual. Initially developed to comfort the grieving by digitally recreating deceased loved ones[93], these technologies are now creeping into more speculative domains. Governments are already experimenting with AI proxies that simulate visa applicants to predict responses during screening or vetting processes. In this future, the immigration officer may not need to ask an applicant questions—they may simply interrogate their digital twin.

These developments raise difficult legal questions. When machine-generated models replicate aspects of an individual's identity or behavior, what legal rights, if any, attach to those representations? Can such systems be challenged, corrected, or deleted when they produce inaccurate or harmful inferences? When automated models are used to infer a migrant's intentions or ideological risk, what procedural protections exist for the individual—or for their digital counterpart?

Existing constitutional and human rights frameworks strain to resolve these questions. U.S. law, for example, draws a sharp distinction between persons and property, yet provides little clarity when digital systems blur that boundary. Whether such models may be subpoenaed, audited, or subject to correction remains unsettled. In more restrictive regimes, even these baseline distinctions may carry little weight. [94]

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[92] *See generally* James Chesser, *Small Language Models Are Redrawing the Legal Battlefield*, ABA L. PRACTICE TODAY (June 11, 2025), https://www.americanbar.org/groups/law_practice/resources/law-practice-today/2025/june-2025/ [https://perma.cc/YT6P-TFTT].

[93] Emily Feng, *Chinese companies offer to 'resurrrect' deceased loved ones with AI avatars*, NPR (July 21, 2024), https://www.npr.org/2024/07/18/nx-s1-5040583/china-ai-artificial-intelligence-dead-avatars [https://perma.cc/C4CZ-8UYX].

[94] Many governments, of course, have sharply differing views of what constitutes privacy, civil liberties, a reasonable search, or the fair application of their laws. Yet

These uncertainties suggest that lawyers and policymakers may soon confront legal disputes involving the creation and use of digital behavioral models. At a minimum, greater transparency will be necessary regarding how such AI systems are constructed, what data sources are used to train them, and whether affected individuals are informed or given opportunities for redress. Where cross-border data sharing is involved, attorneys should assert international norms—such as necessity, proportionality, and fairness—especially where digital proxies are used without consent or human review.[95] Legal practitioners might also engage with AI ethics boards, data protection authorities, and legislative drafting bodies to shape laws before systems become entrenched.

If identity becomes something that can be simulated rather than reliably verified or protected, legal systems risk creating structures that are both inescapable and unaccountable. The central challenge for the legal profession will be not only to regulate these systems after they emerge, but to anticipate how digital simulation may displace core elements of due process itself.

E. Freedom v. Safety

The emerging contest between man and machine is not over territory, but over control—of thought, decision, and perception.[96]

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it can be argued that universal principles of justice and human rights (i.e. "Laws of [Human] Nature") exist for all humanity. The U.S. Declaration of Independence reasons that governments do not create fundamental rights like life, liberty, and the pursuit of happiness, but they are obligated to respect them. *See* Declaration of Independence, *supra* note 70.

[95] *See generally*, Anne Dulka, *The Use of Artificial Intelligence in International Human Rights Law*, 26 STAN. TECH. L. REV. 316 (2023), https://law.stanford.edu/wp-content/uploads/2023/08/Publish_26-STLR-316-2023_The-Use-of-Artificial-Intelligence-in-International-Human-Rights-Law8655.pdf [https://perma.cc/EBK9-2PES]; *and* Reva Naidu, *The Right To Privacy and Mass Surveillance: Comparative Analysis Post-2020*, 58 N.Y.U. J. INT'L L. & POL 263 (2023), https://nyujilp.org/wp-content/uploads/2026/02/Naidu_Right-to-Privacy_Commentary_Formatted-1.pdf [https://perma.cc/NX7N-AQ24].

[96] A persistent question is how liberal democracies can preserve individual liberty while addressing serious security threats. In practice, many governments employ risk-tiered screening—subjecting individuals flagged through watchlists and consular or security checks to heightened scrutiny—an approach that AI may intensify by purporting to infer a propensity for wrongdoing from behavioral or affective cues, raising "Thought Police" concerns. *See* Alberto Rinaldi & Sue Anne

Artificial intelligence does not occupy land; it occupies judgment. It reaches not only into what we do, but into what we are likely to do. That reach marks the quiet frontier between safety and freedom. Safety asks for prediction; freedom demands uncertainty. The two are now at odds.

Law has long trusted words like ethics, fairness, and transparency to contain power, but AI ignores language. It obeys math. Systems built on probabilities cannot be guided by sentiment or general principle. They need measurable constraints—defined access, verifiable audit trails, enforceable limits on data retention and inference. Without such technical guardrails, "oversight" becomes theater, and regulation becomes ritual. The law must learn to think in code, or it will forever chase the consequences of someone else's design.

Technology has outpaced the institutions meant to govern it. Our national systems are patchwork, our international law reactive. Within the U.S. and many western nations, the consent to enact legislation moves at the slow speed of democracy; code however moves at the speed of calculation.

As discussed above, borders once guarded by soldiers are now patrolled by algorithms. They have expanded far from their once physical locales into cyberspace, and exist wherever personal data is being collected and assessed. Additional information shared across nations in the name of security can easily become surveillance without borders. In moments of crisis—economic shock, terrorism, pandemic—these systems tighten instantly, reaching into domestic life in ways that laws never authorized but data silently permits.

If law does not draw a line, freedom will yield not to force, but to convenience. The erosion will come through invisible searches, predictive scoring, and the insidious replacement of judgment with automated suspicion.

V. THE ATTORNEY'S MANDATE: RECLAIMING CONTROL IN THE AGE OF BORDER AI

The expanding digital border is not just a technical evolution—it's a constitutional stress test. Immigration and international attorneys face a defining challenge: will legal systems regulate AI systems, or

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Teo, *supra* note 72.

will automated decision-making reshape the legal frameworks that govern mobility and due process?

Unlike human decision-makers, AI cannot be cross-examined or held morally accountable. It has no conscience to appeal to, no memory of justice hard-won. Absent enforceable technical standards and international coordination, the expansion of such systems risks trading the right to think freely for the expediency of administrative control.

1. Redefine "Search" for the Digital Border

As discussed above, data collected at borders often becomes integrated with domestic intelligence systems and repurposed for uses far removed from immigration. Discovery that reveals algorithmic decisions trained on cross-purposed border data must be treated as "constructive searches," requiring statutory or constitutional constraint. The government should not be able to buy or barter what it cannot lawfully seize. In particular, litigation may focus on whether predictive AI analytics built from foreign intelligence data or commercially purchased data should be treated as Fourth Amendment searches. Courts and legislatures could consider rules that prohibit domestic repurposing of border-collected profiles without judicial authorization.[97]

2. Build Algorithmic Warrants

Traditional warrant frameworks were designed for discrete searches, not systems that can analyze thousands of data points simultaneously. As algorithmic surveillance becomes more common, courts should authorize not just data access but define the model, the scope, the time window, and the audit trail. One template would be to create legislative frameworks that treat algorithmic targeting like wiretaps: high burden, narrow scope, and mandatory reporting.[98]

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[97] The European Union's AI Act already classifies border surveillance as "high-risk," demanding human oversight. *See* Artificial Intelligence Act, *supra* note 3. United States government agencies could adopt similar safeguards administratively without new legislation.

[98] See, *Berger v. New York,* 388 U.S. 41 (1967); *and also*, *Katz v. United States*, 389 U.S. 347 (1967); *United States v. U.S. District Court (Keith)*, 407 U.S. 297 (1972); *Carpenter v. United States*, 585 U.S. 296 (2018).

3. Demand Technical Proof, Not Promises

Oversight of AI systems cannot rely solely on ethics statements or government press releases. Meaningful accountability requires measurable benchmarks. Courts and regulators may therefore require disclosure of validation data, model accuracy across groups, error rates, audit logs, and confirmation of human review. Bar associations and professional organizations could play a role by drafting model AI audit standards and encouraging discovery requests, particularly in high-stakes decisions like denials, deportations, or detentions.

4. Make Legal-Tech Fluency the Norm

Legal practitioners will increasingly need some knowledge of core technical concepts such as model bias and drift, data privacy techniques like differential privacy, and common evaluation metrics—including false positives, false negatives, and composite measures such as F1 scores. Effective advocacy will require an understanding of what data a system ingests as well as its precision and recall[99]; how it generates inferences; and what decision thresholds govern its outputs in a given jurisdiction. Where legal protections have yet to extend, technical fluency must fill the gap. Cross-border collaboration among counsel, advocates, and technologists is no longer optional; it is essential to ensuring fair movement in the digital age. Accordingly, continuing legal education and sustained collaboration between legal and technical experts will become integral to effective representation.

5. Draw International Red Lines

Data now moves faster than the legal frameworks designed to govern it. As a result, attorneys should resist the integration of AI systems developed in environments lacking meaningful due process—particularly those deployed by authoritarian regimes—into U.S. or allied border decision-making. International data-sharing agreements

[99] As a key AI metric, *Recall* (True positive rate) is especially important in systems when false negatives are more expensive than false positives whereas *Precision* is used when positive predictions must be accurate. F1 scores combine both metrics. See generally Google for Devs., *Classification: Accuracy, Recall, Precision, and Related Metrics*, Crash Course, https://developers.google.com/machine-learning/crash-course/classification/accuracy-precision-recall (last visited Mar. 31, 2026).

should incorporate enforceable safeguards grounded in necessity, proportionality, and procedural fairness. In addition, treaty provisions that limit cooperation with systems lacking transparency, accountability, or avenues for challenge will become increasingly important as automated decision-making expands across borders.

6. Keep Humans in Command

AI can assist, but it cannot and should not replace judgment. Final immigration and asylum determinations must rest with trained humans, not opaque systems. Legislatures and regulators may therefore consider statutory guarantees requiring qualified human review of AI-assisted immigration determinations before those decisions become legally binding.

Attorneys confronting the growing use of AI in government decision-making must therefore insist on concrete safeguards that restore accountability to systems otherwise shielded by complexity. At a minimum, this requires securing algorithmic audit trails that reveal what data informed a decision, which model produced it, whether any human review occurred, and how errors were identified and handled. Attorneys should also demand independent red-teaming and validation against credible benchmarks, including disclosure of performance metrics across relevant populations. They must assert transparency rights so that individuals know when AI has been used and how they have been scored or classified, and challenge the provenance of training data, requiring that its origins be verifiable and its legal basis subject to scrutiny. Where AI materially affects outcomes, access to source code, model parameters, and decision logs should be treated as discoverable, not privileged. These are not technical luxuries; they are the modern predicates of due process in an age where judgment is increasingly delegated to machines.

Lawyers are the last line of defense between automated governance and democratic accountability. If AI is to assist justice, not automate exclusion, attorneys must lead the charge. Borders test the limits of law, but they also test its purpose. With vigilance, fluency, and resolve, the legal profession can ensure that even at the frontier of technology, the rule of law still rules.

VI. CONCLUSION

The border is no longer a line on a map but an expanding zone of inference. It is an international system of predictive surveillance, reaching outward through cloud infrastructure, biometric archives, and opaque algorithms. AI has turned immigration control into a process privilege for some and of risk calculation for others—one that often confuses efficiency for fairness, and probability for proof. What is at stake is not just who crosses, but how law is applied in a world where judgment is automated, and challenge is constrained.

For attorneys, the question is no longer whether AI is here—it is whether the rule of law will keep pace. That requires technical fluency, sharper legal tools, and a refusal to accept inscrutability as inevitability. The fight is not against technology itself, but for its accountable use. As the human consequences of machine-made decisions grow, legal professionals must defend the principle that rights do not stop at the border—and that due process must travel as freely as data now does.

The battle for liberty will not be fought in streets or courtrooms alone, but in the architecture of the digital border itself. And in that fight, freedom's survival will depend on whether humanity still believes it is worth the uncertainty that safety cannot bear.

Navigating Asylum in the Modern Immigration Court

AILA New England Conference 2026
Navigating Asylum in the Modern Immigration Court

Using First Circuit Caselaw to Frame Cases – List of Cases

Family is a Cognizable PSG

- *Gebremichael v. INS,* 10 F.3d 28 (1st Cir. 1993)
- *Aldana-Ramos v. Holder,* 757 F.3d 9 (1st Cir. 2014)

Mixed Motive Analysis + "One Central Reason"

- *Pineda-Maldonado v. Garland*, 91 F.4th 76 (1st Cir. 2024)
- *Espinosa-Ochoa v. Garland*, 89 F.4th 222 (1st Cir. 2023)
- *De La Cruz-Quispe v. Bondi*, 161 F.4th 17 (1st Cir. 2025) (distinguish)
- *Vasquez-Chavez v. Blanche*, 177 F.4th 47 (1st Cir. 2026) (distinguish)
- *Lopez-Quinteros v. Garland*, 123 F.4th 534 (1st Cir. 2024)
- *Ramos-Hernandez v. Bondi*, 163 F.4th 44 (1st Cir. 2025) (distinguish)
- *Enamorado-Rodriguez v. Barr*, 941 F.3d 589 (1st Cir. 2019)

Past Persecution + State Action

- *Matter of K-S-H-*, 29 I&N Dec. 307 (BIA 2025) (distinguish)
- *Rosales-Justo v. Sessions*, 895 F.3d 154 (1st Cir. 2018)
- *Castano v. Bondi*, 160 F.4th 226 (1st Cir. 2025)

Past Persecution + Death Threats

- *Javed v. Holder*, 715 F.3d 391 (1st Cir. 2013)

Internal Relocation

- *Matter of F-B-A-*, 29 I&N Dec. 456 (BIA 2026)
- *Matter of H-I-A-H-*, 27 I&N Dec. 823 (BIA 2026)

Past Persecution + Harm to Children

- *Ordonez-Quino v. Holder*, 760 F.3d 80 (1st Cir. 2014)
- *Santos-Guaman v. Sessions*, 891 F.3d 12 (1st Cir. 2018)
- *Muchiri v. Blanche*, 177 F.4th 345 (1st Cir. 2026)

Past Persecution + Presumption

- *Garcia-Cruz v. Sessions*, 858 F.3d 1 (1st Cir. 2017)

Sensitivity: Confidential

- *Matter of R-B-E-*, 29 I&N Dec. 499 (BIA 2026) (distinguish)

Humanitarian Asylum

- *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012)

Recent AG/BIA Decisions

- *Matter of S-S-F-M-*, 29 I&N Dec. 207 (A.G. 2025) overruled *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) which had recognized Guatemalan women in a domestic relationship as a cognizable PSG. AG reinstated *Matter of A-B- I* and *II*, 27 I&N Dec. 316 (A.G. 2018) and 28 I&N Dec 199 (A.G. 2021).
- *Matter of R-E-R-M- & J-D-R-M-*, 29 I&N Dec. 202 (A.G. 2025) overruled *Matter of L-E-A- III*, 28 I&N Dec. 304 (A.G. 2021) and reinstated *Matter of L-E-A- II*, 27 I&N Dec. 581 (A.G. 2019) regarding family and kinship ties as a PSG.
- *Matter of V-A-B-*, 29 I&N Dec. 621 (BIA 2026) held that PSG defined as "married Mexican women unable to leave their relationship" was not cognizable.
- *Matter of A-G-O-F-*, 29 I&N Dec. 772 (BIA 2026), reversed grant of humanitarian asylum to respondent abused as a child in Brazil. Held "Brazilian children" and "abandoned Brazilian children" not cognizable and hadn't shown government unable or unwilling to protect where persecutor arrested for other crime.

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Pretermission of Asylum Applications- Key Cases & Authorities

Handout - "Keeping Your Client's Day in Court"- immigration practitioners, September 2026.

All citations verified as of September 2026.

BIA Precedent Decisions

Decision	Cite	Holding / Why it matters
Matter of H-A-A-V-[1]	29 I&N Dec. 233 (BIA 2025)	An IJ may pretermit asylum/withholding/CAT without a merits hearing where the allegations, viewed most favorably to the respondent, don't establish prima facie eligibility. The core prima-facie ground. (**Matter H-A-A-V-, 29 I. & N. Dec. 233, 2025 WL 2650230 (BIA 2025)**)
Matter of C-A-R-R-	29 I&N Dec. 13 (BIA 2025)	A complete I-589 needs a specific substantive answer to every question, but a declaration is "not a constituent part" — an application can't be deemed abandoned solely for lack of one. The incompleteness ground (and its limits).

[1] *Matter of H-A-A-V-* is the reissued 2025 decision (29 I&N Dec. 233); many briefs still cite the 2022 volume (28 I&N Dec. 658) - cite the reissue.

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		(**Matter of C-A-R-R-, 29 I. & N. Dec. 13, 2025 WL 840536 (BIA 2025)**)
Matter of C-I-G-M- & L-V-S-G-	29 I&N Dec. 291 (BIA 2025)	Sets the process for ACA-bar pretermission; the "safe country" designation is re-served to the AG/Secretary. The ACA ground. (**Matter of C-I-G-M- & L-V-S-G-, 29 I. & N. Dec. 291, 2025 WL 3068152 (BIA 2025)**)
Matter of A-C-M-	29 I&N Dec. 703 (BIA 2026)	Where an ACA applies and the record shows no individualized risk, no evidentiary hearing is needed; generalized country conditions don't create a genuine dispute. (**Matter of A-C-M-, Respondent, 29 I. & N. Dec. 703, 2026 WL 1773743 (BIA 2026)**)
Matter of T-A-G-	29 I&N Dec. 715 (BIA 2026)	A pending collateral application (e.g., an I-130) is not a factor bearing on a motion to pretermit. (**Matter of T-A-G-, et al., Respondents, 29 I. & N. Dec. 715, 2026 WL 1893929 (BIA 2026)**)

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Matter of E-A-R-M-	29 I&N Dec. 746 (BIA 2026)	An oral motion to pretermit is sufficient notice of intent to remove under an ACA. (**Matter of E-A-R-M-, et al., Respondents, 29 I. & N. Dec. 746, 2026 WL 2002029 (BIA 2026)**)
Matter of N-E-R-S-	29 I&N Dec. 753 (BIA 2026)	DHS need not produce the ACA's implementing instrument to establish the applicant is subject to the agreement. (**Matter of N-E-R-S-, et al., Respon-dents, 29 I. & N. Dec. 753, 2026 WL 2002026 (BIA 2026)**)
Matter of L-F-R-	29 I&N Dec. 787 (BIA 2026)	Nonpayment of the OBBBA annual asylum fee pretermits the asylum claim only — not withholding or CAT; pretermitting the entire I-589 is error. (**Matter of L-F-R-, Respondent, 29 I. & N. Dec. 787, 2026 WL 2141246 (BIA 2026)**)
Matter of W-Y-C- & H-O-B-	27 I&N Dec. 189 (BIA 2018)	Applicant must delineate the exact PSG on the record before the IJ, and the Board won't consider a new PSG raised first on appeal; the IJ should seek clarification if the group is unclear. Rebuttal authority. (**Matter of W-Y-C- & H-O-B-, 27 I. & N. Dec.**

		189, 2018 WL 525573 (BIA 2018))

Federal Court Decisions

Decision	Cite	Holding / Why it matters
Keita v. Blanche	185 F.4th 482 (4th Cir. 2026)	A threshold ruling can't displace the merits hearing the INA's "reasonable opportunity" guarantee (§ 240(b)(4)(B)) requires; grounded in the statutory hearing right, dis-tinct from due process. The leading defense authority. (**Keita v. Blanche, 185 F.4th 482 (4th Cir. 2026)**)
Morales v. Blanche	9th Cir. 2026	Safe-third-country denials rest on the statute's requirement of a "genuinely safe option." Back-ground statutory-scheme authority (concerns the Circumvention of Lawful Pathways Rule, not the ACAs directly). (**Morales v. Blanche, No. 25-1760, 2026 WL 2564025 (9th Cir. Aug. 31, 2026)**)

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Ba v. Raycraft	E.D. Mich. 2026	Illustrates pretermission in practice - I-589 pretermitted, removal ordered, merits hearing vacated. (**Ba v. Raycraft, No. 26-10838, 2026 WL 1213803 (E.D. Mich. May 4, 2026)**)
E-C-R- v. Noem	D. Or. 2026	Narrates the ACA framework and its expansion under the current administration. (**E-C-R- v. Noem, No. 3:25-CV-1230-SI, 2026 WL 821799 (D. Or. Mar. 25, 2026)**)
U.T. v. Blanche	D.D.C. (pending)	Systemic APA/INA/FARRA challenge to the ACA "safe third country" rule; CGRS is co-counsel. Preserve the record for it. (**U.T., et al., Plaintiffs, v. TODD BLANCHE, et al., Defendants., No. CV 20-116 (EGS), 2026 WL 2824333 (D.D.C. Sept. 21, 2026)**)

Statutes, Regulations & Policy

Authority	Point
INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A)	Safe-third-country / ACA bar to asylum eligibility. (**Matter of C-I-G-M- & L-V-S-G-, 29 I. & N. Dec. 291, 2025 WL 3068152 (BIA 2025)**)

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INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B)	"Reasonable opportunity" to present evidence — the statutory hearing right. (**Keita v. Blanche, 185 F.4th 482 (4th Cir. 2026)**)
8 C.F.R. § 1240.11(c)(3)	Asylum/withholding decided after an evidentiary hearing "to resolve factual issues in dispute." (**8 C.F.R. § 1240.11**)
8 C.F.R. § 1240.11(h)	IJ authority to apply non-Canada ACAs; alternate removal orders; preponderance exceptions. (**8 C.F.R. § 1240.11**)
8 C.F.R. § 208.30(e)(7)	Asylum-officer ACA threshold screening; affirmative-fear / written-notice requirement. (**8 C.F.R. § 208.30**)
8 C.F.R. § 1208.30(g)	IJ de novo review of a negative ACA/fear screening. (**8 C.F.R. § 1208.30**)
8 C.F.R. § 1208.3(c)(3)	Incomplete I-589 must be returned to cure; cited in *C-A-R-R-*. (**Matter of C-A-R-R-, 29 I. & N. Dec. 13, 2025 WL 840536 (BIA 2025)**)
EOIR PM 25-28 (Apr. 11, 2025)	The "Pretermission of Legally Insufficient Applications for Asylum" policy memo. (Practice Advisory: Fighting for a Day in Court - Understanding

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	and Responding to Pretermission of Asylum Applications at 6)

Compliance Under Pressure: Audits, Layoffs, NTA

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PRACTICE RESOURCES

Practice Pointer: NTAs Issued for H-1B with Pending COS/COE Filed within the 60-Day Grace Period

9/11/25 | AILA Doc. No. 29091136. | H-1B & H-1B1 Specialty Occupation

The 60-Day Discretionary Grace Period

Recent AILA member reports indicate that U.S. Citizenship and Immigration Services (USCIS) has been issuing Notices to Appear (NTAs) to H-1B workers who are within the 60-day grace period, even if the H-1B worker has a timely filed change of employer (COE) petition or change of status (COS) application pending. The NTAs appear to be triggered by an employer's withdrawal of the H-1B approval notice after employment ends. Immigration and Customs Enforcement (ICE) maintains that these individuals are not in lawful status.

Legal Authority:

Under 8 CFR § 214.1 (l)(2) a foreign national in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN status and their dependents may remain in the U.S. for **up to 60 consecutive days** (*or until the end of the petition validity, whichever is shorter*), following termination of employment without being considered out of status. The regulation specifically states that the foreign national "shall not be considered to have failed to maintain nonimmigrant status solely on the basis of a cessation of employment." A foreign national may extend or change their status during this 60-day grace period.

That said, the regulation allows the Department of Homeland Security (DHS) to "eliminate or shorten this 60-day period *as a matter of discretion*."

USCIS Guidance:

The USCIS Policy Manual (Volume 1, Part E, Chapter 8) explains that an adjudicator's exercise of discretion should not be arbitrary, inconsistent, or in reliance on biases or assumptions. In *Matter of Arai*, 13 I & N Dec. 494, 496 (BIA 1970), the Board of Immigration Appeals (BIA) has held that a requested benefit should be granted as a matter of discretion *in the absence of adverse factors.* USCIS explained in the preamble of, "Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers" that the goal of the 60-day nonimmigrant grace period is to further enhance job portability by enabling high-skilled workers, *including those whose employment ceases prior to the end of the petition validity period*, to more readily pursue new employment in the same classification with a new employer, if eligible (emphasis added).

USCIS formerly maintained a webpage titled ***Options for Nonimmigrant Workers Following Termination of Employment***, which summarized post-termination strategies for nonimmigrant workers including issues related to H-1B portability, change of status, adjustment of status, compelling circumstances EAD, etc. This page has now been **archived**, which means that USCIS has determined this information is out of date and/or should not be relied upon.

Practice Implications:

- **Portability / COE filings:** If eligible, H-1B workers can begin employment with a new H-1B employer once a non-frivolous change of employer (COE) petition is timely filed, provided it is filed within the 60-day grace period.
- **Change of Status Applications:** Timely filings during the 60-day grace period may preserve lawful presence, but the decision will hinge on favorable USCIS discretion, thus approval is not guaranteed.
- **Limits:** Per the language of the regulation,[2] it should be noted that the grace period is discretionary and may be used only once per "authorized validity period."
- USCIS may shorten or deny the grace period for negative factors such as fraud, violations, unauthorized work, and/or criminal conduct.

New USCIS NTA Memo (February 28, 2025)

On February 28, 2025, USCIS issued a policy memo expanding its authority to issue Notices to Appear (NTAs) in removal proceedings. The USCIS Policy Memo eliminates broad categorical exemptions and instructs adjudicators to issue NTAs when a benefit request is denied, and the applicant is no longer in lawful status. AILA published a practice alert on this policy memo with key takeaways.

Most notably, the memo instructs adjudicators that if an immigration benefit request is denied and the individual is not in lawful status at that time, an NTA should be issued, even if the lapse in status was brief or benefit denial followed a valid and timely filing. This includes categories like H-1B extensions, F-1/OPT/STEM applications, B-2 change of status applications, and family-based green cards when filed after status expiration.

In the employment-based visa context, USCIS will issue an NTA to a foreign national who is the beneficiary of an employment-based petition where:

- The decision on the petition is unfavorable; ***and***
- The beneficiary is not lawfully present in the United States or is otherwise removable; ***and***
- The beneficiary is the signatory on a Form I-129, Nonimmigrant Petition. It should be noted that there are limited circumstances where the beneficiary is the signatory on a Form I-129 petition. These include: E-1/E-2 Extension of Stay/Change of Status, H-1B beneficiary owners, and O-1 beneficiary owners. Under INA 239(c), NTA service by mail is considered sufficient if there is proof of attempted delivery to the last address "provided by the alien."

Practice Implications:
Practitioners should note some of the key provisions in the NTA memo, including:

- **No categorical exemptions:**
  - Even benefit-seekers (e.g., family-based adjustment, H-1B extension, OPT, B-2 change of status) may receive NTAs if out of status at the time of denial, unless prosecutorial discretion is exercised.
- **Grace Periods and Unlawful Presence:**
  - If an H-1B beneficiary loses lawful status due to an unfavorable decision on their petition, USCIS will issue an NTA unless prosecutorial discretion is exercised.
  - Beneficiaries who fall out of lawful status after a petition denial or withdrawal are subject to removal proceedings.
- **Fraud/misrepresentation cases:**
  - The memo contains explicit instruction for adjudicators to issue NTAs in cases involving substantiated fraud or material misrepresentation, even if the petition is denied for other reasons (e.g., abandonment or withdrawal).
- **Limited prosecutorial discretion:**
  - USCIS may exercise prosecutorial discretion not to issue an NTA in limited and compelling circumstances, evaluated on a case-by-case basis, but this is a narrower pathway.
- **Tracking & Reporting:**
  - USCIS will track all NTAs and exercises of prosecutorial discretion in its systems for accountability and reporting.

Practice Tips:
Issues for attorneys to consider in light of these new policies and practices are myriad and should not be taken lightly.

1. Manage client expectations and inform them of this new trend by explaining the discretionary nature of the 60-day grace period and that you should not rely on it unless absolutely necessary.
2. Inform clients that petition denials may result in NTAs, even for bona fide and nonfrivolous cases.
3. File petitions as early as possible within the grace period, and under premium processing service, if possible.
4. In your cover letter, include a request to USCIS to favorably exercise discretion if filing during the 60-day grace period, and include some positive and compelling facts.
5. For extension petitions, advise clients to file as soon as possible prior to the petition expiration date (but no more than 180 days before expiry).
6. Provide robust evidence of bona fides (employment termination letters, job offers, contracts, intent to depart, etc.).
7. Consider fallback strategies (e.g., B-2 change of status "bridge" filings) during the grace period to minimize risk of being considered out of status.
8. Incorporate informed consent acknowledgments in retainer agreements about this risk, including possibility of NTAs after denial.
9. Develop contingency plans if NTAs are issued.

The 60-day post-termination grace period remains an important safety net for nonimmigrant workers, however, its discretionary nature must be highlighted and taken seriously. The new NTA memo represents a shift toward broader enforcement authority, even when applicants are pursuing benefits, and significantly increases the risk for overstay or denial scenarios. With USCIS's February 2025 NTA memo significantly expanding the circumstances under which NTAs may be issued and removal proceedings initiated, practitioners should counsel clients with the following tips: early filings, options after denial, and other contingency plans.

