

SYMPOSIUM PANEL DISCUSSION

CONTEMPORARY ISSUES IN IMMIGRATION LAW

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Panelists

VINH DUONG,* ROSE HERNANDEZ,** DOUG RUSSO,*** & CHAY
SENGKHOUNMANY****

Moderator

JEFFREY USMAN†

Nicole Chanin:‡ Hello and welcome back, everyone. We're excited to introduce you to our local attorney panel. We have four incredible attorneys from here in Nashville, Tennessee that I'm excited to introduce to all of you. First is Mr. Vinh Duong. Mr. Duong earned his J.D. from American University. He's a Partner at Waller. In his immigration practice, he assists a broad spectrum of industries, ranging from early startups to large multinational corporations, with their international talent acquisition and regulatory compliance needs. Welcome, Mr. Duong.

We have Ms. Rose Hernandez. She earned her J.D. from Vanderbilt University School of Law. She is a Founding Partner at the Saev Hernandez Immigration Practice, where she focuses on permanent residence through employment, particularly the labor certification process. She also works on family-based immigration and humanitarian cases. Ms. Hernandez volunteers for the Tennessee Immigrant and Refugee Rights Coalition,

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TIRRC, as the supervising attorney for its Welcoming Tennessee naturalization clinics. Welcome, Ms. Hernandez.

We also have Mr. Doug Russo. Mr. Russo earned his J.D. from Belmont University College of Law, where he was one of the founding members of the Belmont Law Review. He's the Managing Partner of the Rose Immigration Law Firm. Mr. Russo works primarily with business immigration clients and also has a strong interest in working with foreign national musicians. Welcome, Mr. Russo.

Last, but not least, we have Ms. Chay Sengkhoumany. She earned her J.D. from Georgia State University College of Law. She currently serves as the Lead Immigration Attorney at the Legal Aid Society of Middle Tennessee and the Cumberland. With the Legal Aid Society, she directs the Survivors Immigration Legal Project and provides immigration legal services to survivors of domestic violence, sexual assault, and stalking. Welcome, Ms. Sengkhoumany.

The moderator for today's panel will be Professor Jeffrey Usman. He's our faculty advisor here at Belmont College of Law. We're excited to kick this off. Professor Usman.

Jeffrey Usman: Thank you, Ms. Chanin. One of my favorite parts of this symposium is the aspect that the Belmont Law Review has incorporated in terms of bringing practitioners in to offer some perspective in terms of the issues that we're tackling today. We've had some wonderful presentations already this morning. I know we've got some wonderful presentations ahead of us this afternoon. I'm really looking forward to the insights that we're about to gain here. I think part of that is starting with getting a sense for everyone's feeling of where you're situated in terms of immigration law issues. Each of you has a practice that actively involves you in immigration law matters. I wonder if you could each take a few minutes and tell the audience a little bit about what you do and how your practice immerses you in immigration law matters. Mr. Duong, if you don't mind leading us off.

Vinh Duong: I'd be happy to. Thank you, Professor Usman. Thank you all for inviting me to participate in this symposium. I'm excited to be here. My practice is a corporate business immigration practice with a specific focus on healthcare immigration. I would say probably about 75% of what we do at Waller from our immigration group is healthcare-related, working primarily with international physicians, nurses, physical therapists, and other allied healthcare professionals. We do everything turnkey, start to finish in terms of processing all of the visas and J-1 waivers for all of our doctor clients as well as healthcare systems that we represent. Outside of the healthcare space, we also have a pretty diversified portfolio of clients ranging from, as Nicole said, early startups to multinational companies that are transferring personnel to and from the U.S. from abroad.

Jeffrey Usman: Ms. Hernandez, do you mind offering the audience a sense of how your practice immerses you in immigration law matters?

Rose Hernandez: I do what I think is a wide variety in terms of immigration cases, but none of us can really reach every corner of immigration law nowadays. There are too many details involved with each sub practice area. However, I handle employment-based immigration, work visas, and green cards for employees of my company clients. I also work with families on permanent residence cases. One of my favorite things is handling waiver cases to obtain permanent residence for spouses of U.S. citizens, particularly those who are currently undocumented. Also, I work on some U Visa applications in the humanitarian realm. I don't work on asylum cases or removal defense. Those are the areas I don't reach in my particular practice, but I like getting a wide variety. It keeps the days interesting.

Jeffrey Usman: Mr. Russo.

Doug Russo: First, I want to say thank you, Professor Usman, for having me. I'm very honored to be here, especially having graduated from Belmont, and especially having three other associates at our firm who are Belmont grads as well.

In terms of the practice with our firm, it's like Rose. We try to be somewhat balanced. A majority of the practice is business immigration-related, both nonimmigrant or temporary work visas, and work status for foreign nationals. A lot of those come from professional industries, such as engineering and computer science. We also focus on entertainment—non-immigrant status types for musicians and other entertainers and artists. Along with that, we handle the permanent residence cases for those professional workers and artists. On the family side, we probably do about thirty percent family and humanitarian work, which might include family sponsorship for permanent residence. It might also include humanitarian cases such as U Visa, temporary protective status, and some other categories like that.

Jeffrey Usman: Ms. Sengkhoumany, I wonder if you could offer us a little bit of a sense of what your practice involves?

Chay Sengkhoumany: Thank you so much for having me. It's an honor to be on this panel with some great practitioners. Unlike Rose and Doug, I practice a very narrow part of immigration. Working at Legal Aid Society, we get federal funding from the Legal Services Corporation, which means that there's a lot of strings attached to the money that we receive. We are prohibited by federal regulation from representing most undocumented individuals. There are exceptions to that, and so my practice lives in one of those exceptions. We serve victims of domestic violence, sexual assault, and human trafficking. The bulk of my work is dealing with Violence Against Women Act self-petitions, which is ancillary to the family immigration realm. I also handle U Visas and T Visas, which are

visas for victims of crime and victims of human trafficking. Right now, we're not doing a whole lot of asylum cases simply because the immigration court is in Memphis, and resources are pretty limited to travel back and forth.

Jeffrey Usman: Thank you all. In terms of launching us off here, DACA¹ has been front and center in many respects and has been part of the conversation this morning at the symposium. It certainly attracted a great deal of attention in terms of media focus on immigration law matters. I wonder if you could give us some insight in terms of the shifts that have occurred between the origins of DACA with the Obama administration, into the Trump administration, and now into the Biden administration. Please walk us through the practical, real-world consequences and realities in terms of those shifts with regard to approaches to DACA. Ms. Hernandez, I wonder if you could start us off in that conversation.

Rose Hernandez: Sure. From my perspective, DACA has been such an emotional rollercoaster over the last years. I remember when DACA was first announced. It was actually the year that the AILA annual conference was held in Nashville. It was such an exciting moment to celebrate here in our hometown that the DACA was announced as we were having our big professional conference. It was so exciting, and we were very hopeful that the DREAM Act² would soon be passed as well. People settled into a regular rhythm, renewing DACA every two years at a certain interval before expiration. Then, the Obama administration attempted to expand DACA to a greater number of possible applicants and to have their statuses last longer. That attempt was set aside by the Supreme Court, which was a disappointment.³

Then, of course, DACA was ordered to be ended during the Trump years, only to be salvaged by the courts.⁴ It's been really difficult for hopeful DACA registrants. Recently, there was a federal district court judge that effectively limited DACA to basically only the people that have already had it these past nine years.⁵ I had some new DACA applications pending that are now just suspended. Those clients of mine are obviously frustrated and concerned. We've been through the wringer, and I think DACA is emblematic of that just as much as any other immigration program that has gone so up and down.

Jeffrey Usman: Ms. Sengkhounmany, I wonder if there's anything that you can add in terms of that discussion with regard to these shifts that

1. *Department of Homeland Security's Program of Deferred Action for Childhood Arrivals (DACA)*, 17 A.L.R. Fed. 3d Art. 3 (2016).

2. DREAM Act of 2011, S. 952, 112th Cong.

3. *United States v. Texas*, 136 S. Ct. 2271 (2016).

4. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

5. *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021).

we've seen over the course of three administrations and the experiences on the ground of these people who have been impacted by DACA.

Chay Sengkhoumany: Yes, I absolutely agree with Rose. It's been a rollercoaster, not only for the clients, but for practitioners as well. The reoccurring questions become: Do we file? Can we file? How do we file? When do we file? With processing times taking so long, the equation of when to file has become a big part of practice. If you file too soon, you may not get enough time in your renewal. If you file too late, your work permit may expire before you get a renewal. It's been harrowing, to say the least. What we really need is a permanent fix. Right now, DACA is not even a regulatory solution. It is created through memorandum, and it can be ended and changed at a rapid pace.⁶ We really need a permanent solution so that our clients can have some stability. Having to file every two years, when it's taking maybe six months to get a decision, is costly and stressful.