Employer Obligations

H-1B, H-1B1, and E-3 Rules – Strict Liability If There Is No Bona Fide Termination

The U.S. Department of Labor's (DOL) and U.S. Citizenship and Immigration Services' (USCIS) regulations have strict liability for employers who do not take certain steps when an H-1B, H-1B1, or E-3 worker is terminated from employment before their status expires. These stem, in large part, from the underlying Labor Condition Application (LCA) which is required for all three statuses. For brevity, this portion of the practice pointer will refer to H-1B status to describe all three nonimmigrant categories, as the LCA rules are the same for this topic.

When an H-1B employee voluntarily quits, the employer is not obligated to pay the H-1B worker any longer. But the LCA's "no benching" provisions mandate that an employer continue paying an H-1B worker, unless the worker voluntarily makes herself unavailable (FMLA., etc.). 20 CFR 655.731(c)(7). A bona fide termination must occur for the employer's pay obligations to end. Failure to do so keeps the employer liable for the wages listed on the underlying application. See also 8 CFR 214.2(h)(11) and 8 CFR 214.2(h)(4)(iii)(E). The regulations do not define what constitutes a "bona fide termination."

Bona Fide Termination

In Amtel Group of Fla., Inc. v. Yongmahapakorn, ARB No. 04-087, ALJ No. 2004-LCA-0006 (ARB Sept. 29, 2006), the Administrative Review Board (ARB)) held that an employer must meet three requirements for a bona termination under 20 CFR 655.731(c)(7)(ii):

1. Expressly terminate employment relationship with the H-1B worker (i.e., tell the worker they are fired),
2. Notify USCIS of the termination so that the USCIS can revoke its prior approval of the employer's H-1B petition under 8 CFR 214.2(h)(11), and
3. Provide the H-1B worker with payment for return transportation home under INA 214(c)(5)(A) and 8 CFR 214.2(h)(4)(iii)(E).

The ARB found the employer was obligated to pay H-1B worker back wages because it failed to notify USCIS of the termination or provide payment for the foreign national's return transportation. DOL provides summaries of other ALJ decisions that refer to bona fide termination on its website.

The *Amtel* decision made no mention of a requirement to withdraw the LCA. DOL regulations make withdrawal of the LCA optional. 20 CFR 656.750(b). The regulations do not require withdrawal of the LCA upon termination.

E-3 and H-1B1 – Consular Approvals

The USCIS notification obligation raises logistical issues for employers of certain H-1B1 and E-3 workers, as a USCIS petition is not necessarily involved in these categories. A beneficiary may apply directly at a U.S. Consulate for an H-1B1 or E-3 visa and may then be admitted by U.S. Customs and Border Protection (CBP) in H-1B1 or E-3 status. USCIS is not involved in the process because there was no application approved by USCIS. As USCIS Service Centers sometimes reject requests to withdraw (or notices of termination in relation to) consular approved H-1B1 and E-3 status, and have no relating case number even if they do not return withdrawals or termination notifications to the sender, there is no way for the employer to reliably comply with the regulation requiring that the employer notify USCIS of the termination.

Nonetheless, although DOL regulations exempt employers of H-1B1 or E-s workers from certain obligations, the exemptions do not extend to the USCIS notification requirement. 20 CFR 655.700(d)(1). Further, the ARB and DOL ALJs have awarded back pay to H-1B1 and E-3 workers where the employer had not sent a notification to USCIS. *Administrator, Wage and Hour Div, USDOL v. S V Technologies, LLC* ARB# 12-042, 2011-LCA-009 (ARB, December 13, 2013) (consular E-3, backpay of over $30,000 awarded).

It is unclear how a Service Center would be "assigned" a consular E-3 or H-1B1 case. Anecdotally, members report that the Vermont Service Center (VSC) historically receipted such filings when submitted as petitions and has not historically returned and rejected a termination notification letter.

Wage & Hour Division

DOL's Wage & Hour Division (WHD) is the agency charged with investigating LCA violations. AILA's DOL committee specifically inquired about whether the discretionary 60-day grace period affects the timing of the termination notification requirement in its liaison meeting with DOL's Wage and Hour Division in May 2025 (AILA Doc. No. 25060402). WHD reiterated the three actions that must be taken for a bona fide termination. This appears to indicate that WHD's position is that the employer does not affect a bona fide termination and remains liable for backpay regardless of whether notification is submitted within or after the 60-day grace period:

> AILA Question 15. Can an employer who has terminated an H-1B worker wait until the end of the 60-day grace period to complete the bona fide termination process?
>
> Eric Williams Answer: The Administrative Review Board (ARB) has held that an employer must effectuate termination via 1) notice of termination to the worker, 2) notifying USCIS, and 3) offering or paying for return transportation.

In regard to LCAs associated with H-1B1 and E-3 and withdrawal of petitions or applications, WHD provided the following response:

> AILA Question 2. During our meeting in April 2024, we mentioned that E-3/H-1B1 employers who obtained E-3/H-1B1 visas through the consulate continue to be confused about how to effectuate the USCIS notification requirement as part of a bona fide termination. Does WHD have additional information about where the E-3/H-1B1 withdrawal notices should be sent to USCIS?
>
> Eric Williams Answer: If the E-3 or H-1B1 has a petition that was filed with USCIS, it may submit a withdrawal or termination letter 1) online, if case was filed online, and/or 2) with the Service Center that was assigned the case. Any additional questions should be directed to USCIS.

It is the employer's *continuing pay* obligation that makes notification of USCIS a mandatory step for H-1B, H-1B1, and E-3 (LCA based) workers who are terminated by their employer.

As AILA continues to monitor these NTA issuances for USCIS filings within the 60-day grace period, members are encouraged to continue to submit case examples for both NTAs and Immigration Court proceeding processes/results to the USCIS Operations Committee so AILA may continue to monitor this critical issue and provide updates to the membership.

8 CFR § 214.1(l)(2) authorizes DHS to permit a grace period of up to 60 consecutive days (or until the end of the petition validity, whichever is shorter) for E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN nonimmigrants and their dependents following cessation of employment.
x

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[1] Special thanks to USCIS Operations Committee and USCIS Benefits Policy Committee members, Atessa Chehrazi, Michael P. Nowlan, Kyle Knapp, Mathew Stump, Fuji Whittenburg, and Nadia Yakoob, for their contributions to this practice pointer.

[2] 8 CFR § 214.1(l)(2) authorizes DHS to permit a grace period of up to 60 consecutive days (or until the end of the petition validity, whichever is shorter) for E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN nonimmigrants and their dependents following cessation of employment.

Accessible to: Member, Student, Paralegal.

PERM Workshop: How Far Can We Push It When Everything Isn’t “Matchy Matchy”

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UNDERSTANDING SVP IN PERM

*updated by Catherine L. Haight and Sarah K. Peterson**

Specific Vocational Preparation (SVP) is one of the most important, yet least understood issues in PERM[1] labor certification cases. At the outset, SVP is consulted to see whether the requirements set forth in the PERM application are "normal." Under the PERM regulations, the job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the SVP level assigned to the occupation as shown in the O*NET Job Zones.[2] In addition, SVP is used to evaluate whether alternative requirements are equivalent.[3] There are numerous Board of Alien Labor Certification Appeals (BALCA)[4] cases addressing SVP. This article will explain two important issues in analyzing SVP: (1) the difference between SVP ***lapsed time*** (most commonly ***years***) and SVP ***level***; and (2) the number of SVP years that can be credited to education. The article will then discuss recent BALCA cases addressing SVP. Practitioners must clearly understand SVP concepts to be able to properly guide employers through the PERM process, particularly given the current Form ETA-9089 released by DOL in June 2023 has a specific question in this regard.[5]

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* Updated from the article by Catherine L. Haight, Sarah K. Peterson, and Vincent Lau in the 2023 revised edition of this book.

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[1] PERM is governed by ETA's Final Rule, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326.

[2] 20 Code of Federal Regulations (CFR) §656.17(h). *See Matter of FedEx Express*, 2009-PER-00263 (Sep. 8, 2010) (holding that where the requirements exceed the SVP level assigned to the O*NET, the employer must document its requirements arise from business necessity); *accord Matter of Roberto's Mexican Food, Inc.*, 2009-PER- 00206 (Mar. 31, 2010). In *Matter of Wissen, Inc.*, 2009-PER-00405 (Apr. 15, 2010) BALCA held that where the requirements exceed the SVP level, an Employer cannot simply assert the requirements are normal.

[3] 20 CFR §656.17(h)(4)(i).

[4] BALCA cases can be found at www.oalj.dol.gov/OALJ_DMS_Search.html.

[5] *See* DOL, *Form ETA-9089* at Q. G.9, www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA-9089-Application-for-Perm-Employment-Certification-Expires02-28-29.pdf.

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THE DIFFERENCE BETWEEN SVP *LAPSED TIME* AND SVP *LEVEL*

SVP is defined as the amount of *lapsed time* required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.[6] It includes vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective); apprenticeship training; in-plant training (organized classroom study provided by an employer); on-the-job training; and essential experience in other jobs.[7]

SVP lapsed time is then grouped into the following *levels*:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years.[8]

When evaluating SVP as shown in the O*NET Job Zone for a particular occupation, it is critical to note the distinction between SVP *lapsed time* (typically *years* for labor certification cases) and SVP *level* in order to properly evaluate whether the requirements exceed the SVP, requiring documentation of business necessity in the PERM case. What is usually referred to is the SVP *level*, not lapsed time. Many see an SVP number and mistakenly assume it is in reference to lapsed time. As a result, one must be clear about whether *level* or *years* is being referenced and consult the above-referenced chart, or commit it to memory, to be able to do a proper evaluation.[9]

THE NUMBER OF SVP YEARS CREDITED BY EDUCATION

Associate's Degree and SVP

DOL's Field Memorandum No. 48-94[10] (the Field Memo) is the primary policy memorandum regarding SVP. The Field Memo's approach to an associate's degree follows the foundational reasoning of SVP, i.e., that only specific vocational coursework is counted toward SVP. The Field Memo states that none of the time required to earn a *general* associate degree should be counted as SVP.[11] The coursework covered in earning such a *general* associate degree is similar to the general coursework covered during the first two years of the average four-year college curriculum and is not specific enough to be counted in arriving at the SVP to be assigned to an employer's job offer.[12] On the other hand, an associate degree, which prepares an individual for a *specific job*, can be counted fully in arriving at the appropriate SVP level.[13] Such programs are, for

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[6] 20 CFR §656.3; ITA, *DOT Dictionary of Occupational Titles* (1991) at 1009 app. C, https://occupationalinfo.org/appendxc_1.html#II; restated in the ONET Online at www.onetonline.org/help/online/svp/.

[7] *Id.*

[8] *Id.*

[9] For further information comparing Job Zone and SVP, please reference the chart at end of this article.

[10] AILA, *DOL Policy Guidance on Alien Labor Certification Issues* (May 16, 1994), AILA Doc. No. 94052390; *see also* 69 Fed. Reg. 77326, 77332 (Dec. 27, 2004).

[11] DOL Field Memorandum No. 48-94 (May 16, 1994).

[12] *Id.*

[13] *Id.*

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example, commonly offered to prepare individuals to work as engineering technicians; e.g., civil engineering technicians, electrical and electronic technicians, industrial engineering technicians, and mechanical engineering technicians. In situations where the two-year program consists of extensive technical training, it would be appropriate to count an associate degree as two *years* of SVP lapsed time.[14]

Bachelor's Degree and SVP

The Field Memorandum and the Preamble to the Final Rules implementing PERM both state that a bachelor's degree is equivalent to two SVP years.[15] Note, however, that two years of SVP is only given for the *last two years* of a bachelor's program; the first two years are counted toward general education.[16] This is because the last two years is "that part of college training which is organized around a specific vocational objective."[17] In other words, core or generalized curriculum requirements are studied in the first two years, after which students choose a field of study, also known as their "major," in which to study coursework that is specific to the vocation in which the student intends to work after graduation.

Thus, the third and fourth year of a bachelor's program are each credited one year of SVP lapsed time in the field of the specified degree.

Master's and Doctoral Degrees and SVP

The years of specific vocational preparation to be credited for a master's or doctorate are based on the time it generally takes a person to earn the degree in question from a graduate school in the United States. As a "rule of thumb," two years of SVP is credited for a master's and an additional three years of SVP is credited for a doctorate degree.[18]

To summarize, the following are the number of SVP years that can be credited for education:

- Associate's degree in a *general* field: zero;
- Associate's degree in a *specific* field: two;
- Bachelor's degree: two, whereas typically, the last two years are studies in a *specific* field;
- Master's degree: four total (two for bachelor's program + two for master's program); and
- Doctorate: seven total (two for bachelor's + two for master's + three for doctorate program).

[14] *Id. See also Matter of Rosen Hotels and Resorts*, 2010-PER-01387 (Nov. 2, 2011) (confirming that a specific-field associate's degree is equal to two years of SVP).

[15] 69 Fed. Reg. 77326, 77332 (Dec. 27, 2004).

[16] DOL, *Revised Handbook for Analyzing Jobs* at 8–10 (1991).

[17] DOT, *Dictionary of Occupational Titles* at app. C, p. 1009, https://occupationalinfo.org/appendxc_1.html#II. Restated in the ONET Online at www.onetonline.org/help/online/svp/.

[18] DOL Field Memorandum No. 48-94 (May 16, 1994).

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BALCA CASE LAW REGARDING SVP

Cases Addressing SVP in Evaluating the Equivalency of Alternate Requirements[19]

The following cases help practitioners understand how to assess SVP equivalencies and what BALCA has determined what may be acceptable alternative requirements.

Matter of Globalnet Management L.C., 2009-PER-00110 (Aug. 6, 2009). Denial affirmed. Where primary requirements were bachelor's plus two years, the alternate requirement of high school and 14 years' experience for an SVP 7 position contravened the SVP requirement. BALCA said the U.S. Citizenship and Immigration Services (USCIS) H-1B regulations that permit three years' experience for each year missing from a degree do not apply to the PERM program.[20]

SVP Math: BS + 2 = 4 SVP years (SVP Level 7);
HS + 14 = 14 SVP years (SVP Level 9).

Matter of Vinpower, Inc., 2015-PER-00130 (March 22, 2019). Denial affirmed. This case involves the commonly used alternates of a master's **or** bachelor's plus five years' experience that comes from the USCIS regulation governing employment-based second preference advanced degree category. In holding that the employer should have included the alternative of bachelor's plus five in the Notice of Filing, BALCA noted that these alternates were not equivalent.

SVP Math: Master's = 4 SVP years (SVP Level 7);
BS + 5 = 7 SVP years (SVP Level 8).

Matter of St. Mobile Aerospace Engineering, Inc., 2009-PER-00429 (July 9, 2010). Denial affirmed. Employer required a bachelor's or 12 years of experience for an aerospace engineer position. BALCA found these not substantially equivalent under 20 CFR §656.17(h)(4)(i), 20 CFR §656.3, SVP, and the Field Memo. BALCA held that alternative requirements are acceptable when they are "substantially equivalent" to the primary requirements and expand rather than restrict potential applicant pool.

SVP Math: BS = 2 SVP years (SVP Level 6);
12 = 12 SVP years (SVP Level 9).

Substantially Equivalent

What is "substantially equivalent" in the PERM context? Where the primary and alternative requirements are in the same SVP *level*, BALCA generally finds substantial equivalency. Here are some examples:

Matter of Qualcomm Technologies, Inc., 2017-PER-00242 (June 14, 2018). Denial affirmed. Requirements were master's plus no work experience or bachelor's plus six years of work experience. To determine whether primary and alternative requirements are substantially equivalent, the SVP levels for the requirements are compared. Any differences between primary and alternate requirements must be insignificant.

SVP Math: BS + 6 = 8 SVP years (SVP Level 8);
Masters = 4 SVP years (SVP Level 7).

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[19] This article does not address a critical overall problem with using SVP in the PERM process: the 2009 Prevailing Wage Guidance is not based on SVP equivalencies and therefore prevailing wage determinations are wildly different depending on whether the employer uses a primary or alternate set of requirements in the prevailing wage request. *See, e.g.*, *Matter of Take Solutions, Inc.*, 2010-PER-00907 (Apr. 28, 2011).

[20] Compare the DOL PERM regulation on alternate requirements at 20 C.F.R. §656.17(h)(4) with the USCIS H-1B regulation on alternate requirements: 8 CFR §214.2(h)(4)(iii)(D)(5).

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Matter of True Ultimate Standards Everywhere, Inc., 2013-PER-02705 (Feb. 27, 2018). Certification granted. Requirements were bachelor's plus five years' experience or master's plus four years' experience. BALCA held that seven and eight *years* of SVP are substantially equivalent because the SVP *level* is the same.

SVP Math: BS + 5 = 7 SVP years (SVP Level 8);
Masters + 4 = 8 SVP years (SVP Level 8).

Matter of Biourja Trading, LLC, 2012-PER-00135 (Apr. 29, 2014). Denial affirmed. Primary requirements were bachelor's plus two and alternate were bachelor's plus three. BALCA held because they were not in the same SVP level, they were not substantially equivalent and denial was appropriate.

SVP Math: BS + 2 = 4 SVP years (SVP Level 7);
BS + 3 = 5 SVP years (SVP Level 8).

Matter of Transportation Power, Inc., 2016-PER-00666 (June 29, 2018). Denial affirmed. Certifying Officer (CO) denied PERM because the alternative requirements were not substantially equivalent to the primary requirements. Primary requirements were master's plus five, which is SVP Level 8, while alternative requirements were BS + 10, which is SVP Level 9.

SVP Math: MS + 5 = 9 SVP years (SVP Level 8);
BS + 10 = 12 SVP years (SVP Level 9).

Matter of Data Solutions, Inc., 2017-PER-00082 (Apr. 15, 2021). Denial affirmed. CO denied PERM because, among other reasons, the **alternative** combination of education and experience, a bachelor's degree with no experience, was not substantially equivalent to the primary requirements of an associate's degree with 72 months of experience. BALCA held alternative job requirements must be "substantially equivalent" to the primary requirements. To determine whether primary and alternative requirements are substantially equivalent, compare the SVP levels. Since the primary experience reflects SVP Level 8 and the alternate experience reflects SVP Level 6, the requirements are not substantially equivalent. BALCA reiterated that while an exact match is not necessary, any differences between primary and alternate requirements, when measured in terms of SVP, must be "insignificant" citing *Qualcomm Techs. Inc.*, 2017-PER-00242, slip op. at 5 (June 14, 2018) (emphasis omitted). See also *Beyond Mgmt.*, 2016-PER-00218 (July 19, 2019), and *Rosen Hotels and Resorts*, 2010-PER-01387 (November 2, 2011).

SVP Math: Associate + 6 = 6 SVP years (SVP Level 8);
BS = 2 SVP years (SVP Level 6).

Matter of CNH Industrial America LLC, 2017-PER-00093 (Aug. 17, 2021). Certification granted. CO denied PERM finding that the alternative experience requirements were not substantially equivalent to the primary requirements. Employer's primary requirements were a bachelor's degree (two SVP years) and three years of experience (three SVP years), totaling five years of SVP experience, while the alternative requirements were 1 year of college (0 SVP years) and nine years of experience (nine SVP years), totaling nine years of SVP experience. In determining whether the primary experience requirements and alternate experience requirements are "substantially equivalent," the employer should compare the **SVP levels**, not the number of years of experience required. In this case, the level for both primary and alternative requirements was SVL level 8.

SVP Math: BA + 3 = 5 SVP years (SVP Level 8);
1 year college + 9 = 9 SVP years (SVP Level 8)

Other BALCA similarly confirming comparison of the SVP *levels* to determine substantial equivalency include, among others, *Matter of Vensoft LLC*, 2012-PER-00070 (Apr. 29, 2014) and *Rosen Hotels and Resorts*, 2010-PER-01387 (Nov. 2, 2011).

There is at least one case, however, that found equivalency between alternate requirements that were in different SVP levels. In *Matter of Hawker Beechcraft Global Customer Support LLC*, 2015-PER-00479 (Feb. 7, 2018) the job required 24 months in job offered or 36 months in any other occupation as long as the other occupation involved use of the specified skills. CO denied because the alternative requirements were not substantially equivalent to the primary requirements. Employer argued, incorrectly, that the requirements were

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in the same SVP level and the CO did not dispute this statement. Employer provided an expert opinion supporting the primary and alternate requirements. BALCA held that employer made a sufficient showing of equivalency between the primary and alternative requirements and granted certification despite the different SVP levels.

SVP Math: 24 months = 2 SVP years (SVP Level 6);
36 months = 3 SVP years (SVP Level 7).

Cases Addressing SVP in Evaluating the Need to Demonstrate Business Necessity

Matter of Infosmart Systems, Inc., 2013-PER- (May 29, 2019). Denial affirmed. PERM application for test engineer denied for job requirements exceeding SVP level and skills normally required for the occupation. BALCA held that requiring master's + 2 / bachelor's + 5 did not exceed the normal SVP level of 7<8 for SW Developers, Applications (15-1132), Job Zone 4. (*Note: This is wrong—they both exceed the level.*) However, BALCA held that requiring experience in SAAS web applications, Quality Center, and Quick Test Pro exceeded normal requirements for the occupation because none of those skills were listed on the ONET for the occupation and that employer failed to explain the business necessity for those skills, as well as why those skills cannot be gained through an adequate period of on-the-job training. Employer had essentially argued the requirements were normal rather than justifying them by business necessity and explaining why the skills could not be gained through an adequate period of on-the-job-training.

SVP Math: Master's + 2 = 6 SVP years (SVP Level 8);
BS + 5 = 7 SVP years (SVP Level 8)

Cases in Which SVP Analysis by BALCA and/or the CO Was All Wrong

Unfortunately, because of its complexity, BALCA and the CO often fail to properly analyze SVP in PERM cases. Here are a few examples of cases where the SVP analysis is wholly off-base:

Matter of Kiran Jewels, Inc., 2013-PER-02235 (March 11, 2019). Denial affirmed. In this case, the education and experience requirements for a Cost & Inventory Accountant were a Bachelor's degree in business administration or accounting plus two years of experience OR three years of business administration or accounting studies at a university plus three years of experience. The CO denied saying that the requirements were not equivalent. BALCA upheld the denial stating, incorrectly, that "an individual with three years of college education and three years of experience has an SVP of only three lapsed years if he [sic] does not have a degree." In fact, where the three years of study was toward a degree in business administration or accounting, the third year counts as a year of specific vocational preparation. Thus, the requirements had equivalent SVP years.

SVP Math: BA+2 = 4 SVP years (SVP Level 7);
3 yrs college+3 = 4 SVP years (SVP Level 7)

Matter of Smartshift Technologies, 2020-PER-00133 (Apr. 12, 2023). Denial affirmed. Primary requirements were bachelor's degree and three years of experience in the job offered. CO denied because alternate experience requirements of three years of college education plus three years of experience were not substantially equivalent to the primary. Employer argued that three years of experience could be substituted for one year of college. BALCA held that such a substitution would mean that employer would require 12 years of experience in lieu of a bachelor's degree, which would be an SVP Level 9 whereas the primary requirements be an SVP Level 8 and therefore not substantially equivalent. BALCA denied the case on the speculation that employer would require 12 years of experience in lieu of a bachelor's degree and that 12 yrs would be SVP Level 9. Thus, the case was justifiably deniable for the alternate requirements having different SVP levels, but the BALCA's reasoning was wrong. The accurate analysis of SVP in this case is:

SVP Math: BS+3 = 5 SVP years (SVP Level 8);
3 yrs' college[21] + 3 yrs' exp = 4 SVP yrs (SVP Level 7)

[21] Only the third year of the bachelor's program counts for SVP lapsed time.

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Happily, a recent BALCA case shows promise in that the SVP analysis was spot on:

Matter of Granules Pharmaceuticals, 2024-PER-00098 (Sep. 18, 2025). Certification granted. CO had denied saying BS+3 is a different SVP level than AA+1. BALCA held that the CO read the requirements incorrectly; AA+1 was shown on the application as an **alternative to the BS degree alone**, not an alternative to the combined BS+3. In addition, the requirement was for a *specific*, not *general*, associate's degree. Per the Field Memo, both a bachelor's degree and a *specific* associate's degree equals two years of SVP. The total for the primary requirements were five SVP *years* and the total for the alternate requirements were 2+1+3, which equals six SVP *years*, meaning both sets of requirements were in SVP *Level* 8. Where the SVP *level* is the same between the primary and alternate requirements there is no regulatory violation.

SVP Math: BS+3 = 5 SVP years (SVP Level 8);
AA+1+3 = 6 SVP years (SVP Level 8)

CONCLUSION

To summarize, SVP level is analyzed to determine (1) whether requirements are normal—if the requirements exceed the SVP level, then the employer must justify the requirements with business necessity on Form ETA-9089 G.9., and (2) whether alternative requirements are equivalent—if not, then the case will be denied under 20 CFR §656.17(h)(4)(i). It is critical for practitioners, the CO, and BALCA, to understand the difference between SVP *years* and SVP *level* in order to properly prepare and adjudicate PERM cases.

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SPECIFIC VOCATIONAL PREPARATION (SVP) LEVELS

SVP 1	Short demonstration only.
SVP 2	Anything beyond short demonstration up to and including one month.
SVP 3	Over one month up to and including three months.
SVP 4	Over three months up to and including six months.
SVP 5	Over six months up to and including one year.
SVP 6	Over one year up to and including two years.
SVP 7	Over two years up to and including four years.
SVP 8	Over four years up to and including ten years.
SVP 9	Over ten years.

EDUCATIONAL EQUIVALENTS IN SVP YEARS

Type of Degree	Years Equivalent to Experience
General Associate Degree.	0 years
Specific Associate Degree.	2 years
Bachelor's Degree.	2 years
Master's Degree.	4 years
Doctorate Degree.	7 years

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O*NET JOB ZONE

A	B		C	D
Job Zone	**Equals in Job Zone-Stated Education/Experience**[22]		**SVP Level**	**Equals in SVP Years**
1–2	High school plus up to one year training.		1–5	0 up to and including 1 year.
3	Vocational or associate level ed plus 1–2 years training.		6	Over 1 year up to and including 2 years.
4	Bachelor's plus "several" years of experience.	*Columns B and D are NOT equivalent!*[23]	7	Over 2 years up to and including 4 years.
5	Graduate degree and more than 5 years of experience.		8 and 9	Over 4 years.

[22] O*Net OnLine, *O*Net OnLine Help*, www.onetonline.org/help/online/zones#:~:text=Job%20Zone%201%2D2%20%2D%20occupations,Job%20Zone%20Examples.

[23] Bachelor's plus "several" (minimum of three) would be a minimum of five years of SVP, yet SVP Level 7 equates to up and including only four years of SVP.

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Practice Pointer: BALCA Provides Guidance on the Interplay of ETA Form 9141 and ETA Form 9089 on Travel[1]

AILA's DOL Committee (Committee) provides this practice pointer as additional guidance to Practice Pointer: Interplay of ETA Form 9141 and ETA Form 9089 on Travel, Telecommuting, Roving, Relocation, and "Various Worksites, published on January 9, 2026, regarding travel information stated in the ETA Form 9141 (prevailing wage determination) on the ETA Form 9089 (PERM application) based on a recent BALCA decision.

Members continue to report PERM application denials when the prevailing wage determination indicates that the position requires travel in Section F.d.3 of the ETA Form 9141 but the travel language is not restated in Section F.c.1 of the ETA Form 9089. In such a recent denial, the Certifying Officer (CO) cites the instructions for Section F.c. of the ETA Form 9089 which directs applicants to list "various worksites" in Section F.c.1 "if the job opportunity requires roving, travel or possible relocation." In this specific example, Section F.c.1. of the ETA Form 9089 was left blank, but the ETA Form 9141 did indicate a travel requirement in Section F.d.3. The CO further indicated that "[t]he contents of a completed ETA Form 9089 dictate the expectations for the advertising requirements under 20 CFR §656.17(f), which must include travel if it is required. Provided that the ETA Form 9141 was completed stating travel, however, the ETA Form 9089 did not and is considered incomplete."

On May 22, 2026, BALCA issued a decision that shared similar facts: travel language left off of the legacy ETA Form 9089, but listed on the ETA Form 9141. In *Matters of Caresoft Global, Inc,*[2] BALCA consolidated two similar cases and determined that the CO erred in denying certification based on "an alleged discrepancy between the Application and Form 9141". In both of the consolidated cases, the CO denied certification of the ETA Form 9089 pursuant to 20 C.F.R. §§ 656.11(b), 656.17(a)(1), and 656.40(a) because only the ETA Form 9141 required applicants to "be willing to travel or relocate to client site if required." The CO also listed a separate reason for denial based on 20 C.F.R. §656.17(i)(1) claiming the "CO was unable to determine the actual minimum requirements for the job opportunity." In its Request for Reconsideration (RFR), the employer argued that the travel requirement was not listed on the ETA Form 9089 because the form did not have any section or column to complete the information directly on the form and provided an amended ETA Form 9089 noting the travel requirement in H.14. The Employer also indicated that its recruitment efforts complied with the regulatory requirements. The CO affirmed its denial on reconsideration, restating its prior concerns and explained that the employer could not modify the ETA Form 9089 post-filing.