Jeffrey Usman: On that permanent solution side of things, DHS has recently announced a notice of proposed rulemaking.⁷ Where do you see that going with the Biden administration in terms of the likelihood of something that is more permanent, that creates more stability and structure? How do you see that moving forward with this administration?

Chay Sengkhoumany: I think that a proposed rule is a band-aid on the court case that said to get rid of DACA.⁸ Because DACA was created through memorandum, rather than a regulation, some states attacked the program and said that it violated the Administrative Procedure Act and that it's not legal.⁹ This current proposed rule addresses that. It doesn't really address the long-term, permanent status for our Dreamers. DACA is not an immigration status. It is an executive decision to essentially defer deportation enforcement. As the law stands right now, it doesn't lead to permanent status. Unless something changes, it can be taken away, and our Dreamers are going to have to continue to renew their DACA. In many states, they're not eligible to hold certain licenses.¹⁰ Nursing licenses, for instance, are not always available to DACA recipients.¹¹ So there are still a lot of roadblocks to having this non-status, per se.

Jeffrey Usman: Ms. Hernandez, I wonder if there's anything you want to add in terms of where you see the Biden administration going with

6. *See supra* note 1.

7. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (proposed Sept. 28, 2021) (to be codified at 8 C.F.R. pts. 106, 236, 274).

8. *See Texas v. United States*, 2021 WL 3025857.

9. *Id.*

10. Ann Morse et al., *Deferred Action for Childhood Arrivals | Federal Policy and Examples of State Actions*, NAT'L CONF. OF STATE LEGISLATORS (Apr. 16, 2020), <https://www.ncsl.org/research/immigration/deferred-action.aspx> [<https://perma.cc/Q9QC-GS55>].

11. *Id.*

regard to the DHS's announcement of this proposed rulemaking. How do you see things developing over the course of the Biden administration?

Rose Hernandez: Honestly, I'm disappointed that the rulemaking process that was initiated didn't take any steps to expand DACA beyond the current group of registrants. DACA is only available for people who entered the United States by June 15, 2007.¹² That number of people gets smaller all the time. That was quite a long time ago, and there are a lot of people who otherwise fit the criteria of DACA that aren't able to apply. Hopefully, once the core existing group of DACA registrants is further insulated and protected, we can go forward and widen the group of people who are eligible to apply. That's what I would like to see happen in terms of the administration. Of course, really what we want is for a more permanent solution to be enacted by Congress. That, unfortunately, is unrealistic at this time. I really hope that once we get a good APA rule in place that we can then implement another rule that has an expanded eligibility.

Doug Russo: Professor Usman, if I can add one thing. I would expect that the Biden administration will need to be prepared to defend that rule in federal court because it's likely to be challenged by the states—the same states that challenged the executive orders and the memoranda. I wouldn't be surprised if those same states decided to try to challenge the federal rule that's being promulgated. Then, it's a question of: What does the administration have the power to do? I know you can analyze that constitutional law question.

Jeffrey Usman: Thank you, Mr. Russo. I want to shift focus just a little bit off of DACA. Our last presentation, before this panel started, involved a couple of immigration attorneys in Canada who offered a work-based visa understanding. I think that insight brings us into something to explore here in terms of U.S. immigration law with the H-1B visa.¹³ Mr. Duong, there are some folks in the audience who are very experienced immigration attorneys, and there are others who are simply curious about the topic. I wonder if you could start the audience out with a sense of what exactly the H-1B is. Maybe reflect a little bit on what's working, what's not working, and what reforms might be needed with regard to the H-1B visa.

Vinh Duong: Sure, I'd be happy to. Just to give you broad strokes on the H-1B program—it is essentially a visa category that's reserved for professionals coming to the U.S., where the position that they're being offered by a U.S. employer, for example, requires a bachelor's degree in a specific field, and the individual who the employer is sponsoring possesses a bachelor's degree in that specific field.¹⁴ The program has been around for a long time. It is probably the most utilized visa in our alphabet soup of visas, but it is limited in scope in terms of its availability. There are only

12. *Supra* note 1.