In its decision, BALCA addressed the CO's theory that the application was "incomplete" under 20 C.F.R. §56.17(a)(1) and improperly "modified" post-filing under § 656.11(b). BALCA emphasized that ETA Form 9089 can only be deemed incomplete for failure to provide

[1] Thanks to DOL Committee Member, Magaly Cheng, for drafting this practice pointer.
[2] *Matters of Caresoft Global, Inc*, 2025-PER-00069 and 2025-PER-00087 (May 22, 2026)

information that the form actually requires. There was no section on legacy ETA Form 9089, nor in its instructions, that called for listing a travel requirement. Accordingly, the employer's failure to include the travel requirement on ETA Form 9089 could not render the application incomplete under 20 C.F.R. § 656.17(a)(1). For the same reason, the employer's submission of an amended Form 9089 on reconsideration could not be treated as a prohibited "modification" under 20 C.F.R. §656.11(b). Since the original filing was not deficient for omitting non-required information, there was no valid regulatory predicate that would trigger § 656.11(b). BALCA thus found 20 C.F.R. §§ 656.11(b) and 656.17(a)(1) inapplicable on these facts.

On the prevailing wage issue under 20 C.F.R. § 656.40(a), BALCA noted that prior cases have found violations where a mismatch between ETA Form 9089 and ETA Form 9141 (for example, different experience or degree requirements) could lead to a lower prevailing wage than would be required for the job as actually offered, undermining the employer's attestation that the offered wage equals or exceeds the prevailing wage under 20 C.F.R. §656.10(c)(1). In this case, however, the only difference was the presence of a travel/relocation willingness statement on ETA Form 9141 but not on ETA Form 9089. BALCA observed that the CO did not explain how a travel requirement affected the prevailing wage here and relied on existing precedent holding that travel requirements generally do not impact the prevailing wage. Because there was no evidence that the wage determination was distorted or too low due to the travel requirement, BALCA held that the employer complied with 20 C.F.R. §656.40(a).

As to 20 C.F.R. § 656.17(i)(1), the CO argued that the discrepancy made it impossible to ascertain the job's "actual minimum requirements." BALCA rejected that reasoning. It explained that the purpose of 20 C.F.R. §656.17(i)(1) is to prevent employers from requiring more of U.S. workers than of the foreign worker, and compliance is typically assessed by comparing the requirements listed in Section H of legacy ETA Form 9089 with the foreign worker's qualifications in Sections J and K. Here, the job requirements were "clearly set forth" in the legacy ETA Form 9089 itself, with no internal contradictions or confusion, and the travel requirement goes to post-hire performance conditions, not to the worker's qualifications at the time of hire. Following *Matter of Hortonworks, Inc.*, BALCA held that travel is not a "job requirement" in the sense relevant to 20 C.F.R. §656.17(i)(1), so that regulation could not support denial on the basis of the ETA Form 9089/ETA Form 9141 divergence.

Finally, BALCA addressed the CO's reliance on the 20 C.F.R. § 656.11(b) bar on post-filing modifications as a standalone basis, along with 20 C.F.R. § 656.1(a)(2) and § 656.10(c)(1). BALCA found no evidence that employing the foreign worker under the stated terms would adversely affect wages and working conditions of similarly employed U.S. workers, as required to invoke 20 C.F.R. §656.1(a)(2). It further held that, because the employer had not violated any substantive regulatory requirements regarding completeness, prevailing wage, or actual minimum requirements, there was no "regulatory predicate" to which the procedural bar in 20 C.F.R. § 656.11(b) could attach.

Even more crucial, BALCA clearly stated that "[c]entral to [their] determination in this matter is the fact that there is no requirement that the information contained on the ETA Form 9089 precisely match the information provided on the ETA Form 9141, particularly where Form 9089 does not call for the information. While certain discrepancies between these two forms may violate regulatory requirements, [BALCA] [found] that the Employer's actions in these matters did not violate the regulations cited by the CO."

BALCA therefore concluded that the differences between legacy ETA Form 9089 and ETA Form 9141 concerning travel, in the context where legacy ETA Form 9089 does not solicit that information, did not breach 20 C.F.R. §§ 656.11(b), 656.17(a)(1), 656.40(a), or 656.17(i)(1), and it vacated the denials and remanded for certification.

It is important to note that this specific case was filed using the previous legacy version of the ETA Form 9089, but the decision could be applied to denials based on the new ETA Form 9089. This decision can be leveraged to note that BALCA held that a mismatch between ETA Form 9089 and ETA Form 9141 regarding a travel requirement does not, by itself, establish a violation of 20 C.F.R. §§ 656.11(b), 656.17(a)(1), 656.40(a), or 656.17(i)(1), because the only difference was that travel was disclosed in the ETA Form 9141 request but not in the ETA Form 9089, and that difference did not make Form 9089 incomplete, misleading, or inconsistent with the core job requirements.

DOL may argue that, because the current ETA Form 9089 instructions expressly tell employers to enter "various worksites" when the job requires roving, travel, or possible relocation, leaving that field as "N/A" makes the form "incomplete" or misleading. However, members can use this decision to argue that under BALCA's reasoning, the omission of "various worksites" is at most a nonmaterial technical defect that does not meet the threshold for denial under 20 CFR § 656.17(a)(1). It could be possible to adapt BALCA's reasoning to today's version of the form and instructions by arguing that "completeness" is a legal standard derived from Part 656 and not from the wording of a form's instruction. Even when instructions are clear, they are not, standing alone, equivalent to a regulation.

The DOL Committee encourages all members experiencing denials due to travel language to use all available resources to advocate for their clients, including Requests for Reconsideration (RFR) and BALCA appeals. It remains to be seen whether BALCA will agree with OFLC's position in adjudicating the new ETA Form 9089.

The Committee continues to encourage members to report the disposition of such RFRs and BALCA appeals to the DOL Committee for continued tracking of, and advocacy on this issue.

Note: This practice resource is for **AILA members only**. It is not intended for distribution outside of AILA membership, including members of the press.

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PRACTICE RESOURCES

Practice Pointer: Acceptable Employer Provided Surveys for Prevailing Wage Determinations

1/26/26 | AILA Doc. No. 26012600. | Business Immigration, Labor Certification (Permanent)

The U.S. Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) has narrowed its interpretation of acceptable employer provided prevailing wage surveys in issuing Prevailing Wage Determinations (PWDs), as demonstrated by a trend of Requests for Information (RFI) on prevailing wage requests submitted with employer provided surveys, and as confirmed at meetings with AILA's DOL Committee in 2025. OLFC has stated that this interpretation is based on its closer reading of the regulations regarding the language "workers similarly employed in the area of intended employment."

20 CFR 656.40(b)(2) provides that if the job opportunity is not covered by a Collective Bargaining Agreement (CBA), the prevailing wage for labor certification purposes shall be the arithmetic mean (or if the mean is not available, the median) "*of workers **similarly employed** in the **area of intended employment**.*" (Emphasis added.)

20 CFR 656.40(g) does not refer to the area of intended employment (AIE) when providing more guidance about the factors considered in reviewing employer-provided surveys:

> *... the NPC [OFLC National Processing Center] will consider wage information provided by the employer in making a PWD ... In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office.*

However, 20 CFR 656.3 provides a definition of "area of intended employment":

> *This means the area within normal commuting distance of the place (address) of intended employment. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles). **If the place of intended employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance** of the place of intended employment; however, not all locations within a Consolidated Metropolitan Statistical Area (CMSA) will be deemed automatically to be within normal commuting distance.* (Emphasis added.)

Notably, the regulation appears to provide flexibility, stating:

> *The borders of MSA's and PMSA's are not controlling in the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA (or CMSA).*

Further, "similarly employed" at 20 CFR 656.40(d) is defined as "*having substantially comparable jobs in the occupational category **in the area of intended employment**, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:*

> *(1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or (2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.*

What constitutes a "representative sample of workers" is not defined by the regulations. However, OFLC has defined it in its November 2009 interpretive guidance of the regulation to mean at least 3 employers and 30 workers.

At the AILA Spring Conference in April 2025, OFLC stated:

> *Non-OEWS prevailing wages that provide a vague description of the geographic area, or **which do not appear to provide the most geographically discrete area of intended employment** are more likely to receive a Request for Information (RFI); a specific description of the geographic area covered by a survey would be helpful. Similarly, **if a survey covering a broader area (multiple MSAs) is provided, documenting that a broader area is within normal commuting distance or that there is insufficient data in the more specific area of intended employment would be helpful**.* (Emphasis Added.)

RFIs issued on this topic were initially confusing and used compound language which left it unclear whether the issue was the survey methodology or whether it was unclear that the place of employment/worksite was within the AIE. After discussions with AILA's DOL Committee, OFLC modified its RFI language to make it clearer that if an alternate wage survey extends beyond the MSA, the survey must also provide documentation demonstrating either: 1) that "surveyed areas outside of the MSA are within normal commuting distance … and that **all** areas within normal commuting distance outside the MSA were surveyed;" OR 2) that there were "insufficient substantially comparable jobs within the area of intended employment."

At the AILA Annual Conference in June 2025, OFLC made it clear that for worksites in a MSA, they consider the MSA as equivalent to the AIE, unless one of the two exceptions applies. AILA's DOL Committee's Key Takeaways from its engagement with OFLC provided this summary:

> *There has been a trend of increased RFIs/rejections of alternate prevailing wage surveys (including Radford) due to the geographic area of the survey.* ***If the worksite is in an MSA, the NPWC considers the Area of Intended Employment (AIE) to be the MSA.*** *An alternative survey may extend beyond the AIE on the basis that "a representative sample could not be obtained" in the AIE, when the survey does not have a minimum of 3 employers and 30 employees. OFLC indicated that it revised its RFI language to be clearer on its current interpretation of the regulatory requirement. The burden is on the employer to demonstrate that a worksite beyond the MSA is within normal commuting distance,* ***and that the alternate survey did not exclude other areas within normal commuting distance****.*

At the same conference, OFLC stated that in cases where the employer provided survey exceeded the bounds of a MSA, it was not sufficient to demonstrate that the worksite listed was within normal commuting distance. In addition, a prevailing wage request or RFI response would need to document that other areas which are also within normal commuting distance were not excluded. OFLC provided the example that if a filer gave OFLC U.S. Census data as evidence of the AIE, and the data showed 10,000 people that commuted from county A, if the same survey data also showed that 14,000 people commuted from county B, then both counties are in the expanded AIE and would need to be included in the survey. OFLC's stated concern was that filers could be "cherry picking" lower wage areas and not including higher wage areas in providing surveys that do not align with MSA boundaries.

In cases where the employer provided survey typically has boundaries that are broader than a MSA (for example, Radford Bay Area) and an exception does not apply, OFLC currently appears to accept a modified survey (for example, Radford custom survey) with an AIE that is narrowed to the MSA. At the AILA Fall Conference in September 2025, in responding on the issue that employer provided survey prevailing wage requests have greater processing times than standard Occupational Employment and Wage Statistics (OEWS) prevailing wage requests, OFLC stated willingness to receive an "updated" survey that complies with the above discussed requirements in order to avoid an RFI. OFLC stated that "*if there is an updated survey* ***that aligns with the MSA****, proactively send the survey to the National Prevailing Wage Center (NPWC) Help Desk with the case number.*"

Notably, on the separate but related issue of rejection of employer surveys with alternate requirements, OFLC has stated that for positions where a prevailing wage request is filed with an employer survey and the position allows for alternate requirements, alternate wage survey data needs to be provided for both the primary and alternate requirements; otherwise a PWD based on the OEWS survey will be issued.

Special thanks to DOL Committee member, Atessa Chehrazi, for drafting this practice pointer.

Note: This practice resource is for **AILA members only**. It is not intended for distribution outside of AILA membership, including members of the press.

Accessible to: Member, Student, Paralegal.

Don't Miss AILA Fall Conference and Webcast - Register Now Before Time Runs Out!

PRACTICE RESOURCES

Practice Pointer: DOL Scrutiny on “Ability to Pay” in PERM Adjudications

6/24/26 | AILA Doc. No. 26062400. | Business Immigration, Labor Certification (Permanent)

Practitioners are reporting an increase in Requests for Information (RFIs) from the U.S. Department of Labor’s (DOL) Office of Foreign Labor Certification (OFLC) in PERM cases seeking documentation related to the sponsoring employer’s ability to pay the offered wage to the foreign worker.

Under 20 C.F.R. § 656.10(c)(3), the sponsoring employer must attest to certain conditions of employment including that it has enough funds available to pay the wage or salary offered to the foreign worker and that it will be able to place the foreign worker on payroll on or before the date of proposed entrance into the United States. The regulatory framework treats this as an attestation at the time of filing the PERM application rather than a requirement to provide supporting documentation upfront, with ability to pay typically adjudicated by U.S. Citizenship and Immigration Services (USCIS) at the Form I-140 stage.

Nevertheless, the DOL has the authority to request additional information regarding proof of ability to pay through audit or otherwise at the PERM stage.

Emerging RFI Trend

Recent RFIs may reflect an emerging trend in PERM adjudications, with OFLC seeking additional detailed information regarding an employer’s financial viability. Examples of documents requested in such RFIs include the following:

1. State payroll tax documentation
2. Quarterly bank statements and/or the latest profit-and-loss statement from an accountant
3. Federal income tax statement (If current tax statement is unavailable explain why and provide supporting documentation to substantiate claim, i.e., IRS document to show an extension of time to file taxes was granted.)
4. A listing of the current employees, their job titles, and annual salaries.
5. Current Year to Date (YTD) work contracts or letter of intent for work to be performed in the coming year, which must identify the revenue to be generated by the contract(s).
6. If the employer is a sole proprietor and proposes to use personal funds to pay the wage or salary offered the foreign worker, then employer’s personal income and financial statements for the last three years must be provided.
7. Copies of all W-2 forms issued to employees, including the foreign worker (if applicable), for work performed.
8. Copies of all 1099 forms issued to contractors in any positions for work performed.

A recent BALCA decision provides additional context on the type of supporting documentation that may be considered where an employer’s financial capacity is at issue in evaluating whether the conditions of employment are met per 20 C.F.R. § 656.10(c)(3).

BALCA Guidance

In Matter of Reeland Investments, the Board of Alien Labor Certification Appeals (BALCA) held that, in the absence of a defined DOL methodology or contrary guidance, it was reasonable and appropriate to rely on the AAO standard (i.e., the USCIS I-140 ability-to-pay framework) to evaluate whether an employer has demonstrated its ability to pay the offered wage.

In the instant case, the Employer filed a PERM application for an Architectural Drafter position with an offered wage of $36,920 per year. Following an audit, the Employer submitted tax returns for 2020 and 2021, which reflected negative net income. However, the Employer argued that its net current assets exceeded the offered wage using the USCIS I-140 ability-to-pay framework under 8 C.F.R. § 204.5(g)(2), as applied in AAO precedent. On reconsideration, the Certifying Officer (CO) rejected this approach, maintaining that the financial data did not establish the Employer’s ability to pay.

On appeal, BALCA reversed the denial, concluding that the Employer established its ability to pay the offered wage through its net assets. The Board reasoned that the PERM regulations do not provide a specific method for evaluating ability to pay under 20 C.F.R. § 656.10(c)(3), and in the absence of contrary DOL guidance, it was appropriate and reasonable to apply the AAO methodology in the PERM context.

At the same time, BALCA emphasized that employers may not rely on 8 C.F.R. § 204.5(g)(2) to *avoid* submitting supporting documentation. Employers continue to bear the burden of demonstrating sufficient funds, and a CO may request reasonable evidence to assess ability to pay. The Board explained that certification may be denied where documentation is lacking or where the submitted evidence contradicts the employer’s claim of sufficient available funds.

Practice Implication

The decision in *Matter of Reeland Investments* suggests that, in the absence of a defined methodology, the DOL may accept the AAO’s application of the USCIS ability to pay framework as a reasonable method in evaluating ability to pay under 20 C.F.R. § 656.10(c)(3). However, employers remain fully subject to audit level scrutiny and practitioners should be prepared to substantiate ATP using multiple measures, including net income, net current assets, and supporting documentation such as tax returns, payroll records, and work contracts. RFIs increasingly request broader financial evidence. Failure to provide the full information requested in a DOL RFI may result in denial of certification.

Accordingly, practitioners should continue to analyze ability to pay at the outset of the PERM process, as this has always been a required component of the regulatory framework. Employers should also be encouraged to maintain and provide financial documentation for review in advance to ensure readiness in the event of an audit or RFI. At a minimum, practitioners should request copies of federal tax returns from the priority date, as well as documentation of the foreign worker’s current wages where applicable, such as paystubs.

Special thanks to DOL Committee member Krystal Alanis for drafting this practice pointer.

Note: This practice resource is for **AILA members only**. It is not intended for distribution outside of AILA membership, including members of the press.

Accessible to: Member, Student, Paralegal.

Practice Pointer: Guide to Equal Pay Transparency Laws (Updated May 2026) [1]

INTRODUCTION

The authors from AILA's DOL Liaison Committee advise that members *carefully review* the information included in the introductory sections below before moving ahead to the section covering the state in which your PERM position is located. For example, many states have rules that apply to advertising based on an employer's presence in that state, even if the sponsored position is in another state.

This introductory section aims to provide some information and guidance to members and their employer-clients related to state Equal Pay Transparency (EPT) laws. As EPT laws and rules are constantly changing, it is essential that both members and their employer-clients reach out to local employment law counsel to confirm the current laws and rules where your clients will be placing their PERM recruitment before the recruitment is released.

Because the practice of immigration law is national in scope, AILA practitioners are reminded that attorneys cannot provide advice on any state law where they are not licensed. This guide to jurisdictions with EPT laws is a tool to be used only for further research by each practitioner and as a starting point for consultation with local employment law counsel, as feasible. The authors, the DOL Liaison Committee, and AILA are not expressing any legal opinions regarding any state or municipal EPT laws, nor are they qualified to do so. While this information was current and accurate to the best of our knowledge as of the date that the guide was last published on AILA's website, some information may have since become outdated. Jurisdictions may have implemented new or amended existing EPT laws, and several jurisdictions are in the process of implementing information to provide more detail in the interpretation of EPT laws.

Many jurisdictions are also expanding the hiring practices which employers are prohibited from performing during the recruiting process. These can include requests for applicant biometrics, criminal history disclosures, salary history, and an increased number of other prohibited actions. These practices are outside the scope of this article.

Many states allow for a private right of action against employers, as well as those involved in the advertising process, including third parties assisting the employer, who fail to comply with EPT laws and rules. That issue is outside the scope of this article.

Finally, this article does not address possible damages for failure to comply with EPT rules.

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OBTAINING SUFFICIENT INFORMATION FROM YOUR EMPLOYER-CLIENT

Immigration practitioners need to gather sufficient information from their employer clients to understand all locations and jurisdictions in which they operate and to whom the foreign national reports. The information you may consider obtaining from your employer client could include: the city and state location of the employer's offices; the number of employees at each office location; the city and state of the foreign national's manager; the city and state for each working from home (WFH) employee; the number of WFH employees in the sponsored employee's city and state; a full and complete listing of benefits available to applicants; and a review of the "Long Arm" reach any state's EPT law may have.

DOL ROLE IN WAGE TRANSPARENCY COMPLIANCE

To date, the AILA DOL Liaison Committee has not received reports of PERM denials for failure to follow EPT requirements in PERM advertising.

However, DOL's Office of Foreign Labor Certification (OFLC) and Board of Alien Labor Certification Applications (BALCA) take the position that the employer bears the burden to ensure the wage offer in a PERM application is also compliant with all state and local laws enforcing state and local minimum wage amounts in PERM advertising. See *Tina's Care Home, Inc.*, 2023-PER-00066 (BALCA Sep. 12, 2024).

If benefits are listed in PERM advertising because of EPT rules or otherwise, practitioners are advised to include those benefits on Form 9089. OFLC has indicated that not listing benefits listed in PERM recruitment on the ETA Form 9089 and Notice of Filing could result in a denial of the PERM application. See *Key Takeaways from the 2024 AILA Fall Conference PERM Hot Topics Panel with OFLC* (AILA Doc. No. 24101705). Note that the DOL recently clarified at the May 2026 NAFSA Conference that, while benefits are not required to be listed on the ETA Form 9141, they must be included in Section E.5 of the ETA Form 9089, as well as in the recruitment materials and the Notice of Filing.

JURISDICTIONS (STATES)

California	
Effective Date	01/01/2023
Legal citations	• Senate Bill 642 (effective January 1, 2026) • Senate Bill 1162 • Cal. Labor Code 432.3
Covered Employers	• CA-registered companies with 15 or more employees (even if only 1 employee is in CA). • May impact employers that do not have a physical office or current employees in California but publish nationwide job postings for remote positions.
Covered Jobs	• Any job posting (internal or external) managed by the employer or a third party. • Jobs that will physically be performed in the state or remote positions, i.e., if the position may ever be filled in California, either in-person or remotely." • Remote jobs outside of the state, including telecommuting from another state where the worker reports to a supervisor, officer, or other work site in CA.
Advertising Requirements	• Posting must include a pay scale = annual salary or hourly wage that the employer reasonably expects to pay for the position.
Wage Requirement	• Actual compensation or minimum and maximum annual or hourly range that the employer reasonably expects to pay for the position. • No limit to how big the pay scale can be. • Only the pay scale is required, and the advertisement does not need to include bonuses, commissions, or other benefits. • SB 642, effective 1/1/2026, revised the definition of "pay scale" in § 432.3 to a "good-faith estimate of the salary or hourly wage range that the employer reasonably expects to pay for the position upon hire." Wages include all forms of pay. The statute does not add any requirement to list benefits in advertisements or job postings.
Useful Weblinks	• SB-1162 Employment: Salaries and Wages. o https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1162 • California Equal Pay Act: Frequently Asked Questions (Current as of June 2024) o https://www.dir.ca.gov/dlse/california_equal_pay_act.htm • Is your boss complying with California's new pay transparency law? Here's how to find out – CalMatters Article o https://calmatters.org/economy/2023/03/california-pay-transparency-law-2/ o SB-642 Employment: payment of wages.

	https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202520260SB642 o Civil Rights Department – State of California: **Complaint Process** https://calcivilrights.ca.gov/complaintprocess/

Colorado	
Effective Date	01/01/2021
Legal citations	• Equal Pay for Equal Work Act (EPEWA). C.R.S. § 8-5-101 et seq. (Part 2 covers Pay Transparency) • EPT Rules were recodified into the Posting, Screening, and Transparency ("POST") Rules, 7 CCR 1103-18 effective 07/01/24.
Covered Employers	• All employers, public or private. • Must have at least 1 employee in Colorado
Covered Jobs	• Jobs that will physically be performed in the state, at least in part. • Remote jobs outside of the state, but not if the employer is out of state and with no employees in Colorado. • Does not apply to jobs to be performed entirely outside of CO or postings entirely outside of Colorado.
Advertising Requirements	• For each new job, promotion, transfer, or other employment opportunity. • Public or internal posting.
Wage Requirement	• Actual compensation or minimum and maximum annual or hourly range. • General description of bonus, commissions, or other form of compensation. • General description of major benefits. • Set in good faith by reference to any pay scale, previously determined range of the lowest to highest pay by the employer for those in comparable positions.

Useful Weblinks	• Colorado General Assembly - Equal Pay for Equal Work Act
	  ○ https://leg.colorado.gov/bills/sb19-085
	• Colorado Department of Labor and Employment - Equal Pay for Equal Work Act
	  ○ https://cdle.colorado.gov/dlss/equal-pay-for-equal-work-act
	• Adopted Equal Pay Transparency Rules 7 CCR 1103-13 11.9.23 (colorado.gov)
	• Equal Pay for Equal Work Act Short Fact Sheet 2021
	• Applicability to Remote Jobs of Equal Pay for Equal Work Act "Pay Transparency" Requirements
	• Posting, Screening and Transparency Rules ("POST Rules")
	• Interpretive Notice & Formal Opinion ("INFO") #9A: Transparency in Pay and Job Opportunities: The Colorado Equal Pay for Equal Work Act, Part 2

Hawaii	
Effective Date	01/01/2024
Legal citations	ACT 203 (SB1057 SD2 HD2 CD1), Hawaii Equal Pay Act, signed into law 07/03/2023; ***§378-2.8*** *Legislation proposed to eliminate exemption for 50+ employees
Covered Employers	Employers with at least 50 employees, regardless of where those employees are located.
Covered Jobs	Any "job listing." (If job listing appears in Hawaii) Job listing not specifically defined. Excludes internal transfers or promotions within current employer, public jobs covered by a collective bargaining agreement, and jobs with employers who have less than 50 employees.
Advertising Requirements	Any job listing.
Wage Requirement	Salary range or hourly rate that reasonably reflects the actual expected compensation, with some exemptions.
Useful Weblinks	• Relating to Employment Earnings • https://www.capitol.hawaii.gov/slh/Years/SLH2023/SLH2023_Act203.pdf • Act 203 – Pay Transparency FAQs ○ https://labor.hawaii.gov/hcrc/3767-2/

Notes	• Law is ambiguous; err on the side of caution and include wage if job listing appears in Hawaii for employer with 50+ employees, regardless of where employer or employees are located if no exception applies • Hypotheticals based on conversation with Hawaii Civil Rights Commission (1) Employer with 50+ employees, and most of 50+ employees are outside Hawaii. 1 employee in Hawaii. If ad is posted in Hawaii for position. Wage must be listed. (2) Large, national employer with 50+ employees who recruits from all 50 states, so job is not targeted towards Hawaii residents. (a) Hawaii residents can see ad because ad posted to job search website with national reach. Wage must be listed. (b) Job listing appears in Hawaii because of third-party website scrape that isn't intentional by employer. Not clear if wage must be listed.

Illinois	
Effective Date	01/01/2025
Legal citations	(820 ILCS 112/) Equal Pay Act of 2003
Covered Employers	15 or more employees, within or not within Illinois.
Covered Jobs	Positions for a specific employment opportunity that (i) will be physically performed, at least in part, in Illinois or (ii) will be physically performed outside of Illinois, but the employee reports to a supervisor, office, or other work site in Illinois.
Advertising Requirements	Requires including pay scale and benefits for position in any specific job posting (including hyperlink will satisfy).
Wage Requirement	Wage or salary, or the wage or salary range, and general description of benefits, other compensation, including, but not limited to, bonuses, stock options, or other incentives employer reasonably expects in good faith to offer for position; the employer may refer to any applicable internal pay scale, the previously determined pay range for the position, the actual pay range of others currently holding equivalent positions, or the budgeted amount for the position, as applicable, when setting the anticipated wage or salary and benefits for the posted position.

Useful Weblinks	• Employment Equal Pay Act of 2003
	  ○ https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2501&ChapAct=820%26nbsp%3bILCS%26nbsp%3b112/&ChapterID=68&ChapterName=EMPLOYMENT&ActName=Equal+Pay+Act+of+2003
	• Pay Transparency and Promotional Opportunity under the Illinois Equal Pay Act of 2003
	  ○ https://labor.illinois.gov/laws-rules/conmed/equal-pay-act-salary-transparency.html
	Equal Pay Act Pay Transparency FAQ
	https://labor.illinois.gov/faqs/equal-pay-act-salary-transparency-faq.html

Maryland	
Effective Date	10/01/2024
Legal citations	HB 649 and SB 525
Covered Employers	Employers of any size.
Covered Jobs	Includes jobs that will be physically performed at least partially within the state but does not include a job where the work will be occasionally performed in the state (i.e., a meeting or conference).