13. *See* 8 U.S.C. § 1184 (2021).

14. *Id.*

85,000 H-1B visas available every year for first-time filers.¹⁵ If you are filing an H-1B for the very first time, there is a ceiling on a number of visas that DHS can approve in a fiscal year.¹⁶ They set aside 65,000 for people with a bachelor's degree, and then an extra 20,000 for people with a U.S. master's degree or higher.¹⁷

The program has been around for a long time, but it's extremely outdated. There have been really no substantive changes to the H-1B program since the 1990s. A few years ago, DHS introduced a change to the program where they would allow individuals to file an H-1B registration to get their name added into the lottery system.¹⁸ Over the years, what's happened is the H-1B program has been really oversubscribed. There are just not enough visas to support the demand for that category by U.S. employers. For as long as I can remember, every fiscal year when the program opens up, they've always run out of H-1Bs within a day or two of opening up the program. I think on average, DHS receives an excess of approximately 200,000 H-1B visas every year for only 85,000 slots.¹⁹ There's a clear supply and demand issue there.

Under the Trump administration, they tried to propose changes to the definition of specialty occupation. Thankfully, that has not yet reared its ugly head. In terms of changes, I'd like to see an increase in the number of H-1B visas available for first-time filers, increasing that ceiling over 85,000. That has to be mandated by Congress, and Congress honestly hasn't taken any action on that for quite some time. I'd like to also see a proposal where STEM students (science, technology, engineering, and mathematics) are exempt from the H-1B cap. I know that when President Biden was running for office, that was one of his proposals—to exempt STEM students from the H-1B cap.

Then, I think lastly is just looking at other ways to create. Because the H-1B is generally only available for people with a bachelor's degree, we need to create other categories for lower-skilled temporary workers that are much more easily accessible that our system doesn't really support at this time. Outside of those, I think we need to increase the annual cap on the number of visas that are available, possibly exempting PhD or even master's degree students from the H-1B cap, and then just doing a general overhaul of the system. Those are the things I think that need to be done,

15. *Id.* at § 1184(g)(1), (5).

16. *Id.*

17. *Id.*

18. 8 C.F.R. § 214 (2021).

19. *H-1B Electronic Registration Process*, U.S. CITIZENSHIP AND IMMIGR. SERS. (Nov. 19, 2021), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process#:~:text=For%20FY%202021%2C%20we%20received,volume%20from%20the%20initial%20selection> [https://perma.cc/P262-ACN9].

and I'd like to see it. I'm sure our other practitioners who do business immigration have thoughts as well.

Jeffrey Usman: Do you see particular challenges in the healthcare industry with regard to H-1B visas? I wonder if you could address that.

Vinh Duong: Yes, I do. Nursing, in particular, for a long time has not been recognized by DHS as an occupation that is H-1B caliber. You think that nursing as a profession should be, but because many nurses don't require a bachelor's degree to work, DHS over the years has not recognized nursing as an H-1B eligible category. There are exceptions to that.²⁰ Administrative nurses, highly skilled nurses, would qualify, but generally speaking, RNs don't. I'd like to see potentially some other category of non-immigrant visas created specifically for nurses. I don't know if that's even ever been discussed, but that would be nice to see.

On the healthcare side, a lot of the international medical graduates who come to the U.S., they'll either do their training on a J-1 visa,²¹ or an H-1B visa. If they're doing their training on a J-1 visa, the H-1B issues about the cap or the ceiling or the lottery don't really affect them because they're automatically exempt from those restrictions. Where I do see issues with healthcare workers, especially with doctors, is that there are certain types of visas where they come in to do their training, and the system to keep them in the U.S. is a very patchwork system. It's called the Conrad 30 program.²² It doesn't really make it easy to bring doctors into rural communities. In my practice, I see that a lot. Our clients have hospitals and clinics and physician practices in rural communities where there's a huge shortage of doctors. It would be nice to have available a larger surplus of J-1 waiver slots that you can file for these doctors, and that's not necessarily always the case.

Jeffrey Usman: Mr. Russo, I wonder if you can add to this discussion in terms of H-1B visas, how you see it from your perspective.