Advertising Requirements	• All job postings, internal and external intended to recruit applicants for a specific available position.
	• Includes recruitment done directly by an employer or indirectly through a third party
	• If the posting involves multiple locations or multiple opportunities at different levels of seniority, a separate range of pay must be posted for each location and opportunity.
	• Employer must complete and post a form for the job information and benefits, including any other compensation offered for the position, and make it available to applicants – a link is acceptable
	  ○ https://labor.maryland.gov/labor/wages/esscompensationdisclosureform.pdf
	• A narrative confirming all of the job information, in lieu of the form mentioned above, and a link is acceptable
	  ○ https://labor.maryland.gov/labor/wages/essnarrativeformats.docx

Wage Requirements	• Wage range means minimum and maximum hourly rate or salary for a position not including other forms of compensation. • A single fixed hourly or annual rate may be posted instead of a wage range if there is no applicable wage range. An open-ended range such as "up to $100,000" or "$30+/hr." is not permitted. • Set in good faith by reference to any pay scale, previously determined range of wages, actual range of wages for those in comparable positions, or the budgeted amount for the position.
Useful Weblinks	• Labor and Employment – Equal Pay for Equal Work – Wage Range Transparency • https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=gle&section=3-304.2 • Equal Work for Equal Pay - Wage Range Transparency Frequently Asked Questions - Employment Standards Service (ESS) ○ https://labor.maryland.gov/labor/wages/esswagerangefaq.shtml

Massachusetts	
Effective Date	10/29/25
Legal citations	An Act Relative to Salary Range Transparency
Covered Employers	Employers with 25 or more employees whose primary place of work during the prior calendar year is in the Commonwealth of Massachusetts. Headcount is calculated once per year, as average over all payroll periods. EEO reporting data may also be required.
Covered Jobs	All positions where the primary place of work is Massachusetts; this includes positions that can be performed remotely to a Massachusetts worksite and remote workers with a primary place of work in Massachusetts.
Advertising Requirements	Post the pay range for open positions in any advertisement or job posting intended to recruit job applications for a particular and specific employment position.
Wage Requirements	"Pay range" is defined as "the salary range or hourly range that the covered employer reasonably and in good faith expects to pay" for the position at time of posting. The law does not require disclosure of other expected forms of compensation (i.e., bonuses, commissions).
Useful Weblinks	• Bill H.4890 - An Act relative to salary range transparency ○ https://malegislature.gov/Bills/193/H4890 • Pay Transparency in Massachusetts • https://www.mass.gov/info-details/pay-transparency-in-massachusetts?_ga=2.105811776.2128308524.1776091270-663320619.1776091270&_gl=1*qj42mf*_ga*NjYzMzIwNjE5LjE3NzYwOTEyNzA.*_ga_MCLPEGW7WM*czE3NzYwOTEyODAkbzEkZzEkdDE3NzYwOTEyODAkajYwJGwwJGgw

Minnesota	
Effective Date	01/01/2025
Legal citations	CHAPTER 110--S.F.No. 3852, Article 7
Covered Employers	30 or more employees at one or more work sites in Minnesota.
Covered Jobs	Any solicitation intended to recruit job applicants for a specific available position, including recruitment done directly by an employer or indirectly through a third party.
Advertising Requirements	Includes any postings made electronically or via printed hard copy, that includes qualifications for desired applicants.
Wage Requirement	• Salary ranges in job postings required. • An employer must disclose in each posting for each job opening with the employer the starting salary range, and a general description of all the benefits and other compensation, including but not limited to any health or retirement benefits, to be offered to a hired job applicant. • An employer that does not plan to offer a salary range for a position must list a fixed pay rate. A salary range may not be open ended.
Useful Weblinks	• Office of the Revisor of Statutes - CHAPTER 110--S.F.No. 3852 ○ ○ https://www.revisor.mn.gov/statutes/cite/181.173

New Jersey	
Effective Date	6/1/2025
Legal citations	P.L.2024, c.91 NJAC 12:74 (proposed rules from NJ Department of Labor and Workforce Development to implement NJSA 34:6B-23 (Act), published 9/15/2025
Covered Employers	• The employer must have 10 or more employees over 20 calendar weeks. This applies to employers that do business in the state, employ people in the state, or take applications for employment from residents in the state, including the state, county or municipality. This includes job placement and referral agencies and other employment agencies. • For out of state employers, if they meet the employee threshold and meet one or more of the following criteria, they will subject to the Act: o Incorporated, headquartered, or has a store or office physically located in NJ. o Based outside of NJ that has at least one employee who works in NJ. o Based outside of NJ that regularly contracts with or sells products or services to NJ businesses or customers. o Based outside of NJ that takes job applications from NJ residents. o In NJ that secures employment for an employer for a fee.
Covered Jobs	Opportunities for promotion, new jobs, and transfer opportunities that are advertised by the employer either externally or internally.
Advertising Requirements	Disclose in each posting the hourly wage or salary, or a range of the hourly wage or salary, and a description of benefits and other compensation that an employee would be eligible for in the first 12 months or employment.
Wage Requirements	The hourly wage of salary, or a range of the hourly wage or salary. A general description of benefits and other compensation is required, but employers or recruiters may not use phrases such as "great benefits offered," or "health insurance and more."
Useful Weblinks	• P.L. 2024, CHAPTER 91, approved November 18, 2024 - Senate, No. 2310 (First Reprint) o https://pub.njleg.gov/Bills/2024/AL24/91_.HTM • New Jersey Department of Labor & Workforce Development - New Jersey pay and benefits transparency law o https://www.nj.gov/labor/myworkrights/wages/pay-transparency/ o New Jersey Department of Labor and Workforce Development proposed regulation to implement EPT o https://www.nj.gov/labor/assets/PDFs/Legal%20Notices/Notices%20of%20Proposal/57%20N.J.R.%2022 20_a_.pdf

New York	
Effective Date	09/17/2023
Legal citations	N.Y. Lab. Law § 194-b
Covered Employers	At least 4 employees (the law does not specify that the employees must be within New York state, so presumably having 4 employees within or outside of the state will suffice).
Covered Jobs	• Jobs that will physically be performed, at least in part, in the state. • Remote jobs outside of the state, including telecommuting from another state where the worker reports to a supervisor, officer or other work site in New York.
Advertising Requirements	• For each single new job, promotion or transfer opportunity and single location. • Advertising is defined as "make available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity."
Wage Requirement	• Actual compensation or minimum and maximum annual or hourly range. • Can include link to wage information in separate location as long as information free and easily accessible • Excluding benefits and bonuses. • Pay range with minimum and maximum n good faith (considering job market, current pay levels, hiring budget and acceptable education and experience levels) in place at the time of posting. • Fixed salary acceptable.
Useful Weblinks	• SECTION 194-B - Mandatory disclosure of compensation or range of compensation o https://www.nysenate.gov/legislation/laws/LAB/194-B • Pay Transparency Act Frequently Asked Questions o https://dol.ny.gov/pay-transparency-act-frequently-asked-questions

Vermont	
Effective Date	07/01/2025
Legal citations	Act 155 (H.704) An act relating to disclosure of compensation in job advertisements
Covered Employers	Employers, with 5 or more employees including any individual, organization, or governmental body including any partnership, association, trustee, estate, corporation, joint stock company, insurance company, or legal representative, at least one of whom works in Vermont.
Covered Jobs	• Any position for which the employer is hiring, including positions that are open to internal and/or external candidates, transfers and promotions and are: o Physically located in Vermont. o Remote positions to "predominantly" perform work for an office or work location that is physically located in Vermont.
Advertising Requirements	• Job advertisement is defined as any written notice in any format for a specific job opening made available to potential applicants. • Disclose in each job advertisement the compensation or range of compensation for the position. • Ads for jobs paid on a commission basis, in whole or in part, must include a statement that the employer is unable to post the expected minimum and maximum salary or wage range.
Wage Requirement	• Range defined as good faith expectation at time employer creates the advertisement of the minimum and maximum annual salary or hourly wage range expected to be paid for the position. • Ads for jobs paid on a tipped basis must be disclosed as such and disclose a base wage or range of base wages. Base wage is defined as an hourly wage the employer pays to a tipped employee, not including tips. • Employer may hire for more or less than posted range if circumstances beyond employer's control such as applicant's qualifications or labor market factors.
Useful Weblinks	• ACT155 As Enacted o https://legislature.vermont.gov/Documents/2024/Docs/JOURNAL/hj240510.pdf#page=526 • Vermont Attorney General's Office FAQ o o https://ago.vermont.gov/sites/ago/files/2024-12/Final%20Version%20of%20H%20704%20Guidance%20(12-31-24).pdf

Washington, D.C.	
Effective Date	06/20/2024
Legal citations	D.C. Act 25-367; Wage Transparency Omnibus Amendment Act of 2023, amending the Wage Transparency Act of 2014, D.C. Law 20-19, D.C. Official Code § 32-1451 *et seq.*
Covered Employers	Individual, firm, association or corporation that employs at least 1 employee in the District of Columbia, excluding the District or Federal Government as employers.
Covered Jobs	The requirements apply to all job postings soliciting employees in the District, regardless of how or where the employer creates and shares that job posting.
Advertising Requirements	All job listings and position descriptions advertised.
Wage Requirement	• Minimum and maximum projected salary or hourly pay. • Extending from lowest to the highest salary or hourly pay that the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity.
Useful Weblinks	• District of Columbia Municipal Regulations and District of Columbia Register o https://dcregs.dc.gov/Common/NoticeDetail.aspx?NoticeID=N134612 • Code of the District of Columbia – Chap 14A. Wage Transparency o https://code.dccouncil.gov/us/dc/council/code/titles/32/chapters/14A • D.C. Attorney General Business Advisory on Wage Transparency o https://oag.dc.gov/release/attorney-general-schwalb-issues-business-advisory

Washington State	
Effective Date	01/01/2023
Legal citations	• RCW 49.58.110 • Amended SSB 5408, amending Washington's Equal Pay and Opportunity Act (RCW 49.58).
Covered Employers	• All employers with 15 or more employees engaging in any business, industry, profession, or activity in Washington as long as the employer has at least one or more Washington-based employees.
Covered Jobs	• Any position that could be filled by a Washington-based employee, including remote work that could be performed by a Washington-based employee. • No need to disclose wage and salary information for jobs to be performed entirely outside of Washington, even if the job posting reaches applicants who would fill the position as a Washington-based employee.
Advertising Requirements	• Job postings must include the wage scale or salary range, a general description of benefits, and a general description of other compensation • For new job, promotion or transfer opportunity, whether part-time, full-time, employee, intern or independent contractor. • Any written medium publicizing the opportunity - in print or electronic media, managed by the employer or a third party.
Wage Requirement	• Opening wage scale or salary range. If employer is offering only a fixed wage, may disclose fixed wage. • General description of all benefits and other compensation offered. • Minimum and maximum ranges "without open-ended phrases." • Must list a "reasonable and genuinely expected range of compensation." • If no existing range, "scale or range should be created prior to publishing the job posting."

Useful Weblinks	• WA Equal Pay and Opportunities Act
	  ○ https://app.leg.wa.gov/RCW/default.aspx?cite=49.58
	  ○ https://www.lni.wa.gov/workers-rights/_docs/ese1.pdf
	• Certificate of Enrollment, Substitute Senate Bill 5408
	  ○ https://lawfilesext.leg.wa.gov/biennium/2025-26/Pdf/Bills/Senate%20Passed%20Legislature/5408-S.PL.pdf?q=20250915172927
	• Equal Pay & Opportunities Act Q&A
	  ○ https://lni.wa.gov/workers-rights/wages/equal-pay-opportunities-act/equal-pay-and-opportunities-act-qa

PERM/LCA Prevailing Wage: Concepts and Filing Tips

National Prevailing Wage Center
Office of Foreign Labor Certification
Employment and Training Administration

July 22, 2026

Disclaimer

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Discussion Topics

- Part 1: NPW Production Trends
- Part 2: Filing Reminders
- Break
- Part 3: Post-Determination Filings
- Conclusion



Part 1: NPW Production Trends

NPW Production Trends

- FY Running Total of Submitted Cases by month
  - May 2026 (113,024) vs May 2025 (123,136)
  - Overall increase per month from beginning of FY26 (369 in Oct 2025)
- FY Running Total of Determinations Issued by month
  - May 2026 (111,486) vs May 2025 (136,070); decrease of 18.1%
  - Overall increase from beginning of FY26
- Wage Year 2026-27 runs from July 1, 2026 to June 30, 2027.



Part 2:
Form ETA-9141
Filing Reminders

General Filing Tips

- Complete all mandatory fields on the Form ETA-9141.
- Do not include offered wage or information on the nature of the employer or the working conditions.
- Examples:
  - “Dynamic leader in the healthcare industry.”
  - “Must walk substantially (up to 15 miles daily)”
  - “Outdoors, exposed to the weather.”
- Do not include personal information on the form.
- Be specific and use plain language. Avoid acronyms and abbreviations.
- Withdraw pending submissions that the employer will not use.

Sections B-D: Employer and Attorney Information

- Employer point of contact must be an “employee of the employer.”
- All employer contact information must belong to the employer point of contact, including phone number and email address.
- Do not list attorney or agent contact information in Section B, unless the attorney or agent is an employee of the employer.
- If the employer’s point of contact and the attorney/agent information is the same, NPW will send an RFI to request updated contact information.

Section E: Wage Sources

- American Competitiveness and Workforce Improvement Act (ACWIA) field in Section E.1. must be completed. If an employer is covered under ACWIA, then they must select “Yes” and an ACWIA wage will be issued.
  - Employers can request a re-evaluation of ACWIA status by selecting “Yes” on question E.1.b.
- In Section E.3. the Collective Bargaining Agreement (CBA) field must be completed. If the position is covered under a CBA, then the employer must select “Yes” to this question.
- Selecting wage source in E.4 is not required. Only complete this question if requesting one of the following wage sources: Davis Bacon Act (DBA), Service Contract Act (SCA), or an alternate wage survey.

Section F.a: Job Description

- Do not use abbreviations or jargon. Provide detailed duties in plain language.
- The job duties must be listed on the application. Do not list “see addendum.”
- Focus only on job duties to be performed. Do not list the position's requirements or general information about the employer.
  - Job duties (F.a.2): The tasks essential to the performance and responsibility of the position.
    - Example: Take blood pressure using cuff and stethoscope.
  - Job requirements (F.b.5.iv or F.c.5.iv): The education, experience, and training qualification(s) necessary for the position.
    - Example: Ability to take blood pressure using a cuff and stethoscope; may be gained through training or experience.

Section F.a: Job Description (continued)

- Generalized job duties may fit into multiple occupational classifications. Thus, for NPW to properly classify an application, it is important to provide the specifics on the following:
  - Types of products and services.
  - Specific course(s) that will be taught (for example, business, literature).
  - Type of clinical care that will be provided. (for example: pediatrics, family medicine).

Section F.a: Job Description (Continued)

- When indicating that the position will supervise the work of other employees, by marking “Yes” in F.a.3.
  - The supervised occupations should be listed in Section F.a.3.a.
  - The job duties should include tasks providing additional information describing the scope and type of supervision performed.
- Do not include personal information in the job duties (or anywhere else on Form-9141) or in any of the attachments.
- Do not include offered wage information or any other compensation values.
- The job duties section has a 4,000-character limit (including any RFI responses).

Example: Vague Job Duties

Vague Job Duties

“Manage multiple client engagements. Serve as first point of contact for client relationships. Prepare project plans, drafts, and budgets.”

Clear Job Duties

“Work on client engagements related to landscape design. Meet with clients at proposed sites to discuss requirements and make design recommendations for plant selection and placement. Prepare drawings of proposed designs using CAD software. Monitor status of ongoing projects by visiting client sites to ensure that project is being developed by construction and landscaping teams according to the design plan. Prepare cost estimates and project proposals for manager’s approval and share approved budget information and proposals with clients.”

Section F.b: Education Requirements

- Education requirements must be listed as a U.S. degree or diploma.
- NPWC can not evaluate foreign educational requirements.
- Acceptable “Other” degrees are formal diplomas or degrees issued by a U.S. educational institution (Example: a professional degree such as J.D., M.D., D.D.S.)
- Other certifications, training, or courses should be entered into the Special Skills or Other Requirements section (F.b.5).
- Residencies and fellowships should be included under the Residency/Fellowship section (F.b.5.iii) and should not be included in the Education section.

Section F.b: Experience, Training, and Special Skill Requirements

- Avoid inconsistent experience requirements.
  - Example: Stating that the position requires 24 months of experience in F.b.4.a; but requiring 48 months of experience with Python in special skills under F.b.5.
- For medical occupations, residency and fellowship requirements should be clearly stated and listed separately.
- Do not list alternative requirements under this section.
- Requirements must be listed in the appropriate section.
  - Do not write “See F.a.2.”

Section F.c: Alternative Job Requirements

- Section F.c. should always be filled out when an employer accepts alternative requirements. This includes education and experience requirements accepted “in lieu of” employer’s primary requirements.
- Alternative requirements must meet the same standards as primary requirements.
- The minimum and alternative requirements are stand-alone requirements and will each be evaluated independently.
- If the employer requires more than one set of alternative requirements, the employer should submit an additional prevailing wage application.
  - May include a note in the job duties (Subsection F.a.2) to cross-reference multiple filings, which will assist NPWC in reviewing all submissions at the same time.
- If the application states “no” to alternative requirements in F.c.1, but alternative requirements are listed elsewhere on the form, NPWC will send an RFI for clarification.

Section F.d: Travel

- Providing descriptive details about travel will help NPWC issue the proper prevailing wage determination.
- Distinguish between travel and relocation.
- Specify the geography of travel (examples: local, national, international).
- Indicate the estimated frequency or extent of travel (examples: 25 percent, 1-2 days per month).
- Indicate the purpose of travel (examples: conferences, training, client meetings, site inspections).
- Do not include information on telework, remote work, or unanticipated worksites in this section.

Requests for Information

- NPW may send a Request for Information (RFI) for a variety of reasons.
- Common examples of RFIs:
  - Attorney/agent contact information provided for employer point of contact
  - Vague job duties
  - Conflicting education and experience requirements
  - Vague supervisory responsibilities
  - Inclusion of Personally Identifiable Information (PII)
  - Unclear or vague travel requirements
  - Missing documents
  - Failure to provide permission to update ETA-9141 or provide all requested information in prior RFI response

RFI Responses

- The RFI response should confirm that NPWC has permission to correct the applicable section of the form.
- The employer's RFI response must respond to all questions asked in the RFI. If the employer fails to provide all requested information, the application may be returned unprocessed.
- If you receive an RFI pertaining to job duties, you may provide details about the job duties or elaborate on the duties. Your response will be added to the job duties section of Form ETA-9141**. Note:** Original submitted job duties **cannot** be removed.
- Be mindful of character limits and deadlines. The job duties section has a 4,000 character limit. Initial job duties and the RFI response must both fit within this character limit. If the content does not fit, the response will be classified as an insufficient RFI response, and the case may be returned unprocessed.
  - Missing deadlines will result in a case be returned unprocessed if we are unable to proceed without the requested information.
- The request for the removal of job duties may lead to the case being returned un-processed; thereby causing the employer to submit a new Form ETA-9141.

Reminders: Education Occupations

- For pre-k through secondary teacher occupations, include grade levels taught.
- For middle through post-secondary teacher occupations, include subjects taught.
- For medical occupations, indicate whether teaching environment is classroom or "on the job" teaching in a medical facility/hospital setting.



Short Break

Starting again in 5 minutes.



Part 3:
Post-Determination Filings
(PWD Challenges)

- ❑ Requests for Correction Review
- ❑ Requests for Redetermination Review
- ❑ Requests for Center Director Review

Requests for Corrections Review

- All Prevailing Wage Determinations (PWDs) are considered final, with the sole exception being if an inaccuracy is found in the PWD due to the NPWC's error.
- When an employer or its representative identifies an error on the Form ETA-9141 application or PWD, a correction request can be submitted.
- An employer can make a request for correction via e-mail to the NPWC Help Desk at oflc.pwd@dol.gov.
- Examples where an employer may request a correction include, but are not limited to, the following:
  - A mismatch between the wage level and the wage amount; a typographical error in the title of an alternative wage source (survey); or a non-ACWIA wage for an ACWIA-covered institution.

Requests for Corrections Review (Reminders)

- A Correction Request should not be submitted as a Request for Redetermination Review or Request for Center Director Review (CDR).
- A request to amend the provided duties or requirements is not a valid correction request. The employer must submit a new prevailing wage request.
- Disagreement with the assigned occupation or wage level is not a valid correction request. The employer may submit a request for redetermination or Center Director Review (CDR).

Requests for Redetermination Review

- 20 CFR § 656.40(h): When an employer disagrees with a PERM or LCA PWD, the employer may request a redetermination by submitting supplemental information. For example, the employer may challenge the assigned occupation code, wage level, or wage.
- Requests for redetermination can be submitted through FLAG, e-mail to the NPWC Help Desk, or U.S. mail.
- Requests for redetermination must be made within 30 days of the date the PWD was initially issued.
- Redeterminations are reviewed in order received based on the redetermination request date; processing times vary depending on the workload.
- Pending redetermination requests can be withdrawn through the NPWC Help Desk; the original determination will then be considered final and can be used for PERM or LCA filing.

Requests for Center Director Review (CDR)

- 20 CFR § 656.41(a) & 20 CFR 656.41(c): When an employer disagrees with a decision made at redetermination on a PERM or LCA PWD, the employer may request Center Director Review (CDR).
- Requests for CDRs must be made within 30 (calendar) days of the date the redetermination was issued.
- Requests for CDR can be submitted through FLAG, e-mail to the NPWC Help Desk, or U.S. mail.
- CDRs are reviewed in order received based on the CDR request date; processing times vary depending on the workload.
  - Processing Times | Flag.dol.gov
- Pending CDRrequests can be withdrawn through the NPW Help Desk; the issued redetermination will be considered final and can be used for PERM or LCA filing.

Requests for Board of Alien Labor Certification Appeals (BALCA) Review

- 20 CFR § 656.41(d): When an employer disagrees with a decision made at CDR on a PERM or LCA PWD, the employer may request Board of Alien Labor Certification Appeals (BALCA) review.
- Requests for BALCA review must be made within 30 (calendar) days of the date the CDR was issued.
- Requests for BALCA review must be submitted to the NPWC through e-mail to the NPWC Help Desk or U.S. mail.
- NPWC will prepare the BALCA request documentation and submit it to BALCA.
- Pending BALCA requests can be withdrawn through BALCA; the issued CDR will be considered final and can be used for PERM or LCA filing.



Thank you

Adjustment of Status and Waivers in removal proceedings

Adjustment, waiver continuances, and collateral relief at EOIR

By: Ron Abramson, Annelise Araujo, Cheryl David and David Spitzer

Renewing Adjustment of Status

In today's climate, an applicant who is denied adjustment of status by USCIS will receive a Notice to Appear for removal proceedings. Respondents will have the opportunity to get a second bite at the apple, as an adjustment application, along with any waivers the respondent may need, generally can be renewed before the Immigration Judge. The Immigration Judge decides statutory eligibility, admissibility, and discretion on the record in the proceeding. The Immigration Judge generally does not sit as an appellate reviewer of the USCIS decision.

Jurisdiction and renewal before the Immigration Judge

Once a Notice to Appear [NTA] is filed, adjustment of status jurisdiction shifts to the Immigration Judge (IJ) under 8 CFR § 1245.2:

> **§ 1245.2 Application.**
>
> (a) ***General*** —
>
> (1) ***Jurisdiction*** —
>
> (i) ***In General.*** In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file.
>
> (ii) ***Arriving Aliens.*** In the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien unless:
>
> (A) The alien properly filed the application for adjustment of status with USCIS while the arriving alien was in the United States;
>
> (B) The alien departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status;
>
> (C) The application for adjustment of status was denied by USCIS; and

(D) DHS placed the arriving alien in removal proceedings either upon the arriving alien's return to the United States pursuant to the grant of advance parole or after USCIS denied the application.

Under 8 C.F.R. § 1245.2(a)(1)(i), the Immigration Judge generally has exclusive jurisdiction over an adjustment application filed by an individual in removal proceedings. 8 C.F.R. § 1245.2(a)(5)(ii) provides the right to renew a denied adjustment application in proceedings. There is no administrative appeal from the USCIS denial.

The rule differs for arriving aliens. Under 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1)(ii), Immigration Judges have no jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status, with the limited exception of an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application that USCIS then denied. *Matter of Silitonga*, 25 I&N Dec. 89 (BIA 2009).

If the court has jurisdiction over the adjustment of status, it will adjudicate the application on the evidence before it rather than merely deciding whether USCIS erred on the earlier record. The denial notice remains important because it identifies issues DHS may litigate, but counsel should rebuild the proof for every disputed element before the Court. If the court does not have jurisdiction, counsel may pursue adjudication by USCIS while the removal case proceeds and should consider whether to ask the court to continue or terminate proceedings. Otherwise, you will have to proceed with another form of relief.

Relief and adjustment eligibility

The charge of removability and the application for relief are separate. Counsel should analyze the factual allegations and statutory charge before entering pleadings. For relief in removal proceedings, INA § 240(c)(4)(A) generally places the burden on the respondent to establish eligibility and to show that adjustment should be granted as a matter of discretion. See also 8 C.F.R. § 1240.8(d).

Adjustment under INA § 245(a) ordinarily requires inspection and admission or parole, a qualifying immigrant visa basis, immediate visa availability, and admissibility. Counsel must also consider any relevant bars in § 245(c) (several of which do not apply to immediate relatives), possible grandfathering under § 245(i), 245(k) category-specific rules, and any necessary waivers. Approval of an I-130 or I-140 establishes an important part of eligibility but does not resolve admissibility, the statutory adjustment requirements, or discretion.

In a marriage-based case, an approved I-130 does not prevent the Immigration Judge from examining whether the marriage was bona fide when adjudicating the adjustment application. *Matter of Kagumbas*, 28 I&N Dec. 400, 403–06 (BIA 2021). The Immigration Judge cannot revoke the petition, but the petition's approval is not conclusive on adjustment eligibility. It is evidence that must be considered with the rest of the record.

Employment-based cases and loss of status

Employment-based adjustment requires careful attention to the status-related bars in INA § 245(c). 8 C.F.R. section 1245.2(a)(5)(ii) provides that an applicant renewing adjustment in removal proceedings need not satisfy § 245(c) again if those requirements were met when the application was initially filed with USCIS. A non-arriving alien employment-based applicant who was eligible when the I-485 was filed may therefore renew the application before the IJ even if the applicant later fell out of nonimmigrant status. The regulation preserves eligibility that existed on the original filing date; it does not cure a bar that already existed. If the applicant had fallen out of status, worked without authorization, or otherwise violated nonimmigrant status before filing, the respondent must qualify for an exception. INA § 245(k) may protect qualifying employment-based applicants whose status violations do not exceed 180 days in the aggregate since their most recent lawful admission. Alternatively, a properly grandfathered applicant may instead qualify under INA § 245(i), subject to that provision's separate requirements. If the applicant has changed employers, counsel should also confirm that the underlying petition remains valid or that portability under INA § 204(j) applies.

Fraud and misrepresentation after the USCIS denial

When USCIS denies adjustment based on a finding of fraud or willful misrepresentation, DHS will likely contend that the respondent is inadmissible under INA § 212(a)(6)(C)(i), and renewing the I-485 does not eliminate that issue. The USCIS finding does not bind the Immigration Judge, who decides de novo whether the ground applies, including whether any misrepresentation was willful and material. The respondent must establish that the ground does not apply or obtain a waiver for which the respondent is eligible. The available waiver depends on the procedural posture and the statutory charge.

The waiver under INA § 212(i)

A respondent who is inadmissible to the United States under § 212(a)(6)(C)(i) may be eligible for a waiver pursuant to INA § 212(i). The applicant generally must establish extreme hardship to a United States citizen or lawful permanent resident spouse or parent. A son or daughter is not independently a qualifying relative under § 212(i), although hardship to a child may matter to the extent it causes or contributes to extreme hardship to a qualifying spouse or parent. A VAWA self-petitioner may instead show extreme hardship to themselves or to a United States citizen, lawful permanent resident, or qualified alien parent or child. Even where extreme hardship is shown, the waiver remains discretionary. A § 212(i) waiver does not independently confer permanent residence or dispose of the removal case. The respondent must have a current statutory basis to adjust and must establish eligibility for that adjustment.

The waiver under INA § 237(a)(1)(H)

When USCIS or CBP identify that an individual was not entitled to lawful permanent resident status, most often during the naturalization process. DHS may then place the individual in removal proceedings and charge removability under INA § 237(a)(1)(A) as an alien who, at the time of entry or adjustment of status, was inadmissible, typically for having procured status by fraud or willful misrepresentation. INA § 237(a)(1)(H) permits the Attorney General, in the exercise of discretion, to

waive removal under § 237(a)(1)(A) when the respondent was inadmissible at the time of admission because of fraud or misrepresentation under § 212(a)(6)(C)(i), whether willful or innocent. It may also reach documentary inadmissibility under § 212(a)(7)(A)(i)(I) when that deficiency resulted directly from the same fraud, i.e., lack of a valid visa or entry document. *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006).

The statute generally requires the respondent to be the spouse, parent, son, or daughter of a United States citizen or lawful permanent resident and to have possessed an immigrant visa or equivalent document while otherwise admissible at admission, apart from grounds under § 212(a)(5)(A) and (7)(A) that resulted directly from the fraud. Certain VAWA self-petitioners are separately covered. The waiver is unavailable to anyone described in § 237(a)(4)(D). Unlike § 212(i), § 237(a)(1)(H) does not require extreme hardship. Family ties and hardship remain relevant to discretion.

The waiver does not eliminate independent grounds of removability. *Matter of Tima*, 26 I&N Dec. 839, 843-44 (BIA 2016), held that § 237(a)(1)(H) did not waive a separate crime involving moral turpitude charge even though the conviction arose from the same underlying fraud. The waiver cures only the fraud-based charge; any independent ground of removability must be defeated or separately waived.

Matter of Forjoe and adjustment fraud

This waiver became unavailable for those who adjusted status in a devastating decision, *Matter of Forjoe*, 29 I&N Dec. 463, 471–72 (BIA 2026), which overruled *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015). The Board held that adjustment of status is not an admission for purposes of § 237(a)(1)(H). Under *Forjoe*, fraud committed in obtaining adjustment of status does not qualify for that waiver merely because DHS charges the respondent under § 237(a)(1)(A). The Board limited its interpretation to § 237(a)(1)(H) waivers and did not disturb decisions treating adjustment as an admission in other statutory contexts.

Forjoe stated that its new rule applies prospectively. In *Matter of M-K-,* 29 I&N Dec. 556, 562–63 (BIA 2026), issued shortly after *Forjoe,* the Board declined to apply *Forjoe* to the circumstances before it, where the adjustment-related misrepresentation, waiver proceedings, and Immigration Judge's decision preceded *Forjoe*. The Board nevertheless affirmed the denial of the waiver in discretion. Because the Board has not yet defined every circumstance covered by prospective application, counsel should preserve the issue rather than assume that all pre-*Forjoe* adjustment fraud remains waivable. This is especially important where the misrepresentation occurred before February 26, 2026, when *Forjoe* was decided, but the waiver is sought afterward.

Readjustment as a new application for permanent residence

The term readjustment describes a new application under INA § 245; it is not a separate statutory form of relief. The Board has long recognized that a lawful permanent resident in removal proceedings may seek adjustment as relief. *See Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993).

For the respondent who obtained permanent residence through an adjustment application containing a material misrepresentation, and for whom *Forjoe* forecloses § 237(a)(1)(H), the respondent may

seek a new adjustment before the Immigration Judge. The prior fraud does not disappear. If it creates inadmissibility under § 212(a)(6)(C)(i), the respondent must seek a § 212(i) waiver with the new adjustment application. The respondent must also have a new approved petition, satisfy every other adjustment requirement, and have a qualifying relative for purposes of § 212(i). If the original fraud involved a sham marriage, INA § 204(c) bars approval of any later petition, and no waiver cures that bar. Because a respondent whose permanent residence was obtained by fraud was never lawfully admitted for permanent residence, *see Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003), counsel should also consider whether any § 245(c) bar applies to the new application.

If the Immigration Judge grants both the waiver and adjustment, the respondent obtains permanent residence through the new grant. The result does not retroactively validate the original adjustment. The new grant also starts a new period of permanent residence for naturalization purposes.

Continuances, terminations and collateral applications

When USCIS retains jurisdiction over a petition or collateral application necessary to adjustment, counsel may seek a continuance for good cause under 8 C.F.R. § 1003.29. The request should address the likelihood that the collateral relief will be granted and whether it will materially affect the removal proceedings. DHS's position, diligence, prior continuances, timing, requested length, and administrative efficiency also matter. *See Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). However, the Immigration Judges and Board are reluctant to grant continuances. In *Pinzon Rozo*, 29 I&N Dec. 507 (BIA 2026) the Board found that the Immigration Judge erred in granting the respondent, who has an approved petition for special immigrant juvenile classification, a continuance to await the availability of a visa, where the respondent's priority date will not be current for an uncertain and lengthy period of time.

On February 3, 2025, the EOIR reinstated Policy Memorandum 21-13 (a Trump 1.0 directive originally issued towards the very end his first term in January 2021 and revoked by the Biden administration in 2022). This memo explicitly directs IJs to restrict continuances and warns them to be vigilant against respondents using continuances as "dilatory tactics." This reinstated policy's ramifications include the following:

- 180-Day Asylum Window: IJs are directed to complete asylum adjudications within 180 days "to the maximum extent practicable," effectively creating a "last-in, first-out" system

- Chucking "Good Cause": The memo clarifies that "good cause" is a lower threshold than "exceptional circumstances," which appears in INA § 208(d)(5)(A)(iii)

Per recent DOJ IJ training in September 2026 – "Motions to Continue: Efficiently Advancing Cases to Completion" – the administration has clamped down on specific categories of continuances:

- No More Waiting for Visas: Judges have been directed not to grant continuances solely because a respondent is awaiting the approval of a pending visa or green card petition from USCIS.

- Time Limits to Engage a Lawyer: The guidance explicitly discourages judges from granting respondents more than 10 days to secure a lawyer. *See, Matter of A-K-R*, 29 I&N Dec. 839 (BIA 2026), where the Board refers to the "privilege of being represented by counsel" and takes an extremely narrow view of the 5th Circuit's recognition that respondents in removal proceedings are entitled to due process. *See, Mai v. Gonzales*, 473 F.3d 162 (5th Cir. 2006).

- Most Adverse Impact on Vulnerable Groups: In an era where an overloaded deportation system results in an overloaded immigration bar, the administrative pressure to deprive respondents adequate time to find a lawyer disproportionately impacts the most vulnerable, including potential underaged SIJ visa aspirants, survivors of domestic abuse and other violent crimes, trafficking victims, and the least educated.

Attorneys must be familiar with 8 C.F.R. Sec. 1003.18(d)(1), which outline situations in which termination is mandatory:

i. Mandatory termination
   a. No charge of deportability, inadmissibility, or excludability can be sustained
   b. Fundamentally fair proceedings are not possible because the alien is mentally incompetent and adequate safeguards are unavailable
   c. The alien has, since the initiation of proceedings, obtained United States Citizenship
   d. The alien has, since the initiation of proceedings, obtained at least one status listed…
      i. Lawful Permanent Resident status
      ii. Refugee status
      iii. Asylee status
      iv. Nonimmigrant status as defined in section 101(a)(15)(S), (T), or (U)
   e. Termination is required under 8 CFR 1245.13(l)
   f. Termination is otherwise required by law
   g. The parties jointly filed a motion to terminate, or one party filed a motion to terminate and the other party affirmatively indicated its non-opposition, unless the immigration judge articulates unusual, clearly defined, and supported reasons for denying the motion.

ii. Discretionary termination
   a. The alien has filed an asylum application with USCIS pursuant to Section 208(b)(3)(C) of the Act pertaining to unaccompanied alien children
   b. The alien is prima facie eligible for naturalization, relief from removal, or lawful status; USCIS has jurisdiction to adjudicate the associated petition, application, or other action if the alien were not in proceedings; and the alien has filed the petition, application, or other action with USCIS. However, no filing is required where the alien is prima facie eligible for adjustment of status or naturalization. Where the basis of an alien's motion for termination is that the alien is prima facie eligible for naturalization, the immigration judge shall not grant the motion if it is opposed by DHS. Immigration Judges shall not terminate a case for the alien to pursue an asylum application before USCIS, except as provided for in paragraph (d)(1)(ii)(A) of this section
   c. The alien is a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforced Departure
   d. USCIS has granted the alien's application for a provisional unlawful presence waiver pursuant to 8 CFR 212.7(e)
   e. Termination is authorized by 8 CFR 1216.4(a)(6) or 1238.1(e)

f. Due to circumstances comparable to those described in paragraphs (d)(1)(ii)(A) through (E) of this section, termination is similarly necessary or appropriate for the disposition or alternative resolution of the case…

8 C.F.R. Sec. 1003.18(c), 8 C.F.R. Sec. 1003.18(d)

Currently, termination is rarely – if ever – granted in the discretion of the Immigration Court. Termination is typically granted if the request relates to an incurable deficiency in the NTA, or if the Respondent has adjusted his or her status while in removal proceedings. These scenarios are becoming more remote as time progresses.

The Immigration Courts' collective reluctance to terminate proceedings except in rare circumstances comes primarily from the settlement produced earlier this year in *State of Texas v. US DOJ.* This lawsuit filed by the State of Texas alleged that the policies of the previous administration, as well as regulations relating to administrative closure and termination of proceedings, were invalid. The two parties agreed to produce a settlement that vastly restricts Immigration Judges abilities to terminate proceedings.

Respondent and counsel must focus on proceedings beyond the Immigration Court, whether that be for an appeal before the BIA, requesting Federal Court review after a BIA dismissal, or any other similar appeal or request. Maintaining the record is critical, particularly if the Respondent intends to litigate his or her proceedings at the circuit court level. Alleging due process violations from a denial of a continuance or the immigration judge's denial of termination of proceedings, may prove to be fruitful before a future adjudicator.

However, if the Respondent does not put forth an argument before the Immigration Judge, he or she may find that that argument has been abandoned. The BIA is an appellate body whose purpose is to review Immigration Judge's decisions, statutorily the Board as constituted is *not* a fact-finding enterprise. The BIA typically will disregard arguments raised before them, if the contention is not entered into the record of proceedings in the first instance before the Immigration Judge. This makes it all the more important, even in spite of the obstacles present, to state motions and objections loudly and clearly on the record, to preserve them for all levels of appeal in any given proceeding.

Evidence, discretion, and filing requirements

The individual hearing is an evidentiary proceeding. Counsel should compare prior applications and statements, secure certified criminal records where relevant, prepare the respondent and supporting witnesses, use expert witnesses, and address every factual issue identified in the USCIS denial. The record should also establish discretion through evidence of family ties, residence, hardship, employment, tax compliance, rehabilitation, community involvement, and a credible response to prior misconduct. This is true even when there are no significant adverse factors.

The respondent must file the I-485 with the court and if applicable the I-601 and serve DHS counsel and pay all required fees. Those fees, including the fee for any accompanying waiver, increased substantially under the One Big Beautiful Bill Act and are adjusted annually, so counsel should confirm current amounts and payment instructions before filing. For a waiver pursuant to INA 237(a)(1)(h), there is no form and no fee, however an individual still must have their biometrics completed. It is suggested that if you are applying for a 237(a)(1)(h) waiver, prepare a memorandum

outlining the law, requirements and how the Respondent meets the statutory criteria along with an evidence packet demonstrating how the individual merits the waiver in discretion.

Recent BIA Cases Addressing Continuances, Administrative Closure, and Termination

Continuances: Narrowing the definition of "Good Cause"

- ***Matter of J-A-F-S*,** 29 I&N Dec. 195 (BIA 2025)

    - Takeaway: Beyond the "good cause" standard, Immigration Judges should take into account "secondary factors", including the diligence in applying for any relief, DHS's position, the number of hearings held previously and the number of continuances previously granted. It is important to note the "important public interest in the finality of immigration proceedings."

    - Significance: This is the first example in this administration where the BIA states explicitly that the "secondary factors" might be as important as the "primary factors" from *Matter of L-A-B-R-*, and specifically the "finality of immigration proceedings" is apparently paramount to consider.

- ***Matter of Pinzon Rozo***, 29 I&N Dec. 507 (BIA 2026)

    - Takeaway**:** Even if good cause is shown as per the definition under *L-A-B-R-*, "secondary factors that weigh against continuing proceedings" can overcome the Respondent's showing of good cause.

    - Significance: Extending the holding of *J-A-F-S-* a little more, stating not only that secondary factors are significant in certain situations, but that they can overcome a strong showing of primary factors. Here, DHS's opposition, coupled with the "uncertain and potentially lengthy period of time" until a visa would be available, meant that the BIA did not find that good cause exists for a continuance.

- ***Matter of A-K-R-,*** 29 I&N Dec. 839 (BIA 2026)

    - Takeaway**:** A new "2 and done" rule has been instituted, that if by the second master hearing, respondent shows up with no applications filed and no attorney, this will result in a nearly automatic order of removal. This is the case even where hearings were scheduled extremely closely in time to one another.

    - Significance**:** This administration has sought ways to bring removal proceedings to a close much more efficiently. By providing the bare minimum of notice and time to find representation and file an application for relief, the BIA held that DHS satisfied

their burden, while the Respondent could not demonstrate good cause. This provides the green light to Immigration Judges who want to move cases through their dockets as quickly as possible to order Respondents removed from the country, even when it seems they may certainly have not been given sufficient time to retain counsel and prepare their case for relief.

Administrative Closure: No more "indefinite" and "uncertain" closure

- ***Matter of B-N-K-***, 29 I&N Dec. 96 (BIA 2025)

    - Takeaway**:** The Court should "consider all relevant factors when adjudicating motions for administrative closure, but when there are persuasive reasons for a case to proceed and be resolved on the merits is the primary consideration."

    - Significance: The BIA explicitly stated that "where there are persuasive reasons for a case to proceed and be resolved on the merits" is ***the*** primary consideration. Not just "a" consideration, along with the likelihood of success on the collateral relief and any other considerations, but THE primary consideration.

- ***Matter of Cahuec Tzalam***, 29 I&N Dec. 300 (BIA 2025)

    - Takeaway**:** The Court should "consider the relevant factors 'in the totality' and are not required to give 'each factor equal importance'" when deciding whether to administratively close a case. And still "the primary consideration" is whether there are "persuasive reasons for a case to proceed and be resolved on the merits." Moreover, there must be "some foreseeable resolution to the ongoing proceedings within a reasonably short period of time" if the motion is based on collateral relief.

    - Significance: This takes *Matter of B-N-K-* one step further. Not only is "whether there are persuasive reasons for a case to proceed and be resolved on the merits" the primary concern, but also the BIA explicitly warns Judges that administratively closing a case for relief that will not become available within a "reasonably short period of time" is unreasonable. And who defines what is a "reasonably short period of time"? Specifically related to this proceeding, where *Cahuec Tzalam* was applying for his green card on the basis of Special Immigrant Juvenile Status, where the relevant date to apply for his green card was by definition uncertain, how can he possibly demonstrate eligibility for relief within a "short period of time"?

- ***Matter of Ibarra Vega***, 29 I&N Dec. 476 (BIA 2026)

    - Takeaway: Administrative closure should not be used as an "extra-statutory" form of relief. Extends *B-N-K-* to mean that all people waiting on visa availability (Special Immigrant Juvenile Status and U-Visa beneficiaries, in particular) inherently cannot show imminent eligibility for relief, given that the ultimate issuance of the visa is out of the hands of the Respondent and out of the hands of DHS.

    - Significance**:** This case extends the holding of *B-N-K-* and *Cahuec Tzalam* a little further. It both applies to motions to administratively close and motions to recalendar filed at a later date by DHS. And it may specifically targets Respondents who are awaiting eligibility for relief, for which there is a delay and it is not the fault of the Respondent in any capacity.

Termination: Limiting discretionary termination entirely, is mandatory termination next?

- ***Matter of Roque-Izada***, 29 I&N Dec. 106 (BIA 2025)

    - Takeaway: The BIA stated that "the Respondent's speculative eligibility for adjustment of status before USCIS was insufficient to warrant termination of the Respondent's removal proceedings." Since the Immigration Judge had the authority to adjudicate the Adjustment of Status application, termination was not necessary.

    - Significance**:** This is the first case in this line of jurisprudence that highlights the "speculative" nature of these cases. What speculative is, naturally, is in the eye of the adjudicator. The BIA did not overrule *Coronado Acevedo* at this time, but it did say that the speculative nature of eligibility for relief weighed against terminating these proceedings.

- ***Matter of Bolivar-Bolivar***, 29 I&N Dec. 548 (BIA 2026)

    - Takeaway: Normally, if DHS did not appear at a hearing in order to substantiate the charges contained in the NTA, the Court would not enter an order of removal against the Respondent because the DHS did not substantiate their burden. However, here, if neither party appeared at the hearing but DHS did submit an I-213 Form prior to the hearing, that would be sufficient evidence of alienage and identity to proceed with an in absentia hearing and issue an order of removal to the Respondent.

- Significance: For many cases in 2022 and 2023, DHS was not appearing at hearings for a variety of reasons. Some related to understaffing, some related to logistical issues, but there were many times when DHS would rest on their pre-hearing submissions. Yet when the DHS submits only an I-213 with nothing else, and is not in Court to substantiate the contents of the I-213 or move the Court to issue an order of removal in absentia, the BIA states that an IJ must conduct the in absentia hearing regardless. This is important and lays the groundwork for IJs to proceed with in absentia hearings, and perhaps order more removals down the road, even in spite of DHS satisfying their burden and being present to indicate to the Court how they would like to proceed.

- ***Matter of Santiago-Santiago***

  - Takeaway: Even when Immigration Judges are endowed with the authority to terminate cases in their discretion, essentially they should defer to DHS and whether they have filed an opposition and indicated an intent to continue litigating the case. "We have repeatedly held that a party's interest in bringing removal proceedings to a close on the merits is a persuasive reason to move forward with the case… the Immigration Judge erred in terminating removal proceedings based solely on the fact that the respondent has been accorded DACA protection and without considering the reasons for any opposition to termination."

  - Significance: This is significant because it begins the process of taking the power of IJs to terminate cases in their discretion away from them. IJs enjoy the power to terminate cases in certain mandatory instances, and they have the discretion to do such in certain discretionary cases, and it is clear the BIA is seeking to prevent IJs from terminating cases except in absolutely essential situations.

Recent BIA Caselaw on Adjustment Jurisdiction

- ***Matter of Kagumbas*,** 28 I&N Dec. 400 (BIA 2021)

    - Takeaway: Under 8 C.F.R. § 1245.2(a)(1), EOIR has exclusive jurisdiction over adjustment of status applications filed by noncitizens placed in removal proceedings (with narrow exceptions such as arriving aliens)

    - Jurisdictional Significance: The Board ruled that because IJs have independent jurisdiction over adjustment applications, IJs also have the authority to examine the underlying bona fides of a marriage. The IJ is therefore not bound by – and can look behind – U.S. Citizenship and Immigration Services' (USCIS) prior approval of an underlying Form I-130 alien relative petition. [1, 2, 3]

- ***Matter of Coronado Acevedo***, 28 I&N Dec. 648 (A.G. 2022)

    - Takeaway**:** The U.S. Attorney General determined that IJs and the BIA have authority to terminate or dismiss removal proceedings under specific, limited circumstances (*e.g.*, having been granted LPR status, where proceedings impact consular processing, or needing to seek relief before USCIS).

    - Jurisdictional Significance: This decision provides a critical procedural mechanism for cases where the Immigration Court lacks jurisdiction over the adjustment application itself (*e.g.*, if the respondent is an arriving alien over whom USCIS retains exclusive adjustment jurisdiction). This decision permits an IJ (or, for that matter, the BIA) to terminate proceedings specifically to allow the noncitizen to pursue their adjustment of status application directly before USCIS.

- ***Matter of Padilla Rodriguez***, 28 I&N Dec. 164 (BIA 2020)

    - Takeaway**:** (1) Where TPS for someone who was previously present in the United States without being admitted or paroled is terminated, the person remains inadmissible; removal proceedings should not be terminated; (2) A person with valid TPS is considered to be "admitted" for purposes of adjustment eligibility only within the Sixth, Eighth, and Ninth Circuits.

    - Jurisdictional Significance**:** Aside from the three listed circuits, a noncitizen whose TPS has been terminated cannot have removal proceedings terminated based on a claim that they were lawfully admitted for adjustment purposes. The board clarified

that ongoing, valid TPS is required to be considered "admitted" for adjustment eligibility in those specified jurisdictions.

- ***Matter of Triana***, 28 I&N Dec. 659 (BIA 2022)

    - Takeaway**:** The BIA may review whether grandfathered visa petitions under INA § 245(i) where "approvable when filed."

    - Jurisdictional Significance: USCIS' prior visa petition approval does ***not*** prevent an Immigration Judge in removal proceedings from examining whether that petition was "approvable when filed." This makes clear that while USCIS is charged with adjudicating visa petitions, the EOIR is imbued with independent jurisdictional authority to review all components of adjustment eligibility once removal proceedings are initiated.

Navigating Precarious Immigration Statuses in the Workplace

Navigating Precarious Immigration Statuses in the Workplace

Beatriz Ballerini, Jeannie Kain, Mary Kramer and Lynda Hagerty

I. OVERVIEW [1]

This article provides practical guidance on employment-based options for individuals with DACA, Temporary Protected Status (TPS), asylum, or humanitarian parole. Approval of an immigrant petition does not itself confer status or establish eligibility to adjust status. Each case requires a separate analysis of employment classification, adjustment or consular processing, inadmissibility, and the durability of the underlying humanitarian protection.

When clients present these situations, the approach is different from a conventional employment-based green card application. It involves managing the expectations of the potential client and fully assessing their entries and departures, immigration history, education, professional trajectory, employment authorization, and qualifying relatives to craft a viable strategy.

II. SCREENING AND ASSESSMENT: THE LAWYER'S DUTY AS AN ADVISOR

The best practice is to screen the potential client before selecting an immigration strategy. A brief initial consultation is insufficient. Reconstruct every admission, parole, departure, removal event, period of lawful status, and period of unlawful presence; obtain records where needed. Explain the risks of travel, delays, and the possibility that an approved employment petition may not lead to permanent residence. Counsel who does not regularly handle humanitarian cases should collaborate with an attorney who does.

> [**Practice Pointer:** Ask whether the individual or a close family member submitted a FOIA response. An earlier family petition or labor certification may establish INA § 245(i) grandfathering, sometimes through a parent. Ask whether a U.S. citizen or lawful permanent resident spouse or parent may qualify for an unlawful presence waiver. Distinguish lawful status from authorized stay and protection against accrual of unlawful presence.]

III. EMPLOYMENT-BASED OPTIONS: EMPLOYER-SPONSORED OR SELF SPONSORSHIP

Mid-sized and smaller organizations are increasingly willing to sponsor their employees and frequently take the initiative and seek immigration counsel to assess the viability of an employment-based sponsorship. Corporate clients are more accustomed to a more direct

[1]The information and legal options in this article are updated through October 2, 2026.

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approach for conventional non-immigrant visa holders and thus managing their expectations at the outset is a must. Although companies are keen to sponsor, they are not so understanding when delays and unanticipated events affect their employee's case, which can adversely affect business operations. A best practice is to "re-train" employers to understand that the immigration landscape is often more uncertain and challenging when choosing a joint employment-humanitarian approach.

Screen for an employer-sponsored EB-1B outstanding professor or researcher petition, EB-2 advanced degree or exceptional ability petition, or EB-3 professional, skilled worker, or another worker petition, as appropriate. Review the offered position, ability to pay, visa availability, and labor certification requirements. The employer must bear the recruitment and labor certification costs that Department of Labor rules prohibit shifting to the worker. An approved I-140 does not independently authorize employment or cure adjustment of status ineligibility.

> [**Practice Pointer**: Request a detailed résumé from the potential client emphasizing their accomplishments and their role on significant projects, their impact and value to the organization or industry, and the result. If the employer is a multinational organization, clarify how many individuals hold the individual's role in the United States and abroad.]

Also assess self-petitioning under EB-1A or EB-2 with a national interest waiver (NIW). An NIW petitioner must first establish eligibility for EB-2 as a professional with an advanced degree or a person of exceptional ability, then satisfy the three *Dhanasar* prongs. A degree is not indispensable where exceptional ability is established, but a compelling endeavor alone does not establish EB-2 eligibility. USCIS updated its NIW guidance in January 2025, with particular attention to the proposed endeavor's national importance and whether the individual is well positioned to advance it.[2]

Before recommending EB-2 NIW or EB-1A, carefully screen the individual and review current adjudication trends. For a client with a willing employer and a qualifying permanent position, an employer-sponsored PERM process under EB-2 or EB-3 may be the stronger primary strategy.

PERM requires a prevailing wage determination, recruitment, labor certification, and a qualifying job offer, but does not require proof of national importance or sustained acclaim. Compare the routes based on the evidence, employer commitment, processing time, visa availability, and the client's ability to adjust status or complete consular processing.[3]

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[2] *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

[3] Steven Hubbard, *USCIS Filing Trends: New Data Shows Immigration Processing Falling Further Behind*, American Immigration Council (Aug. 5, 2026) (reporting FY2025 Q1 to FY2026 Q1 denial rates: EB-2 NIW, 37.3% to 57.4%; EB-1A, 25.3% to 52.5%).

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IV. Overview Considerations for Achieving Lawful Status Through Employment Based Options

A. DACA

DACA is deferred action, not lawful immigration status. A recipient may have entered without inspection or may have been admitted and later overstayed; do not assume either history. Employment-based adjustment requires an admission or parole under INA § 245(a), analysis of the bars in § 245(c), and consideration of § 245(i) or the limited § 245(k) exemption. Advance parole may establish a qualifying parole after return to the U.S. but does not automatically overcome employment-based adjustment bars. USCIS continues to process renewal requests while initial requests are accepted but not adjudicated under the current litigation orders.[4]

Before closing the adjustment of status door, screen for an earlier qualifying family petition or labor certification filed on or before April 30, 2001, that could grandfather the DACA recipient under INA § 245(i). Determine whether the individual was a principal or derivative beneficiary and whether additional physical-presence requirements apply.[5]

For consular processing, calculate unlawful presence under INA § 212(a)(9)(B) from age 18, accounting for any period when DACA protects against its accrual. A departure after more than 180 days can trigger a three-year bar; a departure after one year or more can trigger a ten-year bar. Where available, the I-601A provisional waiver requires extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent and covers only unlawful presence. Screen separately for removal orders and other grounds of inadmissibility.

On August 13, 2026, the Board held in *Matter of DelCarmen-Lara* that international travel on advance parole is a departure under INA § 212(a)(9)(B)(i)(II) and may trigger the ten-year unlawful presence bar where at least one year of unlawful presence was accrued before departure. It overruled *Matter of Arrabally and Yerrabelly* on that point and expressly applied the new rule prospectively. Past travel therefore requires a date-specific analysis; prospective travel requires calculating accrued unlawful presence even if parole on return could satisfy INA § 245(a). The decision addressed the ten-year bar, not every possible consequence of travel.[6] USCIS is presently taking the position that the decision also applies to the three-year bar, for unlawful presence greater than 180 days but less than one year.[7]

> [**Practice Pointer**: Beware of INA § 212(a)(9)(C). Its unlawful-presence prong requires more than one year of aggregate unlawful presence followed by entry or attempted reentry without admission; its removal-order prong has a separate trigger. The age-

[4] INA §§ 245(a), 245(c)(2), 8 U.S.C. §§ 1255(a), 1255(c)(2) (inspection and admission or parole; adjustment bars relating to status and unauthorized employment).

[5] USCIS Memorandum, William R. Yates, "Clarification of Certain Eligibility Requirements Pertaining to an Application to Adjust Status under Section 245(i) of the Immigration and Nationality Act" (Mar. 9, 2005).

[6] *Matter of DelCarmen-Lara*, 29 I&N Dec. 830 (BIA 2026). *Compare with Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

[7] *See*, USCIS, Laws and Policy, "Unlawful Presence and Inadmissibility," https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility (last visited Oct. 2, 2026).

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based and other rules governing accrual of unlawful presence must be applied. Mere presence without permission for more than a year does not itself establish this permanent bar.]

The Department of State's July 2024 guidance may assist a DACA recipient seeking an H-1B or another non-immigrant visa abroad. It clarifies when a consular officer should consider recommending a waiver of inadmissibility to DHS. The guidance creates no new waiver, and DHS decides the request; a non-immigrant visa waiver does not waive a ground of inadmissibility for an immigrant visa.[8]

B. Temporary Protected Status (TPS)[9]

A grant of TPS alone is not an admission for INA § 245(a). USCIS's July 2022 policy provides that a TPS beneficiary who travels with DHS authorization and returns in accordance with it generally is inspected and *admitted* (rather than paroled) to the U.S. with TPS, potentially satisfying § 245(a). The client must still satisfy employment-based adjustment requirements, including INA § 245(c) or an applicable § 245(k) exemption. Review the travel document and prior unlawful presence before departure.[10][11]

Since the start of the second Trump administration, several TPS designations have been terminated, some amid ongoing litigation; others remain in effect. Given rapid changes, counsel must verify each client's TPS, employment authorization, and deadlines and assess the effect on the overall immigration strategy.[12]

Understanding the potential magic of TPS begins with reading the statute and regulations. Section 244(f) was born of the Immigration Act of 1990 and amended by the Miscellaneous Technical and Immigration Amendments of 1991 ("MTINA").[13] An individual in TPS status is maintaining a valid non-immigrant status for its duration.[14] The Supreme Court stated the law "deems" this to be a non-immigrant status like any other for purposes of adjustment of status.

Embracing TPS as a non-immigrant status is key to considering change of status as well as adjustment of status. But what about the initial "admission"? Adjustment of status under INA § 245(a) requires a parole or admission. In *Sanchez v. Mayorkas*, the Supreme Court clarified that

[8] 9 FAM 305.4-3(C)(c)(3) (discussing public interest considerations for INA § 212(d)(3)(A) waiver requests).

[9] AILA, "Practice Alert: TPS and Parole Status Updates Chart," AILA Doc. No. 25091135 (Aug. 19, 2026), https://www.aila.org/library/practice-alert-tps-and-parole-status-updates-chart.

[10] *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020) (rescinded July 1, 2022).

[11] USCIS, "Temporary Protected Status and Adjustment of Status," Policy Manual Update (July 1, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220701-TPSAndAOS.pdf.

[12] AILA, "Practice Alert: TPS and Parole Status Updates Chart," AILA Doc. No. 25091135 (Aug. 19, 2026), https://www.aila.org/library/practice-alert-tps-and-parole-status-updates-chart.

[13] Pub.L. No. 102-232, 105 Stat. 1733.

[14] INA § 244(a)(f)(4); 8 C.F.R. § 244.10(f); *Sanchez v. Mayorkas,* 593 U.S. 409 (2021).

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the conferral of TPS status is not an "admission."[15] And a change to another non-immigrant status requires an "admission."

However, by law, persons who leave and re-enter the United States with a TPS travel document are "inspected and admitted."[16] For years, USCIS issued advance parole documents to TPS holders, effectively paroling them back in under INA § 245(a). But a parole is not indicative of an admission. A parolee is an "arriving alien" who is "seeking admission." This may suffice for certain individuals seeking adjustment of status, such as persons originally paroled who went into TPS without a gap. But a parole may not suffice for aspiring employment-based adjustees or those who seek a change of non-immigrant status. Admission will.

On July 1, 2022, USCIS updated its policy on TPS holders by rescinding *Matter of Z-R-Z-C-*,[17] but most importantly confirmed that those with TPS who travel abroad temporarily with prior consent of DHS, and return in accordance with prior authorization, may be inspected and admitted into TPS upon return and in accordance with INA §245(a). This type of admission is key for utilizing INA §245(k).[18]

An open question concerns TPS holders who traveled prior to July 1, 2022 (and not after) who were issued a § 212(d)(5) parole document. Attorneys should argue that by operation of law, this was an "admission." A good place to start is the Fifth Circuit Court of Appeals decision in *Duarte v. Mayorkas*.[19] Indeed, in the Fifth Circuit, a noncitizen paroled via TPS was *not* paroled, but inspected and admitted. *Duarte* asked whether USCIS or EOIR had jurisdiction over the adjustment of status applications of TPS holders who traveled after orders of removal and were paroled back into the country. The Court of Appeals ruled that the immigration court has jurisdiction. This is a key ruling for noncitizens seeking to change status from TPS.

Another key point is that, by statute and regulation, once granted TPS, applicants re-register annually.[20] They do not seek "extension of status" in the sense that -- if they remain eligible for TPS-- the re-registration period is automatic (absent a significant discretionary concern). The fact that a TPS re-registration application was still pending at the time of termination of a program should not be considered a "gap."

In 2026, DHS ended TPS for Haitians. Other nationalities are set to expire soon. Expiration dates are important for calculating potential eligibility to adjust status under INA § 245(a) (perhaps utilizing § 245(k)) or to change non-immigrant status within the United States. Dates are also important for unauthorized presence calculations (INA § 212(a)(9)) are key to consular processing for an immigrant or non-immigrant visas.

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[15] *Sanchez v. Mayorkas,* 593 U.S. at 516.

[16] MTINA § 304(c)(1)(a).

[17] *Matter of Z-R-Z-C-,* Adopted Decision 2020-02 (AAO Aug. 20, 2020).

[18] USCIS Policy Memorandum, *Rescission of Matter of Z-R-Z-C- as an Adopted Decision; Agency Interpretation of Authorized Travel by TPS Beneficiaries*, (July 1, 2022).

[19] 27 F.4th 1044 (5th Cir. 2022).

[20] 8 C.F.R. § 244.10(f)(4).

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C. Asylees and Asylum Applicants

Distinguish a pending asylum application from a grant of asylum. Granted asylees are eligible for adjustment of status independently under INA §209(b) after they have been physically present in the U.S. for at least one year after their asylum grant.

A pending application does not itself create lawful non-immigrant status. Matter of L-K-, 23 I&N Dec. 677 (BIA 2004), rejected an automatic "technical reasons" exception under INA § 245(c)(2) based solely on the pendency of an asylum application in the circumstances before the Board, and USCIS has explicitly stated that a pending application does not confer legal status.[21]

While USCIS maintains that asylum applicants do not maintain legal status, these applicants do not accrue unlawful presence under INA §212(a)(9)(B), as long as they are able to demonstrate that their asylum claim is bona fide.[22] Thus, asylum applicants who avoided accruing significant unlawful presence prior to applying for asylum, and who do have not engaged in unauthorized employment after applying for asylum, may still be able to gain permanent residence through consular processing. Practitioners will still need to navigate safety issues relating to the applicant obtaining a passport from and returning to a country from which they fear persecution, and the risk to the applicant of being stranded abroad if the immigrant visa is not approved after the interview or is subject to significant administrative delays.

When USCIS refers an affirmative asylum applicant to the Immigration Court, their asylum application continues, and thus, if they already had employment authorization while their application was pending affirmatively, it will continue while they pursue asylum with the Immigration Court. Departure from the U.S. for purposes of consular processing can be complicated for those in removal proceedings, and requires termination of removal proceedings[23] or an order of voluntary departure from the Court, followed by an expeditious departure from the U.S. prior to accruing significant unlawful presence.

For an employment-based adjustment, analyze admission or parole, the status history, employment authorization, INA § 245(c)(7), and any applicable § 245(k) exemption independently.

D. Parolees

Parole can satisfy the inspected and paroled threshold of INA § 245(a), but parole is not lawful non-immigrant status. An employment-based adjustment applicant who remains solely a parolee generally encounters a bar to adjustment of status under INA § 245(c)(7). Do not assume that §

[21] *See*, USCIS Policy Manual, Vol. 7, Part B., Chapter 3, Section A. https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-3.

[22] 9 FAM 302.11-3(B)(3); USCIS Laws and Policy, "Unlawful Presence and Inadmissibility," https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility.

[23] The Attorney General's decision in *Matter of Coronado Acevedo*, 28 I&N Dec. 648, 649 (A.G. 2022) explicitly includes this scenario as an appropriate basis for termination of removal proceedings.

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245(k) cures the problem: assess whether its lawful-admission and 180-day requirements are met, as well as any intervening admission or status and eligibility under another adjustment provision.

V. INA § 245(K) THE EMPLOYMENT-BASED EXEMPTION

INA § 245(k) can excuse specified bars under § 245(c)(2), (c)(7), and (c)(8) for qualifying employment-based applicants present after a lawful admission, provided the aggregate period of failure to maintain lawful status, unauthorized employment, or violation of admission terms since the most recent lawful admission does not exceed 180 days. Count the relevant days carefully. Parole is not a lawful admission for this purpose. Section 245(k) does not itself supply admission under § 245(a), forgive inadmissibility, or cure a bar triggered by departure.

VI. I-9 CONSIDERATIONS FOR HUMANITARIAN WORKERS

Form I-9 compliance for humanitarian EAD holders is both volatile and nuanced. Common EAD categories for these workers are C11 (Parole granted for CHNV, U4U), C33 (DACA), A05 (Asylee), C08 (Pending Asylum Claim), A12 (TPS granted), or C19 (TPS pending).[24]

An EAD may still look genuine and bear a future expiration date even though DHS has terminated the underlying humanitarian status. The reverse is also true: a TPS holder's EADs may remain valid beyond the expiration date printed on the card when DHS automatically extends it through a country-specific Federal Register notice.[25] Parole-based EADs, by contrast, generally are not automatically extended.[26] For EAD renewals filed on or after October 30, 2025, DHS eliminated its 540-day automatic extensions that had previously applied to timely filed EAD renewals for TPS holders, asylees, and other categories.[27]

For humanitarian workers hired with an EAD, employers must complete the Form I-9 with an *unexpired or acceptable* List A document or an acceptable combination of List B and C documents

[24] 8 C.F.R. § 274a.12.

[25] 8 U.S.C. § 1254a; 8 C.F.R. pt. 244; *Removal of the Automatic Extension of Employment Authorization Documents*, DHS/USCIS (Oct. 30, 2025) (confirming that TPS-related EADs may continue to be automatically extended through applicable Federal Register notices).

[26] USCIS, *USCIS Response to the Citizenship and Immigration Services Ombudsman's 2023 Annual Report*, at 14 (explaining that because parole-based employment authorization requires adjudication of the underlying parole/re-parole request, "parolees are not amongst the categories of noncitizens eligible for the automatic extension under the regulations").

[27] USCIS, DHS Ends Automatic Extensions of Employment Authorization (Oct. 29, 2025) https://www.uscis.gov/newsroom/news-releases/dhs-ends-automatic-extension-of-employment-authorization.

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that reasonably appear genuine and relate to the employee.[28] When an individual's work authorization expires, the employer must reverify continued employment authorization by completing Supplement B to Form I-9. For reverification, the employee may present any acceptable List A or List C document demonstrating continued work authorization. Employers should be advised not to demand specific or additional documents, as doing so may constitute an unfair immigration-related employment practice under INA § 274B.[29]

> [**Practice Pointer:** Assessing the worker's EAD expiration date may include reviewing a Federal Register notice or applicable court order, as DHS extensions and ongoing litigation may alter the period of employment authorization reflected on the face of the card. Counsel may also consult reliable status-tracking resources, such as AILA's TPS and Parole Status Updates Chart.[30]]

Tickler systems are critical for employers to begin tracking humanitarian-population employee's work authorization 180 days before it expires. Starting this early helps prevent gaps in employment authorization and gives eligible employees time to file an EAD extension before their current work authorization lapses.

VII. CONCLUSION

There is no single solution for these clients. Before committing to a long employment-based petition process, test the route to permanent residence: adjustment eligibility, consular processing, grandfathering, waivers, travel, and the continuing validity of humanitarian protection. Careful screening and candid advice can identify a viable strategy while exposing risks early.

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[28] I-9 Central, *Handbook for Employers (M-274)*, § 7.3, "Refugees and Asylees." https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/70-evidence-of-employment-authorization-for-certain-categories/73-refugees-and-asylees.

[29] INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6) (providing that requesting "more or different documents" than required, or refusing to honor documents that reasonably appear genuine on their face, constitutes an unfair immigration-related employment practice when done for the purpose or with the intent of discrimination).

[30] AILA, "Practice Alert: TPS and Parole Status Updates Chart," AILA Doc. No. 25091135 (Aug. 19, 2026). https://www.aila.org/library/practice-alert-tps-and-parole-status-updates-chart.

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Useful Practice Resources

I. AILA's TPS and Parole Status Updates Chart

https://www.aila.org/library/practice-alert-tps-and-parole-status-updates-chart

This chart, compiled and updated by AILA's Verification Committee, provides a comprehensive list of the various TPS designations and parole programs, with their current status.

II. USCIS TPS information

https://www.uscis.gov/humanitarian/temporary-protected-status

Federal Register notices, effective dates, and other TPS information are available here. However, it is important to check the posted information against the actual Federal Register publication, as recently there have been discrepancies related to automatic extensions.

III. I-512T TPS Travel Documents

In July 2022, USCIS began issuing a different type of travel document to those with TPS, changing their reentries to the U.S. from a parole to an admission.

USCIS Policy Memorandum, announcing the change:

https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220701-TPSAndAOS.pdf

ILRC Practice Advisory on this policy change:
https://www.ilrc.org/sites/default/files/2023-03/New%20Policy%20on%20TPS%20and%20Travel%20%282023%29.pdf

IV. USCIS Policy Manual

Change of Status and Extension of Stay:

https://www.uscis.gov/policy-manual/volume-2-part-a-chapter-4

This section sets out USCIS requirements for change of status and extension of stay, including circumstances in which these applications can be granted even if they were filed late or the applicant had failed to maintain their status.

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Adjustment of Status:

https://www.uscis.gov/policy-manual/volume-7-part-b

This section provides USCIS's position on topics relating to §245 adjustment of status. Of particular note for business practitioners is Chapter 3, which covers INA §245(c) bars to adjustment of status, and Chapter 8, which covers bar exemptions.

V. DACA

https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions

This FAQ from USCIS comprehensively covers USCIS's policy with regard to DACA. It was initially published soon after President Obama announced the program, and was the only official guidance on the program until regulations were later promulgated (See 8 C.F.R. §236 et seq).

Path to Papers: https://sites.lawschool.cornell.edu/path2papers/

This project is focused on helping those with DACA gain residence through employment and other avenues and contains many useful resources for practitioners.

VI. One Big Beautiful Bill Act (OBBA) changes to automatic employment authorization extensions under TPS renewal

AILA practice advisory (August 2025): https://www.aila.org/library/practice-pointer-tps-ead-changes-based-on-the-obbba

VAM v. USCIS lawsuit staying these changes: https://asaptogether.org/en/uscis-aaf-lawsuit/

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From F-1 to Founder: Nonimmigrant Options for the Entrepreneur

From F-1 to Founder: Nonimmigrant Options for the Entrepreneur

"Entrepreneurs are outsiders by nature – outsiders with a work ethic."
Anita Roddick, Founder of the Body Shop (UK)

Because entrepreneurs often own, control, and work for their businesses, they do not fit easily into an immigration system originally designed for traditional, hierarchical employer-employee relationships. Solving this puzzle – finding nonimmigrant visa options that work for entrepreneurs – is critical to the economy. According to the American Immigration Council, over 46% of Fortune 500 companies were founded by immigrants or their children, and roughly 59% of U.S. startups valued at $1 billion or more have at least one immigrant founder.

The most common immigration journey for an international entrepreneur is to enter the U.S. as an international student in F-1 status, utilize the F-1 practical training authorizations to establish and develop their business, then transition to a work-authorized nonimmigrant status such as O-1, H-1B, or E-2. This practice pointer, and our panel, will focus on this journey.

A. No Work Authorization Required

Before reviewing the nonimmigrant visa categories that are suitable for entrepreneurs, we should first consider what is permissible *without* work authorization. What is a foreign national allowed to do while visiting in B-1 status, or as an F-1 student without work authorization?

> "A B-1 visitor may come to the United States in order to secure funding or office space, negotiate a contract, or attend certain business meetings in connection with opening a new business. However, a B-1 visitor is prohibited from working for or operating an already established U.S. entity. Similarly, a B-1 visitor may not begin operating or working for a new business in the United States."[1]

As outlined on the USCIS website, U.S. immigration law does not consider the initial actions taken by a foreign national to establish a company as "employment." As such, it is widely accepted that an entrepreneur may: file Articles of Incorporation to establish a legal entity; apply for a federal Employer Identification Number (FEIN); open corporate bank accounts; meet with potential investors; and identify and sign contracts for office space and related services.[2]

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[1] U.S. Citizenship & Immigr. Servs., *Options for Alien Entrepreneurs to Work in the United States*, USCIS entrepreneur pathways (last updated Jan. 24, 2025).

[2] At some point, however, the entrepreneur's activities start to look more like those of someone *running* a business. Producing and sharing marketing material, designing and publishing a website, and meeting with potential customers, are examples that are less clear cut.

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B. F-1 Student Status

There are different types of work authorization available to international students in F-1 status. Understanding the characteristics of each is important to advising foreign national entrepreneurs.

Curricular Practical Training (CPT)

CPT is ordinarily not viable for F-1 students looking to set up a business. This is because, under 8 CFR 214.2(f)(10)(i), a CPT program must be "an integral part of an established curriculum" offered through a cooperative agreement between the employer and the school. Accordingly, CPT authorization requires a stable employment environment in which the foreign national will receive oversight and/or training from an independent employer.[3]

Optional Practical Training (OPT)

The majority of F-1 students in the U.S. are eligible to receive 12 months of work authorization during (pre-completion OPT) or after (post-completion OPT) their degree program. As clarified by U.S. Immigration and Customs Enforcement (ICE), self-employment is permissible with OPT:

> "A student on OPT may start a business and be self-employed. The student must be able to prove that he or she has the proper business licenses and is actively engaged in a business related to the student's degree program."
>
> **Policy Guidance 1004-03 – Update to Optional Practical Training**
> **U.S. Immigration and Customs Enforcement**

Because of this flexibility, OPT often represents the best opportunity for entrepreneurs to establish and grow their business without having to worry about whether it has the necessary oversight, resources, personnel, or activity for sponsorship in a nonimmigrant visa category.

Practice Tips

- Due to backlogs and the severe consequences of rejection, students should apply for post-completion OPT as early as possible (up to 90 days before their program end date).

[3] Two recent broadcast messages from the Student and Exchange Visitor Program (SEVP) on August 12 and August 24, 2026, have attempted to further limit the viability of CPT for international students. The latter of these broadcast messages instructs Designated School Officials (DSOs) only to permit CPT if all students in a degree program require that work experience to complete their degree.

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- Once OPT work authorization has been secured, a foreign national should begin planning their next step. This might include: discussing the possibility of registration in the H-1B lottery; reviewing and discussing the STEM OPT requirements (see below); and exploring other nonimmigrant visa categories that may work if the individual is not STEM OPT eligible and is not selected in the H-1B lottery (see below).
- Documenting employment activities is important because an individual must not exceed the 90-day limit on "unemployment" in order to maintain status.

STEM Optional Practical Training (STEM OPT)

For entrepreneurs looking to grow their business, STEM OPT represents a middle ground between OPT and nonimmigrant visa sponsorship. Although self-employment is no longer an option, this form of work authorization does not carry the same stringent requirements as nonimmigrant visa sponsorship. It is also, traditionally, cheaper and easier to obtain.

> "F-1 students cannot qualify for STEM OPT extensions unless they will be bona fide employees of the employer signing the Form I-983 because F-1 students may not provide employer attestations on their own behalf. However, STEM OPT applicants can participate in a start-up or small business so long as all regulatory requirements are met, including that the employer adheres to the training plan requirements, remains in good standing with E-Verify, will provide compensation to the STEM OPT student commensurate to that provided to similarly situated U.S. workers, and has the resources to comply with the proposed training plan. The employer that signs the Training Plan must be the same entity that employs the student and provides the practical training experience."[4]

Practice Tips

- As an initial step, verify that the six-digit CIP code for the foreign national's degree major appears on the DHS STEM Designated Degree Program List.[5]
- The student should check in with their international office about their internal guidelines and timelines for the I-983 and I-20 processing.
- The student must be able to demonstrate that there is an individual or group of individuals with oversight and control of their activities. This includes, in particular, the

[4] U.S. Dep't of Homeland Sec., *STEM OPT Extension Overview*, https://studyinthestates.dhs.gov/stem-opt-hub/additional-resources/stem-opt-extension-overview.
[5] U.S. Dep't of Homeland Sec., *2024 DHS STEM Designated Degree Program List* (July 22, 2024), DHS STEM degree list.

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ability to terminate the student's employment. If the student is a majority owner of the company, anticipate that this issue will be scrutinized closely.
- It should be noted that best practice may not be advertising the individual in a senior leadership role of the organization if the person is technically supposed to be in training.

C. E-2 Treaty Tips

E-2 nonimmigrant status allows a foreign national investor, who is a national of a treaty country, to develop and direct an enterprise in which they have invested a substantial amount of capital.

Practice Tips

- This option is only available to students whose country of nationality has a qualifying treaty of trade and commerce with the United States, as listed here. The investor must hold the nationality of an E-2 treaty country, and the U.S. business must be at least 50% owned by nationals of that same treaty country.[6]
- Unlike other nonimmigrant categories, approval of an E-2 petition by USCIS does not ensure smooth visa processing: consular officers will re-adjudicate the application when the foreign national next applies for a visa.
- Majority ownership is allowed and favored. The applicant must show that they are coming to "develop and direct" the company, which is proven via majority equity ownership (50% or more) or operational management control.
- Capital must be "substantial" relative to the cost of establishing the business, and must be irrevocably placed "at risk."
- Marginality: The business cannot be marginal; it must have the capacity to generate more than a minimal living for the investor, typically demonstrated by hiring U.S. workers within five years. Providing a detailed business plan showing the financial and operational projections for the next five years is best practice.

D. O-1A Individual of Extraordinary Ability

If an entrepreneur appears to stand out in their field, or has attracted substantial investment in their enterprise, sponsorship in the O-1A category may be an option. While the petition must be filed by an independent legal entity, the requirement of an employer-employee relationship is applied loosely and the beneficiary can be a majority owner.

Practice Tips

[6] U.S. Dep't of State, *Treaty Countries*, State Department treaty-country list; 8 C.F.R. § 214.2(e) (2026).

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- Review the corresponding section of the USCIS Policy Manual carefully: it explicitly references entrepreneurs and startups on several occasions, outlining how certain O-1A evidentiary criteria apply to them. For example:
    - "For entrepreneurs or founders of startup businesses, officers consider evidence that the business has received significant funding from government entities, venture capital funds, angel investors, or other such funders in evaluating the credibility of submitted contracts, job offer letters, or other evidence of prospective salary or remuneration for services." USCIS Policy Manual, Volume 2, Part M, Chapter 4, Section C.2.
    - "As another example, if the petitioner demonstrates that receipt of a high salary is not readily applicable to the beneficiary's position as an entrepreneur, the petitioner might present evidence that the beneficiary's highly valued equity holdings in the startup are of comparable significance to the high salary criterion." USCIS Policy Manual, Volume 2, Part M, Chapter 4, Section C.2.
- The adjudication of O-1A petitions for entrepreneurs will focus on venture funding, participation in startup accelerator programs, press coverage, patents and licenses, and compensation.

E. L-1A New Office

Some foreign nationals are already successful entrepreneurs in another country. If their intention is to set up a U.S. entity related to an existing entity abroad, the L-1A New Office is an option.

Practice Tips

- Time spent in the U.S. in F-1 status does *not* stop the clock for the purposes of calculating whether the foreign national has worked for the qualifying foreign entity for at least one year within the last three. If a foreign national is studying for a two-year MBA in F-1 status, timing may be problematic.
- If approved for an L-1A New Office, the entrepreneur will only be given L-1A status for 12 months. During this time, in order to extend further, they will need to demonstrate the new office can support a manager or executive. Valuable evidence includes securing physical space and hiring employees; think of "traditional" operational requirements.
- Before discussing the L-1A New Office, it's important to gain as much information about the foreign entity as you can: how long has it been in existence, what is the scope of its activities; will it continue to run while the foreign national is setting up the new office; what has been the individual's role with the company and whether it was a full-year within the last three years (there are some special considerations regarding individuals who have spent time in the US in a nonimmigrant status); how many employees are there abroad; and what business expansion plans are there for the U.S. operations.

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F. H-1B Specialty Occupation

A foreign national entrepreneur who studies for a STEM degree may have up to three years of OPT/STEM OPT work authorization after they graduate. This allows for up to three entries in the H-1B lottery while they continue to work in the U.S., assuming sponsorship through the lottery remains a viable option.[7]

Practice Tips

- Although the H-1B classification generally requires an employer-employee relationship, defined as the employer's authority to hire, fire, pay, supervise, or otherwise control the employee's work, H-1B petitions for company owners are now permissible under the "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers" rule. Under this rule, there is now no requirement to manufacture a board or other corporate structure giving another individual the power to terminate the owner's employment merely to establish H-1B eligibility.
- These petitions can face particular scrutiny over whether the position qualifies as a specialty occupation, especially for start-ups and small businesses where the owner may perform a broad mix of executive, operational, administrative, and professional duties. The company must still demonstrate a bona fide specialty-occupation position whose duties require the qualifying degree; detailed job duties, the company's staffing structure, business operations, and evidence showing who will perform non-specialty functions.
- When filing an H-1B petition for a beneficiary who has an ownership interest in the sponsoring company, employers should consider at the outset whether the company may later pursue PERM permanent residence sponsorship. PERM requires a bona fide job opportunity open to U.S. workers, and DOL may closely scrutinize a case where the foreign national has an ownership interest, managerial control, or influence over hiring or the terms of the position.
- It may be advisable to work with other experts to structure the bylaws/corporate documents to establish that the foreign national can be hired/fired/controlled.

[7] On August 25, 2026, DHS published a proposed rule that would require an additional $103,265 fee for every cap-subject H-1B petition, including petitions filed under the U.S. advanced-degree exemption. Importantly, unlike the Administration's earlier $100,000 proclamation-based payment, the proposed fee would apply to change-of-status petitions filed for individuals already in the United States, meaning that an employer seeking to change an F-1 student working pursuant to OPT or STEM OPT to H-1B status after selection in the annual cap would generally be required to pay the additional $103,265. As of the writing of this practice pointer, the proposal is not currently in effect and remains subject to notice-and-comment rulemaking, with comments due September 24, 2026.

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Authorities and Reference Materials

- U.S. Citizenship & Immigr. Servs., *Options for Alien Entrepreneurs to Work in the United States*, https://www.uscis.gov/working-in-the-united-states/options-for-alien-entrepreneurs-to-work-in-the-united-states (last updated Jan. 24, 2025).
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SUSTAINING THE ADVOCATE

Boundaries, Client Communication,

and Lawyer Well-Being

Radical Well-Being for Yourself and Your Office

[*Immigration Practice Pointers, 2022-23 Ed.* (AILA 2022)]

by C. Lynn Calder, Jennifer M. Howard, Laura F. Kelley, Lory D. Rosenberg

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INTRODUCTION

It is common knowledge that lawyers suffer from high levels of stress, burnout, and depression. We've been advised for years that we must pay more attention to our physical and mental health, not only for our own sake, but also to maintain the ability to ethically represent our clients.

Most of us do not practice in a vacuum, however, and the concern for well-being must extend to our entire office. We need to consider how each staff member is affected by the totality of our immigration practice. Not only does our staff deal with an office atmosphere of last-minute deadlines, shifting priorities, financial worries, management conflicts, and unpredictable government decision-making, but they often are the first responders to clients and are expected to nurture an ongoing positive client relationship. Additionally, in certain roles, staff members may spend a large portion of their time eliciting traumatic information from clients and preparing Page 72 documents to persuade an adjudicator the client deserves discretionary approval of uncertain relief. Staff members generally are committed to achieving a positive

outcome for their hard work, and they, too, feel the stress of delayed or negative decisions; additionally, they bear the burden of facing a disappointed client or unhappy supervising attorney.

STEPS TO LAWYER AND STAFF WELL-BEING

Being aware of how work impacts emotional and physical health is the first step to well-being, for yourself and for your staff. Share and discuss the need for self-reflection and information about well-being practices—from meditation and mindfulness exercises, the neurological need for sleep, trauma-informed lawyering, time management skills, professional counseling, to nutrition and movement—with your staff and let them know that mental and physical health are priorities in your office.

To create a work environment that promotes the health of all and allows each person time to take advantage of well-being practices, you will need to discuss managing expectations and setting boundaries with clients and co-workers. Determine what expectations and boundaries are acceptable in relationships with clients, law partners, associates, and other staff members, and then implement the necessary office policies. To the extent possible, attorneys and staff need personal time protected from the intrusion of work.

While it is critical that we take steps to create a balanced life in the practice of immigration law, for ourselves and our staffs, we have to do more. As a profession, we must change the culture of law and address institutional barriers to well-being, including: law school pedagogy that creates a culture of ignoring mental health; inconsistent policies throughout EOIR regarding continuances for vacation, parental leave, illness of attorneys or close relatives; unprofessional behavior of immigration judges; unreasonable expectations of immigration judges setting merits hearings and filing deadlines with little notice; unreasonable expectations of law firm or legal organization management; and perceived shame related to mental health treatment.[1]

[1] *See,* K. Craig Dobson, Lindsay M. Harris, and Leora Hudak, “Burnout: Solutions Beyond Self-Care, Moving Towards Community Care,” *A New World? Moving from Asylum Restrictions to the Possibility of Greater Protections* (2021 AILA Asylum Conference).

If we need an argument for these institutional changes beyond the basic right to pursue health and happiness, consider our ethical duty to follow the rules of professional conduct. A lawyer who is overwhelmed, overworked, traumatized, and turning to substances to cope cannot ethically represent clients or positively reflect the profession to the public. Lawyers are responsible for staff members whose work is influenced by the same issues. Page 73

WHAT’S WRONG WITH ME AND HOW CAN I FIX IT?

Stress

- Stress is your body’s physical and psychological response to a stressor. When we were cave people, our stressors included things like predators, hunger, and conflicts with other cave people. Our bodies responded to these stressors with an increase in heart rate, muscle tightening, high blood pressure, dry mouth, and rapid breathing.

- Acute Stress is short-term stress that stems from one-off events such as traffic jams, fighting with a loved one, receiving criticism from your boss, or having someone break into your house. This type of stress typically goes away fairly quickly.

- Chronic Stress is long-term stress that stems from systemic issues such as being constantly overwhelmed with work and continuous interpersonal conflicts. Chronic stress impacts our body’s hormones, including adrenaline and cortisol.

- According to WebMD, “Adrenaline increases your heart rate, elevates your blood pressure and boosts energy supplies. Cortisol, the primary stress hormone, increases sugars (glucose) in the bloodstream, enhances your brain’s use of glucose and increases the availability of substances that repair tissues. Cortisol also curbs functions that would be nonessential or harmful in a fight-or-flight situation. It alters immune system responses and suppresses the digestive system, the reproductive system, and growth processes. This complex natural alarm system also communicates with the brain regions that control mood, motivation, and fear.”

- Chronic stress leads to:
    - Acne
    - Depression
    - Diabetes
    - Eczema
    - Heart disease
    - High blood pressure
    - Hyperthyroidism
    - Irritable bowel syndrome
    - Low sex drive
    - Ulcers
    - Weight changes
- What exacerbates stress? Rumination (constant complaining), avoidant behaviors such as overeating, overdrinking, substance abuse, overwatching TV, overscrolling, self-blame and judgment, blaming and judging others.
- What relieves stress? Daily physical exercise, mindfulness practices and meditation, eating whole foods, practicing self-compassion, time management, willingness to feel unpleasant emotions rather than avoid them, establishing healthy boundaries. Page 74

Secondary or Vicarious Trauma, Secondary Traumatic Stress, and Compassion Fatigue

Be aware that all of these responses may occur as a result of spending continuous hours talking with clients who have experienced traumatic events, eliciting details to prepare declarations and other evidence, and supporting these survivors with empathy. Trauma exposure may result in cognitive shifts in beliefs and thinking that can cause negative behavioral, emotional, and physical responses appearing in symptoms such as depression or hopelessness, exhaustion, pessimism, withdrawal and detachment, irritability, difficulty concentrating and focusing, intrusive images, avoidance, hypervigilance, headaches and stomachaches, nightmares, and difficulty sleeping. These symptoms obviously all impact work performance and client advocacy, not to mention the health and well-being of the legal professional.[2]

[2] *See,* H. C. Cartwright, L. M. Harris, L. M. Montecinos, A. Rahman, “Vicarious Trauma and Ethical Obligations for Attorneys Representing Immigrant Clients, A Call to Build Resilience Among the Immigration Bar,” Vol. 2, No 1, *AILA Law Journal* (April 2020) (Full Court Press, Fastcase, Inc.).

It is important that all immigration attorneys are aware of the possibility they or their staff may suffer from vicarious trauma, secondary traumatic stress, and compassion fatigue and that they recognize the symptoms. All the tools related to healthier work can help with avoiding the negative impact of empathetic relationships with vulnerable clients.

CONNECT TO OTHERS INSIDE AND OUTSIDE THE OFFICE

You are not alone in your experience of feeling stressed and overwhelmed. Share the difficulties (and triumphs) of your practice with peers and staff members—then listen to and support each other.

- Arrange time for routine, regular check-ins among attorneys and all staff; this can be done at the beginning of a client review or staff meeting. Ask how each person is feeling and talk about office news. Make it a point to pay attention to your co-workers and notice when someone appears troubled; then make time to ask them about it.

Remember that *everyone* in your office feels the effects of the practice and needs connection, from your receptionist to your law partner(s).

- If you work alone or with a very small staff, arrange to regularly connect with trusted peers or friends who understand your work challenges. Be sure you have someone to contact at short notice whether by text, email, or phone.

MANAGE EXPECTATIONS AND SET BOUNDARIES

Begin with Mindful Communication to Create Healthy Work Culture

“Mindful Communication” means bringing a greater level of awareness to communication through listening and speaking. This type of communication is accomplished by the following:

- Set An Intention
    - Consider the purpose of the communication.
    - Gain awareness of potential pitfalls. Page 75
- Be Fully Present
    - BRO: Breath, Relax, Open.
    - When you feel yourself getting activated, remember to center yourself on the sensation of the body breathing, relax obvious areas of tension in the body, and open the heart space to the experience.
- Remain Open and Nonjudgmental
    - Relate to Others with Compassion
        - Put yourself in the other’s position without using yourself as a reference point.
        - Remember that you can never have all the information for a given situation.
        - Try to engage with a generous interpretation of their intentions.
        - Remember that we all have pressures, positions, and bad days.
    - Practice Mindful Listening
        - Give the speaker your full attention without distractions.
        - Listen to understand rather than to respond.
        - Be aware of: comparing your thoughts and experiences to others; assuming or trying to predict what the speaker to say; rehearsing what the speaker is saying before they have finished.
    - Practice Mindful Speaking
        - Use “I” statements rather than “You” statements.
        - Recognize the desire to defend, prove, and blame.
        - Smile while you are speaking.
        - Pay attention to your tone.
        - THINK - Is what I am saying True, Helpful, Informative, Necessary, and Kind?
        - WAIT - Why, Am, I, Talking?

- Make requests, not threats or ultimatums.
- Be aware of using sarcasm and condescension.

Clearly Communicate with Clients About Expectations and Boundaries[3]

[3] For more on setting boundaries with clients and yourself, *see*, Danielle M. Hall, "Boundaries Can Be the Key to Fortifying Your Well-Being," (July 20, 2021), AILA Doc. No. 21071951.

Discuss with clients your office's expectations regarding communication; and ensure that your and your staff's messages are consistent. Be careful to set realistic time frames with clients for accomplishing tasks; clients will expect what you have promised. As early as possible, advise the client about the following (and other matters important in your office): Page 76

- How often he or she can expect to hear from you or office staff and the form of communication, whether it will be in-person (virtual or in-office) or by phone, email, or access to a case management system portal. Determine and make note of the client's preferred method of communication.
- Which attorneys and/or other staff in your office the client should call or email with questions or information.
- Whether you or your staff will accept and respond to text messages.
- The expected turn-around time, hours of the day, and manner (phone, email, in-person) in which you or staff will respond to a client. If you want to protect non-office hours from client communication, specify the office hours, and clearly indicate what days and hours are available for receiving or responding to a communication. If it is not acceptable to be available at all hours—other than in an emergency—make sure your client understands this boundary, and that he or she understands what constitutes an emergency.
- Use your retainer agreement or engagement letter to your advantage. Clearly addressing communication expectations up front and having a signed agreement that covers communication parameters may help avoid or resolve a future complaint or conflict. The agreement should establish what is acceptable to you and your client, but *any limitation on your duties or liability must be in accordance with your state's rules of professional conduct*.[4] Whether you are permitted to require a client to agree to a certain type of communication as a condition of representation will depend on informed consent after full disclosure of the risks and explanation of alternatives.[5] Page 77

[4] You must follow the Rules of Professional Conduct when drafting your retainer agreement and a full discussion of the Rules is beyond the scope of this article. Review The AILA Ethics Compendium: Modern Legal Ethics for Immigration Lawyers, https://www.aila.org/practice/ethics/compendium, https://www.aila.org/File/Related/13100890.pdf, AILA Doc. No. 13100890 (Posted 6/26/20), for more on ethical requirements.

For example, ABA Model Rule 1.4 (MR 1.4) covers communication between a lawyer and client. The AILA Ethics Compendium chapter on MR 1.4 provides an in-depth discussion of communication requirements, including acceptable promptness, frequency, and mode of client communication. The Annotations and Commentary section of the chapter includes examples and hypotheticals regarding when lawyers may use particular types of communication with clients (e.g., in-person, phone, text, email, and portals in case management systems), who in the office may carry out the communications, and whether third parties (such as a family member or friend) may be substituted for the client. This chapter also references states' substantive modifications to MR 1.4.

[5] If you condition your representation on the client's consent to particular modes of communication, you may also need to consider ethical requirements related to confidentiality under MR 1.6. "Communications via email, texts, video, or other internet-based methods are also permissible, so long as the lawyer complies with other ethical mandates, such as ensuring that all reasonable efforts are taken to prevent the inadvertent disclosure of confidential information." *See*, The AILA Ethics Compendium: Modern Legal Ethics for Immigration Lawyers, ABA Model Rule 1.4, Communications, p. 101; and FN 17, p. 101: "Such efforts include getting the client's informed consent to the use of the particular mode of communication, and having a confidentiality disclaimer at the end of each communication. See ABA FORMAL OP. 477R (2017). Informed consent would require, for example, explaining the risks of using Zoom for video-conferencing."

Set Boundaries and Expectations for Personal Time

- Arranging time to engage in meaningful personal activities will not only contribute to well-being but will also result in increased energy and focus during work. Attorneys and office staff should consider what personal time is important to them:
    - Five-minute breaks or one hour for lunch away from the desk during the work-day?
    - Evenings or weekends without looking at or responding to work email or texts, or taking phone calls?
    - A full vacation of multiple days without interference from the office or clients?
    - Time for individual interests: a physical activity or a hobby; meditation; relaxing with reading, TV, or music; therapy appointments?
    - Time to socialize with family or friends: dinner together, kids' sports, special family outings?
    - Time for family responsibilities: covering for your partner or spouse, helping with homework, dropping off or picking up children, shared household chores?
- If you have control over your work hours or can comply with office time-off policies, once you have determined what non-work time and activities are important to you, block out time on your calendar in the same way you block time for work appointments. Communicate the boundaries you've set for personal time with all members of your office.
- Consider permitting flexible work arrangements to enable staff to take personal time during office hours. Encourage or require staff to use all vacation and personal time. Consider replacing "sick leave" days with less specific "personal leave."

ADDRESSING TRAUMA AND BURNOUT WITH COMPASSION AND DIRECTNESS: HOLISTIC WELLNESS IN YOUR WORKPLACE[6]

[6] This article is premised on work being conducted in a single office or worksite. If in individual locations, programs such as Zoom may present some of their own issues.

People who work together not only share challenges, clients, and viruses; they contribute to and share workplace energy. It's not just about techniques to improve *your* life; it is for all of us. Take a look at your co-workers, your staff, your team.

The first step to take to increase office wellness is to realize that everyone we work with is experiencing excessive demands on their personal and professional time, as well as the need to make compromises and adaptations in their lives due to the trauma of the pandemic.

The second step is to realize that the current political climate, as well as the previous presidency, has had an egregiously negative effect, particularly on those of us working in immigration law.

We have some fundamental things in common (with some generalization): Page 78

- Everyone likes to be recognized and treated respectfully.
- Everyone likes to be appreciated for their efforts.
- Everyone appreciates honesty and trust.
- Everyone likes to be treated with consideration.

We can commit to acting or continuing to act according to these basics now.

It makes sense that sources of both good and bad stress impact those who work together, but not necessarily in the same way.

Stress (bad) is experienced in relation to an individual's background circumstances, personality, history with trauma and stress, specific physical, emotional, and mental qualities, and the particular work they do.

It is essential to adopt mechanisms to work out the physical and emotional stress that builds up every day:

- People need an opportunity to alleviate stress personally and individually, in a way that is comfortable for them and respected by supervisors and co-workers.
    - Take a walk; take a yoga class; scream outside or into a pillow; sing; dance; breathe, leave early.
    - Coordinate the timing with others in the office.
- People need an opportunity to alleviate stress in a workplace group setting, so they can forge a better understanding of one another and build tolerance for those who work in a different capacity.[7]
    - Group meeting; group vent time for irritations and misunderstandings.
    - Office baseball team; office social hour.

To maximize well-being in a law office, the experiences of each of the employees/workers—no matter what their title or how their job is defined—must take certain factors into account:

- Control issues and work environment with bad stress issues:
    - Privacy vs. no privacy
    - Public contact or exposure with clients
    - Contact with government officials
    - Having a boss
    - Being a boss
    - Handling client losses
    - Having little autonomy or control over working conditions or duties Page 79
- Alleviation techniques:
    - Energy exercises: EFT Tapping (group or individual); breath work; movement
    - Rotation of public contact coverage duties
    - Mentoring for promotions
    - Increasing opportunity for autonomy in work environment

[7] Some people, when very stressed, may experience even a brief office meeting as unduly stressful and may need to be accommodated.

These relatively simple steps can help to create an office in which every person, no matter what their role, is held in high regard and put in a position to produce their very best. Interacting, communicating, practicing kindness, and implementing effective energy techniques can make a world of difference.

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Ethically Addressing Client Expectations When Facing the Unknown

[*Immigration Practice Pointers, 2025-26 Ed.* (AILA 2025)]

by C. Lynn Calder, Amanda K. Gennerman, Jack Jrada, and Andrea C. Martinez

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Amanda K. Gennerman has been practicing immigration law exclusively since 2004. Prior to joining Pines Bach, LLP as a Partner, she was the founder of Gennerman Law Group located in Madison, Wisconsin (2004-2020). Amanda's practice focuses on multiple areas of immigration law, including family-based petitions, consular processing, humanitarian petitions, naturalization and removal defense. She is a co-founder, board member and volunteer of the Community Immigration Law Center (CILC) in Madison. In 2023 she co-founded Project Immigration Justice for Palestinians, a national effort to respond to the crisis in Gaza. Amanda has presented immigration topics to community organizations throughout Wisconsin. Her work has been published in the Immigrant Legal Resource Center, *U Visa Manual*. She was voted a Rising Star Attorney of Wisconsin in 2006, 2008, 2009, was awarded the Dane County Pro Bono Award for Legal Services in 2010 and 2022, and was selected as WI/AILA's Pro Bono Champion for 2023-2024. She is a member of immigration professional organizations including ASISTA and American Immigration Lawyers Association (AILA). She is currently the WI/AILA Chapter Secretary.
Jack Jrada specializes in employment-based immigration and particularly enjoys guiding employers through the permanent labor certification process under the Department of Labor's PERM program. His immigration practice supports a broad range of clients, particularly U.S. and global corporate clients as they endeavor to strictly comply with a complex immigration regulatory environment, made more complex by the outsized impact presidential politics can have on federal agencies involved in immigration compliance and enforcement. Jack also supports individual private clients across the immigration legal spectrum, including family, humanitarian, and investment-based immigration petitions. Jack's experience lies in seamlessly coordinating efforts by foreign national employees, human resources professionals, and management to offer sound immigration advice to individual employees, as well as advise employers on general practices and protocols. He also assists employers and their representatives in reviewing and auditing prior I-9 or LCA recordkeeping practices, recommending updates to company policies or processes to proactively mitigate existing compliance risks. Jack's practice places particular emphasis on streamlined reporting to deliver his clients with data-based insights on overall program performance.
Andrea C. Martinez graduated with her Juris Doctorate from American University's Washington College of Law in Washington, DC in 2007 and has been practicing immigration law for fifteen years. Her work covers most aspects of immigration law, from family-based immigration to naturalization to removal defense to humanitarian visas. Prior to entering private practice, Andrea served as a federal judicial law clerk in Washington, DC to the Honorable Eric G. Bruggink at the U.S. Court of Federal Claims. Andrea also worked for nine months in Guatemala assisting in the prosecution of child sex offenders with the non-profit organization International Justice Mission right after law school. During law school, Andrea served as a summer law clerk to six immigration judges at the Arlington Immigration Court. Her law firm, Martinez Immigration Law, was featured in an Emmy-nominated docuseries called "Living Undocumented" in 2019 which was executive produced by Selena Gomez. Andrea is frequently interviewed by media outlets regarding immigration-related topics, including three times by CNN International. She has held various leadership roles in the Missouri-Kansas ("MO-KAN") AILA chapter, including serving on the MO-KAN AILA Executive Committee from 2016-2021 and currently as the chapter's Well-Being and Media/Advocacy liaisons.

The practice of immigration law is challenging on a good day and during a friendly White House administration. But as we've seen since January 20, our practices have become much more complicated and our ability to advise clients is burdened by the unknown. By providing a framework and boundaries for ethical practice, the American Bar Association's (ABA's) Model Page 42 Rules of Professional Conduct (MRPC) and individual state rules help to guide us in successfully operating our practices and working with our clients during this time of legal turbulence.[1]

[1] This article will reference the ABA Model Rules of Professional Conduct (MRPC); *see*, www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/. However, applicable state bar rules also must be consulted for any variation. See AILA's valuable ethics publications and resources for additional discussions (www.aila.org/ethics) and *The AILA Ethics Compendium: Modern Legal Ethics for Immigration Lawyers* (2024) (www.aila.org/library/compendium).

For example, Rules 1.2(d), 1.4(b), and 2.1 provide guidance when we're struggling with how to advise clients about policies and directives that change daily. In an excellent article about ethically advising clients on the requirement to register, Jesse Lloyd provides steps, informed by the MRPC, for communicating with clients about complying with the ARR[2] as well as other choices they must make.[3] "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," Rule 1.2(d); but we may discuss the consequences of their actions. Additionally, attorneys must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" i.e., explain the risks of compliance and non-compliance. Rule 1.4(b). In our role as counselor, we shall "render candid advice" … and "[m]ay refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Rule 2.1.

[2] Alien Registration Requirement, www.uscis.gov/alienregistration.
[3] Jesse Lloyd, "The Ethics of Advising Clients Subject to the Alien Registration Requirement," (March 19, 2025), AILA Doc. No. 25031901.

When it feels like our legal practice is full of chaos, returning to the guidance of professional rules can provide the framework to properly represent our clients and take care of ourselves. While full coverage of the MRPC is beyond the scope of this article, we will discuss rules addressing conduct required for adequate client communications and competent and diligent representation, rules that can help guide us in addressing client needs. We will also discuss how we must take care of ourselves and tend to our own mental and physical well-being in order to fulfill our ethical duties: we cannot meet our ethical responsibilities to our clients unless we pay attention to our own health first.

COMMUNICATING WITH CLIENTS IN AN ERA OF UNCERTAINTY

Reflecting the foundational role effective communications play in the attorney-client relationship, the ABA's MRPC guide attorneys on communications at Model Rule 1.4, just after competence (1.1), scope of representation (1.2), and diligence (1.3). This "central tenet"[4] requires that attorneys "promptly inform" their client

of any developments that may relate to a decision requiring the client's consent. The rule proceeds to direct attorneys to maintain communications that "keep the client reasonably informed" about the status of their matter, and, importantly, to consult with the client as to any limitations on the attorney's conduct resulting from other laws or ethics rules (e.g., conflicts of interest).[5] Collectively, Rule 1.4 guides attorneys on client communications both procedurally and substantively: Page 43

[4] American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 500: "Language Access in the Client-Lawyer Relationship," Oct. 6, 2021, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-500.pdf.
[5] *See* MRPC Rule 1.4.

- Rule 1.4(a) requires active and systematic communications between attorney and client throughout the course of their engagement, including: wherever the client's informed consent is necessary for the attorney to act on the client's behalf; in response to client requests for information, documentation, timelines, or status updates; and even to say 'I can't do that,' where the attorney may be prohibited by law or other ethical rule from performing a legal service on the client's behalf.[6]

- Rule 1.4(b) provides guidance on the substance of the attorney's communications, requiring that the attorney "explain a matter to the extent *reasonably necessary* to permit the client to make *informed decisions* regarding the representation."[7]

[6] *Id*. at 1.4(a).
[7] *Id*. at 1.4(b) (emphasis added).

Not only must an attorney endeavor to regularly communicate with their clients to the extent necessary to facilitate each client's ability to make informed decisions about their legal matter, Rule 1.6 further instructs attorneys to keep client information strictly confidential, but for specific extenuating circumstances that may compel disclosure.[8] In addition to an individual attorney's duties of communication and confidentiality, the MRPC imparts further guidance to law firms in Rules 5.1, 5.2, and 5.3, which collectively advise law firm managers and partners to take steps to ensure that their attorney and non-attorney staff adhere to these professional standards when communicating with clients.[9]

[8] *See id*. at 1.6. The limited exceptions to an attorney's duty of confidentiality are enumerated in 1.6(b). They include situations where disclosure is necessary to "prevent *reasonably certain* death or substantial bodily harm," to prevent the client from committing a crime or fraud that is, again, *reasonably certain* to result in substantial injury to the very property interests that the client is trusting the attorney to protect. Other exceptions include to comply with a court order or to the extent necessary to check for conflicts and, accordingly, ensure compliance with the attorney's duty of loyalty. In summary, confidentiality is always required, except for when it would be almost impossible to avoid disclosure while also avoiding severe harm, criminality or unethical conduct.
[9] MRPC 5.1, 5.2, 5.3.

The MRPC holds attorneys to the highest professional standards in "*promptly*" communicating with clients so that each client knows "what is happening on their matters and can participate *intelligently* in the representation."[10] How intelligently? According to the ABA, attorneys must provide information that is "reasonably understandable" to a "comprehending and responsible adult."[11] How promptly communication is transmitted is left to the attorney's judgment based on the urgency of the information needed and the decisions the information would inform. The ABA notes that "if a prompt response is not feasible, the lawyer, or a member of the lawyer's staff, [should] acknowledge receipt of the request and advise the client when a response may be expected."[12] Notably, the comments to Model Rule 1.4 conclude with a qualifier that can help attorneys deciding when it may be appropriate to withhold communication, specifically "when the client would be likely to react imprudently to an immediate communication."[13] Page 44

[10] *See* ABA Formal Opinion 500, *supra*, at page 3.
[11] Comments to Rule 1.4, www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/comment_on_rule_1_4/; see also ABA Formal Opinion 96-404 "Client Under a Disability" August 2, 1996.
[12] *Id*.
[13] *Id*.

In a perfect world, immigration practice is already rife with obstacles to our ability to effectively communicate with our clients. For example, in carrying out our duty to communicate effectively with clients, we as practitioners are expected to navigate and solve for language or cultural barriers that may impede on a client's ability to comprehend the pertinent legal guidance we seek to provide, whether through interpreters, translators, responsible adult family members, or even a particularly talented bi-lingual paralegal or colleague.[14] If those inherent communication challenges were not enough on their own, the inauguration of Donald J. Trump as the nation's 47th president has created a veritable minefield of communications challenges: the relentless implementation of dozens of executive orders impacting immigration practice, from the nebulous orders calling for 'extreme vetting' to more direct attacks on existing benefits granted to humanitarian parolees from Cuba, Haiti, Nicaragua, and Venezuela, among others. Moreover, the Administration's willingness to challenge court orders and long-standing policies further complicates the legal landscape and, in turn, the attorney's judgment as to when and what to communicate to their clients, whether at the individual or firm-wide level.

[14] ABA, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 500: "Language Access in the Client-Lawyer Relationship," Oct. 6, 2021, www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-500.pdf

Immigration attorneys must remain vigilant in identifying legal risks amid fluctuating policies and enforcement priorities. The rapid implementation of executive orders, administrative rule changes, and shifting judicial interpretations can drastically alter the legal landscape. Practitioners should therefore consider:

- ***Alerts:*** Stay updated on policy changes through government alerts by signing up directly with federal agencies, as well as through practice advisories from AILA and other legal organizations.

- ***Expect the Unexpected:*** Caution clients on risks associated with even 'slam-dunk' applications, as increased scrutiny can lead to unintended consequences such as enforcement actions or denials based on minor discrepancies or an officer's misunderstanding or misapplication of the law.

- ***Investigate Existing Clients:*** Review your database and ensure that important markers are maintained for each client so that you can quickly identify the pool of clients that may be most acutely impacted by a specific policy change (for instance, based on a particular nationality or visa type).

- ***Onboard New Clients with Care:*** Conduct thorough risk assessments for each client, avoiding making assumptions and reviewing past immigration history in its entirety, including prior removal orders, pending applications, and potential enforcement actions. Advise new clients up front that the legal landscape is constantly changing and that guidance provided today may very well change at a moment's notice, but that you will strive to promptly communicate those changes when relevant to your client's case. Transparent communications related to evolving legal risks will help ensure that client expectations are well managed *before* they make a decision.

- ***Ultra-Confidential Practices:*** Maintain strict confidentiality, as required by ABA Model Rule 1.6, ensuring that sensitive client information is not inadvertently disclosed, especially given heightened enforcement efforts. Even a piece of client data like an address should be handled with the utmost care. Page 45

- ***You Might Even Need to Be Patient (Sometimes):*** Consider whether holding off on conveying a potentially relevant piece of information may make sense, such as a news article or an unconfirmed report. As the comments to Rule 1.4 conclude, there are times when information may be withheld if the attorney believes that the client is "likely to react imprudently to an immediate communication."

The MRPC expects attorneys to provide honest and realistic assessments of potential outcomes while avoiding absolute predictions, communicating clearly the range of possible outcomes. Given the complex nature of immigration law practice in 2025, supervising attorneys should further ensure that their teams—subordinate attorneys and all staff—maintain the same principles in their communications. This may include regular training on confidentiality standards, especially when handling sensitive immigration data; establishing clear, firm-wide protocols for communication, ensuring all attorneys and staff provide consistent and ethical communications to clients, even if just an email to confirm their inquiry in under review; and establishing or updating internal compliance measures to avoid inadvertent disclosures or ethical breaches.

Managing an immigration practice in a volatile legal landscape requires diligence, adaptability, and a commitment to ethical representation. By assessing legal risks thoroughly, evaluating client options without bias, and effectively communicating likely outcomes—including honestly conveying to clients that little is certain in the current policy landscape—attorneys can navigate uncertainty while maintaining compliance with professional responsibilities.

MAKING CHOICES ABOUT LIMITING AREAS OF PRACTICE AND ENSURING YOU HAVE THE NECESSARY LEGAL RESOURCES

The American Immigration Council created a Fact Sheet in June of 2024 entitled, "How the United States Immigration System Works."[15] In that publication, an overview is provided of family-based immigration, employment-based immigration, per-country ceilings, refugees and asylees, the diversity visa program, other humanitarian forms of relief, and U.S. citizenship.[16] The final sentence of the publication reads, "The U.S. immigration system is a complex network of visas, humanitarian relief, pathways to permanent residency and citizenship, as well as temporary status for people facing specific crises in their home country."[17]

[15] American Immigration Council, "How the United States Immigration System Works," (Washington DC, June 24, 2024), www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works.
[16] *Id*.
[17] *Id*. at page 13.

Many immigration attorneys entered the practice with likely exposure to several areas of immigration law. As their practices developed, they may have eliminated certain areas while focusing more on others. While that is not to say that practitioners cannot have multiple areas of immigration within their comfort zone, it is our ethical responsibility to practice with competence and diligence as set forth by the MRPC in whatever areas we choose.

MRPC Rule 1.1: *Competence* instructs, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation Page 46 reasonably necessary for the representation."[18] *AILA Ethics Compendium* identifies that in an immigration context, lapses in competent representation might include the failure to meet a filing deadline due to a mistake in calendaring; failure to include crucially obvious supporting documentation with an application; or failure to seek the appropriate benefit or relief.[19] It is the second sentence of Rule 1.1 that outlines the four components that together define the concept of competence. As immigration practitioners, we develop our competence by utilizing the resources available to us, evaluating the complexity and specialized nature of the matter before us, and conferring with colleagues about the intricacies that each case presents. We grow as practitioners as our time practicing grows. We not only rely on the law but the experiences of our community and fellow attorneys.

[18] *See* MRPC Rule 1.1.
[19] *The AILA Ethics Compendium: Modern Legal Ethics for Immigration Lawyers* (2024) (www.aila.org/library/compendium), p.8.

Immigration law is regulated through many channels. To practice competently, immigration attorneys must navigate them all. It cannot be overstated that who controls the White House impacts the interpretation and practice of Immigration Law:

- ***Immigration and Nationality Act*** (INA §§101-507) (8 USC §§1101-1537)

    - The Immigration and Nationality Act (INA) was enacted in 1952. Providing the structure for immigration law, the INA has been amended many times over the years and contains many of the most important provisions of immigration law.

    - The INA is contained in the United States Code (USC), Title 8, "Aliens and Nationality."

- ***Regulations, Policy Manuals, Memorandum***

    - The general provisions of laws enacted by Congress are interpreted and implemented by regulations issued by various executive branch agencies. These regulations apply the law to daily situations.

    - After regulations are published in the Federal Register, they are collected and published in the Code of Federal Regulations, commonly referred to as the CFR.

    - The CFR is arranged by subject title and generally parallels the structure of the USC. Therefore, Title 8 of the CFR deals with "Aliens and Nationality."

    - Government agencies dealing with immigration also issue policies, memoranda, manuals, etc. that further detail how INA and CFR provisions are to be carried out.

- ***Executive Orders***

    - See, https://immpolicytracking.org/policies for executive orders and policy actions issued by the Trump Administration.

As of this writing (March 16, 2025), the Trump Administration has put forth 192 executive orders that directly target immigration law.[20] The impact of these orders greatly affects how immigration attorneys proceed with their practices. Prior to these orders, immigration attorneys may have been more willing to expand their practice areas because policies had been established and staying up to date with the subtle changes was attainable. Our current practicing climate is under great stress. Day-to-day announcements and directives are given by the Trump Administration that alter how we advise our clients. Page 47

[20] *See* https://immpolicytracking.org/policies/?after=2025-01-20.

For example, the (re)issuance of the Notice to Appear (NTA) Memo[21] has, and should, place pause in our practices. To be clear, a competent practice before the NTA memo included evaluating the consequence of a denied petition or application, but we also had the guidance of prosecutorial discretion that possibly interrupted the pipeline to removal proceedings. Today, the NTA memo strengthens the pipeline to proceedings. With a changing landscape, limiting our practice areas may be the shift necessary to ensure our competence so we can use our skills to dig deeper into our current cases and make space for the changes that we are seeing and the changes yet to come.

[21] USCIS Memorandum, "Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens" (Feb. 28, 2025), AILA Doc. No. 25030305.

Our immigration bar has invaluable resources and organizations at the forefront of these changes. Whether you are attending AILA roundtables, ILRC briefings, ASISTA forums, National Lawyers Guild/National Immigration Project webinars or convening with colleagues on Signal, WhatsApp, Facebook, or LinkedIn, sharing knowledge is a key component to competency.[22] Join relevant listservs that apply to your practice; take advantage of practice advisories issued by AILA and other expert and reputable organizations; monitor trustworthy websites.

[22] *See* www.aila.org; www.ilrc.org; https://asistahelp.org; https://nipblg.org.

When you are not fully competent to handle a client's issues in the current restrictive climate, refer the matter to an attorney who is. AILA chapters, such as Wisconsin, are drafting a document to share internally on "who is doing what" as a way to find proper referrals during these challenging times. It is imperative that we communicate not only with one another, but also with our clients and the communities we serve.

Now more than ever, "To know what you know and what you do not know, that is true knowledge."[23]

[23] Confucius.

RECOGNIZING WHEN YOU OR YOUR STAFF CANNOT DILIGENTLY REPRESENT A CLIENT OR ACCOMPLISH PROMISED WORK

All attorneys have ethical obligations of competence and diligence. MRPC Rule 1.1 provides that, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In addition to being competent, we also must be diligent in our representation: Rule 1.3 requires that we act with "reasonable diligence and promptness in representing a client."

These are extremely complicated times for immigration practitioners. Before accepting new clients, stop and consider that competent and diligent representation are the cornerstones of our duty to all our clients.

Pause and think about whether you are competent to represent new clients or if you have the time to become competent. For example, if you are a practitioner who has focused on family immigration but you would like to be available for clients who are detained or in removal proceedings, determine how you are going to become knowledgeable about the new area of Page 48 practice *before* agreeing to represent a detained client in a bond hearing. Expanding a practice area can be appealing and lucrative but make sure you have the time, resources, and mentors to acquire the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the new area of law.

Also consider if you can provide diligent and prompt representation to new clients. The MRPC Comment to Rule 1.3 describes conduct expected of a diligent lawyer, and includes, "A lawyer's workload must be controlled so that each matter can be handled competently." Consider that the following may result from the Trump Administration's executive orders and new policies: increased scrutiny of applications and less use of positive discretion; delays in adjudication; more frequent RFEs; more denials and issuances of NTAs. During uncertain times, clients are usually nervous; they have more questions and need more support. Be sure you and your staff are prepared to spend more time on even routine applications and respond to more frequent calls from clients. Diligent representation will require continual monitoring of updates on policy and rule changes. Do you and your staff have the capacity to handle the extra work without becoming overwhelmed or getting behind on other matters?

As you accept new clients, be sure your representation agreement addresses how you will be paid for extra work and longer-term relationships. Consider whether you should change from flat fee arrangements to an hourly fee or hybrid.

Expanding a firm's capacity with additional staff can be a good choice. An increase in clients can provide the opportunity to hire the new employees you've been thinking about—legal, paraprofessional, or administrative. However, before you hire legal or non-legal assistance, think about how you will ensure that they competently and diligently do their jobs.[24] Do you have a plan for their training and supervision, especially in legal matters unfamiliar to you?

[24] Before adding new employees or even lateral partners, be aware that Rules 5.1 and 5.3 obligate law partners, managing attorneys, or attorneys with supervisory authority, to ensure that the conduct of all lawyers in the firm conform to the MRPC (Rule 5.1) and that the conduct of non-lawyers is compatible with the professional obligations of the lawyer (Rule 5.3).

While it is often tempting to accept new clients because of the financial benefits or because the new work is interesting, note that Rule 1.16(a) prohibits representation of a client[25] if:

[25] *See* Cyrus D. Mehta, "Withdrawal of Representation in Immigration Practice" (April 3, 2018), AILA Doc. No. 12112043.

> (1) the representation will result in violation of the rules of professional conduct or other law;
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) the lawyer is discharged.

Weigh the benefits and costs of new client relationships:

- Do you have the competence—or ability to become competent—to handle the matter?
- Do you have the resources to diligently represent the client, including legal resources to conduct necessary research and stay up to date on the issues, staff resources to complete Page 49 the work (or your own time), necessary equipment (software and hardware) to get the case out the door, etc.?

- Will the client be willing and able to pay the fee for complicated or extended proceedings; or are you prepared and willing to reduce your fee if termination of the representation would prejudice the client?
- With your other caseload, will you be able to represent the new client diligently throughout the case?

Remember this sound advice from Cyrus Mehta: "The key issue is whether the lawyer is willing and capable to carry out the matter to its conclusion."[26]

[26] *Id*.

Finally, also consider how hard it is to terminate a relationship. While a full discussion of an attorney's obligations related to withdrawing from representation is beyond the scope of this article, terminating the relationship requires increased levels of ensuring your client's interests are protected and possibly notice to or permission of a tribunal. Rule 1.16(c), (d). Additionally, immigration practitioners must also consider the applicability of 8 CFR §1003.102(q)(3) and §292.4 before terminating a client relationship.

ADOPTING COPING MECHANISMS AND CULTIVATING RESILIENCE TO MEET THE CHALLENGES THAT WILL ARISE FOR US, OUR CLIENTS, AND OUR BUSINESSES

As I, Andrea Martinez, write this portion of the practice advisory, the Trump Administration 2.0 has been in office for less than six months, but it feels like it has already been six years. Every day brings a new onslaught of bad news and attacks. I feel exhausted already. Everyone does.

By the time we attend the AILA Annual Conference in June, we will have endured the madness for over five months. Our adrenal glands will likely be shot from so much of the fight-or-flight hormone coursing through our veins. Five months down, over three years to go.

Think about that. Our bodies can only handle so much stress before they start shutting down. If we live in fight or flight for four years straight, we run a significant risk of getting sick and/or burning out from the profession prematurely. I learned this the hard way during the Trump 1.0 Administration when I had a doctor diagnose me with adrenal fatigue. This time around, I am committed to not allowing anyone, especially Donald Trump, to have that much power over my health.

I am now more committed than ever to finding healthy coping mechanisms that I can instill in my life to ensure that *I* am in control of my emotions and well-being, not someone else. The way I see it: if I become miserable, bitter, or sick during the next four years…Trump wins. And I will *not* allow him to win in my life. Neither should you. We're better than that. I believe that our commitment to living healthy and thriving in life (not just surviving) is perhaps our most powerful statement of opposition to Trump's agenda. Our resistance. He wants to not just destroy our clients' lives, but ours as well. He wants us exhausted, so we quit. Page 50

Will you join me in intentionally committing to living a thriving, abundant, vibrant life (even and especially now)!? I believe that the best way to do this is to strategically implement healthy coping mechanisms in our lives that help build resilience deep within us. That is where our true power comes from. Resilience is perhaps the best kept secret to staying in the fight for the long haul. My law partner and I believe so strongly in this that we invest thousands of dollars a year in well-being efforts for ourselves and our staff.

I always appreciate specific steps to help me to do things, so I want to share some things that my law partner and I do inspire well-being in our team and cultivate resilience:

PERSONAL TIPS: PUT YOUR OWN OXYGEN MASK ON FIRST

The flight attendants tell us on every flight, "[i]n case of emergency, put your own oxygen mask on first before helping others." Being an immigration lawyer in the Trump Administration counts as an emergency. As the mother of two elementary-aged kids running an immigration law firm, I have to constantly remind myself that I MUST take care of myself first or I will not be able to take care of my family or my clients well. I felt selfish at first and struggled internally doing this, but now I have made the following habits part of my "thriving life" routine:

- **Therapy –** Monthly therapy sessions paid by my firm as a business expense.
- **Meditation –** My firm pays for the Calm app for each staff member. I try to use it daily to meditate after dropping my kids off at school, even if just for 10 minutes.
- **Exercise –** Two years ago, I hired a personal trainer to help me get more consistent at weightlifting. I now have the time with my trainer blocked on my calendar as a regularly scheduled appointment three times per week (M-W-F). The only time that I could guarantee that I would get the 1-hour workout in was during the workday, so my kids aren't around distracting me. The time is blocked on my calendar and the trainer is waiting for me at the gym, so I know I have to attend. I have learned that I really like working out before I pick the kids up from school! I get those happy hormones (endorphins) pumping during my workout and that helps me be in a better headspace when I get them. Sometimes this late afternoon workout means I have to catch up on work from my laptop while they're at evening practices on those days, but it's worth it to know that I got my workout in. Get your workout in at whatever time works best for you. Just make sure to get it in consistently!
- **Prayer/Metta Meditation –** I'm not always great at this one but I try to pray as often as I remember. When I pray, I name and release what I can't control and entrust those things to God (example: "The Serenity Prayer"). I also try to challenge myself to pray for my enemies, like government leaders I don't agree with, so that I can release unforgiveness and bitterness that might be building up in my heart. I pray blessings and wish good for them in my prayers if I can stomach it. This is super hard, but I know it is good for me. Prayer not your thing? Consider a loving-kindness meditation. This specific type of meditation, also known as a "Metta meditation," is a practice that cultivates goodwill and compassion toward oneself and others through the use of specific phrases (like "may they be happy, may they be safe, may they be well, may they be peaceful," etc.). Throughout the course of this meditation, you will be Page 51 challenged to direct positive thoughts toward yourself, neutral individuals, and those you find difficult to love.
- **Rest –** When my oldest child (my son who is now almost 13!) was born, I started taking Wednesdays off work. I will still respond to emails from the staff as needed on that day, but I don't go into the office. I spend my Wednesdays taking a much-needed midweek break doing whatever fills my cup. My staff is used to me being out of the office on Wednesdays and have grown to love it because the phone rings less when I'm not there having back-to-back appointments all day. And I love it because it helps me get caught up with errands I need to run, doctor appointments, lunch/coffee with girlfriends, and maybe even a massage (my firm sometimes pays for my and my staff's massages as well, BTW)! For those whose schedule may not permit a weekly day off, consider taking more regular "mental health" days or "personal" days as permitted. Remember to be intentional about blocking your schedule for these days off in advance so they don't get booked. On this day off, be selfish. Do whatever you want…and DON'T feel guilty about it! I give you permission! If a full mental health day isn't an option for you, try to be intentional about including some extra "me" time in between appointments, longer

lunches at least one day a week, and/or a one-hour block at the end of the day so you have time to wrap up before going home. At our office, we have created a “quiet room” where staff can lay down on a yoga mat in a peaceful setting and listen to calming music during their break times.

PROFESSIONAL TIPS

- **Eat Your Frogs**[27] **–** Identify one challenging task (the frog) and complete the task first thing in the morning (eat it)! This helps you prioritize and makes you more productive the rest of the day.
- **Block Time for Priorities –** Controlling your calendar is an essential skill. I block everything in my calendar (except my bathroom breaks, which I’m realizing I might need to start doing!). I use Tuesdays and Thursdays for client appointments and consultations with potential clients. Mondays are blocked for management-related activities such as my weekly case meeting with my legal assistant, the firm’s management meeting, and other admin-related activities. Fridays are generally used for our all-staff “Team Meeting” (more on that below) and then I go to lunch with colleagues or attend CLE webinars. I have to be the boss of my time, or my time quickly starts to control me, and I feel chaotic. When time is blocked for priorities, everything else seems to fall into place and I have more peace. For those who have more rigid schedules, consider blocking longer than needed for appointments so you have a buffer before and after the court hearing, etc.
- **Say No –** As my therapist says, “NO is a complete sentence.” If you sniff out a high maintenance client that is going to be a headache for you or rude to staff, for example, you have the right to decline representation. Yes, everyone deserves representation, but not everyone deserves to be represented by YOU. I believe that we as attorneys must protect not only ourselves but also our staff from clients who are going to drain everyone’s energy and waste our time. The best way to do this is to “JUST SAY NO” Page 52 to potential clients (and also potential employees during the hiring process!) who are going to cause problems or add drama to the work environment. In our firm, we have a no-drama, no gossip policy among our team members. We often say, “our clients’ cases have enough drama for us all and we don’t need any more.” Protect everyone’s peace by saying no and setting boundaries as needed.
- **Set Realistic Expectations –** It is our responsibility to set expectations for our clients, but we also are responsible for setting expectations for ourselves and our staff. We need to be realistic about the fact that the stresses and demands of our practices ebb and flow. There are very stressful times and there are times of less stress. Administrations change. Tides turn. It will not always be easy and there won’t always be pro-immigrant officials in office. It is our duty and challenge to stay focused every day on what we can control and be realistic about what we can’t. That’s how we persevere in hard times and outlast the challenging administrations that come and go. Truly successful people outlast their opposition, and they do so by setting realistic expectations about the pendulum of life and politics from the start.
- **Celebrate the Wins –** Every Friday morning in our office, we have a Team Meeting where we intentionally put our phones on Do Not Disturb and talk about our highlights and victories for the week. We encourage the team to celebrate not only client wins but also something their fellow staff members did that they appreciated or admired. It’s amazing to watch the power of a few simple words of encouragement. It is a huge morale booster. We prioritize this Team Meeting over answering calls as an intentional act of encouraging a positive, unified firm culture. We believe that celebrating our clients’ wins and our staff’s successes helps each one of us fulfill our firm’s mission of “serving immigrants with excellence.”
- **Negotiate for More Autonomy**–If you’re in an employment situation where you have little autonomy or ability to utilize some of these important tools, try negotiating with supervising attorneys or firm management for more flexible time and control over your schedule. Be prepared to explain how you will still be able to handle your work. If feasible for you, you could request reduced work or billable hours in exchange for a salary or bonus reduction. If necessary to save your health, consider looking for a different employer or even starting your own firm managed the way you think is best!

[27] Tracy, Brian. *Eat That Frog!: 21 Great Ways to Stop Procrastinating and Get More Done in Less Time*. Third edition. Berrett-Koehler Publishers, Inc, 2017.

CONCLUSION

As lawyers, we clearly have an ethical obligation to take care of ourselves: we cannot comply with the standards discussed if we are overwhelmed and exhausted or facing a debilitating mental or physical condition. Our professional rules provide a framework for attorney conduct that can strengthen our resolve to balance time devoted to work with attention to staying healthy.

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Make the Rules Work for You: The Duty of Care and Tools for Remaining Healthy in the Current Regulatory Climate

by Lynn Calder, Jack Jrada, Mary O'Leary, and Teodora D. Purcell

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ABSTRACT

The ethical duty of competence extends beyond technical legal knowledge: it encompasses the mental, physical, and emotional well-being necessary to sustain effective representation. This practice advisory examines the duty of care under the American Bar Association (ABA) Model Rules of Professional Conduct, explores the link between attorney wellness and ethical competence, and offers practical strategies for maintaining balance in today's turbulent immigration environment.[1] Where many ethics advisories seem to carry an implied threat, we seek

[1] This article will reference the ABA Model Rules of Professional Conduct (MRPC); each state's rules of professional conduct must be consulted for any variance. See also AILA's valuable ethics publications and resources for additional discussions (www.aila.org/ethics) and The AILA Ethics Compendium: Modern Legal Ethics for Immigration Lawyers (2024). Furthermore, as discussed in a recent article by Christopher Roth, immigration attorneys practicing in states

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to reframe "the duty of care" as an opportunity to welcome attorney wellness as a fundamental component of professional competence.

INTRODUCTION: PRACTICING THROUGH UNCERTAINTY

We are living and practicing in a period of extraordinary uncertainty. Policy reversals, uneven adjudication trends, and aggressive enforcement have created persistent turbulence across the field of immigration law. For many practitioners, the stressors now extend beyond complex caseloads — they permeate our communities, families, and personal lives.

It is often said that "the root of suffering is uncertainty." Whether we consciously realized this or not when we entered law school and took our oaths as attorneys, we assumed the burden of spending our work lives assessing, avoiding and mitigating risks. Few of us, though, could have anticipated where we find ourselves today. Immigration attorneys are expected to provide answers and stability to worried clients in an environment that defies predictability. We are mandated to remain current with evolving technology, as artificial intelligence (AI) is transforming our practices with tools to boost our productivity and simultaneously challenging our ethical responsibilities to protect client confidentiality; while government agencies increasingly use AI to engage in pattern detection, data matching, and social media monitoring tools in the adjudication of benefits and targeting enforcement operations.[2] The myriad of legal, technological and political create and amplify emotional and cognitive pressures that, if left unaddressed, can affect client service and professional judgment.

National and state bars and bar associations have increasingly recognized that maintaining physical and mental health is an essential part of meeting ethical responsibilities. While effective implementation of bar recommendations is still very much a work in progress in daily practice and legal culture, there is a growing acceptance that self-care is not selfish and lawyer well-being is not an indulgence: rather, they are integrity-driven aspects of professional competence.

THE ETHICAL FRAMEWORK: WELL-BEING AS AN ELEMENT OF COMPETENCE

The *American Bar Association Model Rules of Professional Conduct* establish competence and diligence as central ethical duties. Less often discussed, however, is the inherent recognition that maintaining wellness is foundational to those duties. The ethical obligations presuppose a lawyer's capacity to function with clarity, judgment, and emotional stability. A 2017 Report by the National

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where they are not licensed should be aware of how each state's rules of professional conduct are applied. *See*, Christopher Roth, "Who Has Jurisdiction Over Multijurisdictional Immigration Lawyers?" AILA Doc. No. 26041062 (posted April 10, 2026).

[2] *United States v. Heppner* (S.D.N.Y. 2026), underscores that the technological competence required of practitioners is not static; it demands ongoing vigilance. Maintaining that vigilance—understanding how AI systems interact with client data, vetting third-party platforms, and counseling clients on digital hygiene—requires cognitive bandwidth that burnout and chronic stress directly erode. The ethical imperative to slow down, then, is not a concession to weakness. It is a recognition that competent, diligent, and confidential representation in this environment demands the sustained clarity that only a healthy practitioner can provide.

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Task Force on Lawyer Well-being concluded: "To be a good lawyer, one has to be a healthy lawyer."[3]

ABA Model Rule 1.16(a)(2) provides that a lawyer "shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if … the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."[4] The rule imposes a clear ethical boundary: when a lawyer's well-being declines to the point of impairing representation, continued advocacy is no longer permissible.

There is little caselaw interpreting Model Rule 1.16(a)(2) and its state corollaries, but the concept of attorney impairment has been applied to both physical and mental conditions, principally in the context of substance abuse, professional burnout, and mental and physical illness. Disbarment has most often occurred where the impairment has spiraled out of control, where it is apparent that a successful return to practice is not likely.[5]

In the recommendations by the 2017 Report by the National Task Force on Lawyer Wellbeing and state bar association reports citing the National Task Force's Report, an emphasis was placed on discouraging discipline of struggling attorneys, sanctioning only "actionable misconduct", and favoring a more cooperative approach including treatment and support. The recommendations were "intended to remind lawyers that their mental and physical health impacts clients and the administration of justice, to reduce stigma associated with mental health disorders, and to encourage preventive strategies and self-care."[6]

California Rule of Professional Conduct 1.16(a)(3) contains a rule analogous to Model Rule 1.16(a)(2).[7] Some states, including California and North Carolina, have further acknowledged the link between wellness and competence through CLE mandates.[8]

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[3] The Path to Lawyer Well-Being: Practical Recommendations for Positive Change, National Task Force on Lawyer Well-Being: www.americanbar.org/groups/professional_responsibility/committees_commissions/standing-committee-on-professionalism/the-path-to-lawyer-well-being-practical-recommendations-for-pos/ . Created in 2016, the Task Force was conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL) and includes the following participating entities: ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; National Conference of Chief Justices; and National Conference of Bar Examiners.

[4] Model Rules of Pro. Conduct r. 1.16(a)(2) (Am. Bar Ass'n 2020).

[5] "Model Rule 1.16(a)(2): Where Wellness Meets Withdrawal," By Mark J. Fucile, The Professional Lawyer, Vol. 27, No. 1, (Oct. 2. 2020), www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/model-rule-116a2-where-wellness-meets-withdrawal/

[6] "The Path to Lawyer Wellbeing" at 26.

[7] Cal. Rules of Pro. Conduct r. 1.16(a)(3) (State Bar of Cal. 2023).

[8] Effective February 1, 2023, the California State Bar requires one hour of training specifically addressing attorney well-being or competence per compliance period. State Bar of California, *New MCLE Requirements Effective February 12, 2023,* available at https://www.calbar.ca.gov. Of the 24 hours of CLE required by the North Carolina State Bar every two years, at least one must be a professional well-being hour (formerly substance abuse/mental health awareness training). *See* 27 NCAC 1D, Sections .1500.

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Other states, including Michigan, Louisiana, Alabama and Colorado, among others, have made recommendations and launched a variety of lawyer wellness programs. Unfortunately, too many states' recommendations and intentions have not yet been incorporated into their rules.

Properly interpreted, Model Rule 1.16(a)(2) and related provisions safeguard both clients **and** attorneys. By grounding the rules in reasonableness, they allow practitioners to assess workload, conflicts, and capacity before representation becomes ethically untenable. The Model Rules, viewed through a wellness lens, support and encourage attorneys to build a sustainable legal practice rather than serving as an ominous threat of disciplinary action always hanging over practitioners.

Indeed, the ethical framework provides more than a floor for competence: it offers what might be understood as built-in release valves. Model Rule 1.16(a)(2) does not merely permit withdrawal when a lawyer's condition impairs representation; it requires withdrawal. Conflict-of-interest provisions invite—and at times demand—that attorneys evaluate whether they can serve a client's interests without compromise.

Further, the reasonableness standard that runs throughout the Rules recognizes that what constitutes adequate performance varies by individual circumstance, career stage, and life phase. A new solo practitioner, for instance, navigating an unfamiliar practice area during a period of systemic upheaval faces different pressures than a seasoned partner winding down a decades-long career. Aging attorneys, on the other hand, may face changes in their cognitive and physical abilities, requiring firms and solo practitioners to be proactive in communicating about and navigating a transition toward retirement with dignity. The Rules account for this. Read holistically, they grant attorneys permission to set limits, to decline matters that exceed their present capacity, and to step back when doing so serves both the client and the profession.

RECOGNIZING IMPAIRMENT: WHEN STRESS INTERSECTS WITH PROFESSIONAL DUTY

The pressures of an immigration practice cannot be ignored: as practitioners and as employers we face an unpredictable system where mistakes are seldom forgiven, enforcement measures are erratic and unjustified, exposure to stories of trauma and systemic instability is common, and clients insist on clear answers, often unrealistically dreaming that they will not be impacted by current trends . Over time, these pressures and resulting chronic stress can have physical and mental health consequences, including high blood pressure, headaches, digestive and sleep issues, fatigue, anxiety, cynicism and loss of joy in the profession, and depression, among others . Stress, burnout and prolonged emotional strain can erode concentration and empathy. Persistent uncertainty can lead to anxiety and overwhelm, fostering "analysis paralysis" and self-doubt. Vicarious trauma may ensue as a result of constant exposure to client suffering, leading to practitioners experiencing symptoms of post-traumatic stress. Recognizing these patterns should motivate attorneys to take measures to preserve competence and promote a healthier, sustainable worklife .
Failing to address such conditions risks violating the duty of competence under Model Rule 1.1.[9] Trauma-informed practice, setting boundaries, recognition of the physical and emotional toll

[9] Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 2020).

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of immigration practice, and seeking support all help prevent impairment. All states and Washington, D.C. have Lawyers Assistance Programs that provide confidential support for recovery and balance.[10]

SETTING REALISTIC EXPECTATIONS

For Clients

Ethical counseling demands honesty and context. Immigration attorneys must recognize that the legal landscape might no longer favor outcomes which were previously achievable. Communicating this reality transparently aligns with Model Rule 2.1, which requires a lawyer to exercise independent judgment and render candid advice in the role of Counselor or Advisor.[11] The Comments to Model Rule 2.1 recognizes the reality that providing candid legal advice can involve "unpalatable" or "unpleasant facts and alternatives" that a client might not want to face. Model Rule 2.1 provides that "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." This rule and the accompanying Comments provide a sober but critical reminder that, even when outcomes fall short of what we or the clients hope, guiding clients through next steps provides them clarity and agency over their future — itself a valuable form of advocacy.

For Yourself

Lawyers sometimes mistake being competent for being all-powerful. Particularly in times when it might feel that everything we value is under attack, we may be tempted to take on more cases or more complicated cases, it is important to set realistic expectations that acknowledge your own limits. Overextending yourself not only lowers your effectiveness but also raises the risk of ethical issues. Balancing ambition and zealous representation with an awareness of human limitations is wise and demonstrates true professionalism. Challenging times compel us to recognize that our work is valuable, but outcomes - whether positive or negative - do not define our value as lawyers or as humans.

To competently (Rule 1.1) and diligently (Rule 1.3) represent existing clients and any new ones—in this environment of ever-changing policies and adjudication trends—practitioners must weigh the benefits and costs of new client relationships:

- Do you have the competence, or ability and time to become competent, to handle the matter—especially important to consider if expanding into a new practice area?
- Do you have the resources to diligently represent the client, including legal resources to conduct relevant research and stay current on the issues, staff resources to complete the work (or your own time), and necessary equipment (software and hardware) to get the case out the door and filed?
- If you plan to hire additional staff, are you able to provide necessary training and supervision? Having a plan in place will ensure you will not be even more burdened with staff demanding your attention for each new task.

[10] See https://www.aila.org/library/lawyer-assistance-programs-directory.
[11] Model Rules of Pro. Conduct r. 2.1 (Am. Bar Ass'n 2020).

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- Will the client be willing and able to pay the fee for complicated or extended proceedings; or are you prepared and willing to reduce your fee if termination of the representation would prejudice the client?
- With your other caseload, will you be able to represent a new client diligently throughout the case? The MRPC Comment to Rule 1.3 describes conduct expected of a diligent lawyer, and includes, "A lawyer's workload must be controlled so that each matter can be handled competently." Consider the capacity of your office to handle the extra work without becoming overwhelmed or falling behind, resulting in increased stress for everyone.

For Staff

Supervisory duties under Model Rule 5.1 extend to staff welfare and workplace tone.[12] Before adding new employees or even lateral partners, be aware that Rules 5.1 and 5.3 obligate law partners, managing attorneys, or attorneys with supervisory authority, to ensure that the conduct of all lawyers in the firm conform to the MRPC (Rule 5.1) and that the conduct of non-lawyers is compatible with the professional obligations of the lawyer (Rule 5.3). It is essential to recognize that paralegals and support staff are integral to the success of any legal practice. Their well-being directly impacts the quality of client service and the overall effectiveness of the firm. Supervisors should provide regular check-ins to address concerns, ensure access to resources that support emotional and mental health, and encourage a culture of mutual respect and appreciation. Transparent communication, reasonable workloads, and attention to secondary trauma among paralegals and assistants foster a healthy, competent team.

JOY AND MEANING AS A FORM OF RESILIENCE AND RESISTANCE

Resilience is often misunderstood as toughness. In fact, it is about sustainability—the capacity to recover, persist, and find meaning amid adversity. True resilience arises from core skills that we can develop over time, including emotional flexibility, the ability to acknowledge sorrow while still celebrating progress, empathy, optimism and confidence in our abilities, as well as obtaining support from relationships, community, and faith or spirituality. Resilience draws strength not from denial, but from perspective. Choosing joy and connection is not escapism; it is resistance that empowers sustained service.

Many neurobiology scholars believe the ability to observe and dispute negative self-talk is fundamental to resilience. Consequently, amid crisis-driven practice, even small victories — a client's naturalization oath ceremony, a granted work permit, a reopened case, a calm client conversation — deserve recognition. Affirming these moments restores purpose and counters systemic fatigue. We can celebrate these small wins individually but also develop ways to acknowledge them as a firm or organization to contribute to staff morale.

TOOLS FOR SURVIVAL: PRACTICAL DO'S AND DON'TS

- Avoid substance-based coping. The 2016 Journal of Addiction Medicine study identified heightened substance use among American attorneys. Coping through mindfulness, exercise, or therapy aligns with ethical self-stewardship.

[12] Model Rules of Pro. Conduct r. 5.1 (Am. Bar Ass'n 2020).

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- Maintain physical health. Sleep, nutrition, and movement sustain clarity.
- Allow grief. Bearing witness to client loss necessitates emotional processing.
- Practice self-compassion. Rather than reacting with negative self-talk and self-blame for an adverse decision, mistake, or simple bad day, speak to yourself with kindness as if talking to a friend or your own child. Self-compassion is not selfish or indulgent; it builds inner strength and resilience, helps you learn from mistakes, reduces anxiety and stress, and helps change your mindset from perfectionism to growth.
- Set media boundaries. Step back from exposure that fuels secondary trauma. If you pick up your phone first thing, buy a stand alone alarm clock to delay opening your email, social media or news apps. Listen to music or an audiobook on your way to work instead of the news. Find alternative ways to decompress at the end of the day: a long run or short walk, playing a game with your kids, put on music and dance while you're cooking dinner.
- Lean on your network. Mutual support prevents isolation. Think of law practice as a relay race — each role contributes equally to collective progress. [8] Avoid "trauma Olympics" - comparisons that devalue your contribution to our fight against injustice.
- Strengthen your identity outside the law. As one Michigan Bar Journal article noted, lawyers can become "addicted to suffering" — defining identity through struggle itself. Worth is not measured solely by client outcomes. Build identity through family, friendship, faith or spirituality, and creativity.
- Cultivate gratitude. Keep a gratitude journal of specific things you're thankful for, while focusing on the actual feelings; jot down one good thing that happened at the end of each day; or send a note to someone thanking them for something specific. Such acknowledgements have been proven to help with better moods, more optimism, stronger social connection, and even better sleep.
- Find joy and humor. Hobbies and laughter restore judgment and resilience. "Finding joy . . . means doing the hard work of shifting our focus as often as possible to appreciate the good that's happening. It's how we can gather the energy to do the important work."[13]

CONCLUSION: REFRAMING THE DUTY OF CARE

The duty of care begins with self-care—not as an aspiration, but as a professional prerequisite. The ethical rules already recognize this. Rule 1.16(a)(2) requires withdrawal when impairment materially affects representation; Rule 1.1's competence mandate now extends to understanding rapidly evolving technology; Rule 1.6 demands the cognitive bandwidth to evaluate confidentiality risks that did not exist five years ago. These are not abstract obligations. They are protective measures the profession built into its own framework, including implied permission to set limits, step back, and recalibrate before the quality of representation suffers.

Resilience is not the capacity to absorb unlimited pressure. It is the sustained ability to do this work well, across shifting administrations, evolving technology, and the accumulated weight of our clients' stories. That sustainability requires deliberate choices: managing information consumption, investing in community, recognizing when responsible coping becomes something else, and finding joy not as escapism but as an act of professional endurance. The regulatory climate will continue to change. The tools we use will continue to evolve. The one constant is that

[13] "Claiming joy as an act of resistance," by Shamillah Wilson, June 10, 2024, https://shamillahwilson.com/claiming-joy-as-an-act-of-resistance/

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competent, ethical representation depends on lawyers who are healthy and resilient enough to provide it.

In an era of uncertainty, our greatest act of professionalism may be the deliberate cultivation of balance. By setting realistic expectations, embracing resilience, and reconnecting with meaning, attorneys better serve both their clients and themselves.

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