Doug Russo: I completely agree with everything that Vinh had just said. I think the solution is really either increasing the statutory numbers or making more professional level workers exempt from the cap. Right now, the cap exemptions are limited to either people working at institutions of higher education, nonprofit or government research organizations, or nonprofits affiliated with institutions of higher education,²³ and then like Vinh said as well, J-1 physicians under a Conrad waiver. Just to give a little perspective on the problem and how big it is. Last year, there were 308,000 registrations filed for 85,000 H-1B numbers. It's a big problem, and Congress would need to act to increase the numbers. Actually, Congress had acted before during the tech boom in the late 1990s, early 2000s. The

20. 8 C.F.R. § 214.2(h) (2021).

21. 8 U.S.C. § 1101(a)(15)(J) (2021).

22. 8 U.S.C. §§ 1182(e), 1184(l) (2021).

23. 8 U.S.C. § 1184(g)(5) (2021).

numbers went up to 115,000 for a couple years,²⁴ and then they went up to 195,000 in the early 2000s.²⁵ Then that largest number sunset, and we've been stuck at 65,000 plus the master's cap.

Jeffrey Usman: Ms. Hernandez, I wonder if you could touch upon work visa issues in the context of essential workers. What are the challenges we're seeing there in terms of essential workers and work visas?

Rose Hernandez: We just don't have the categories for essential workers. There are only two categories of work visas for work that doesn't require at least a bachelor's degree to enter into the occupation. It's our H-2A²⁶ and H-2B²⁷, and they're both seasonal categories. Landscaping businesses can bring folks in on a seasonal basis, say nine months out of the year to work in landscaping, because you can't landscape here in Tennessee in December, so it's a seasonal business. Lots of important work is done not on a seasonal basis, but year-round. Those kinds of employers can't bring folks in from other parts of the world on work visas at all. For example, non-seasonal agricultural work or some restaurants like seasonal restaurants with seasonal business, like at a ski resort or something. They can use the seasonal essential worker non-immigrant visa category H-2B.

For many, many employers, there's just no solution in terms of a temporary, immediately available work visa. This happens nearly every day. We talk to an employer who says: "I want to bring this person that I've identified who applied for the job that I'm offering. I want to bring them here to the United States because I haven't been able to find any U.S. workers, and I want them to get here in a reasonable amount of time so they can work for me when I need them right now." I have to say, "Gosh, no, because that's an essential skills job, meaning it's not one that requires at least a bachelor's degree, we can't do an H-1B, aside from the fact that numbers aren't available in the H-1B category anyway. Even theoretically, we couldn't do any H-1B. All of the other professional worker visa categories aren't available. All I can offer is we can do a green card case, and it'll take a few years. Do you think you'll still need this person in a few years?"

That's just a much harder thing for a business to decide about. Long-term planning is stymied by the absence of short-term solutions. I think that's also really shocking to a lot of employers: "Wait, our immigration system doesn't address my needs at all? It doesn't matter that I absolutely can't find anyone to work at my restaurant?" It's too bad that we can't offer a solution there. I think right now, it's one of those moments in history where we're all hearing constantly in the media about the labor

24. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, §§ 411(a), 414(a), 112 Stat. 2681 (1998).

25. American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, § 102(a), 114 Stat. 1251.

26. 8 U.S.C. § 1188 (2021).

27. 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2021).

shortage. Wouldn't it be nice if we could plug some of those shortages with immigrant labor? But for the most part, for essential skills jobs, that's not something that we can offer at all.

Jeffrey Usman: Mr. Russo, I wonder if you have anything to add here in terms of essential workers and visa issues?

Doug Russo: Well, another category of potential essential workers would be in healthcare, like Vinh had talked about with nurses. The general rule is that for filing for permanent residence, for skilled, unskilled, or most professional workers, you would require something called a labor certification, which is a test of the labor market. The laws do try to work for certain occupations. For example, nurses are pre-certified, but the issue that you run into, like Rose has said, is that even though that application for labor certification is pre-certified in a way, you still need to file a request for a prevailing wage determination, which right now is taking about five months.

Then after that, the employer would need to file a petition. Then after that, the individual would need to apply for an immigrant visa abroad if they're outside of the U.S. We don't know how long it's going to take right now based on consular closures primarily due to COVID, but even in a normal scenario, you would be talking about a year. I think this is a common theme for employers: "What do you mean my employee just doesn't fit into the immigration system?"

And as Rose had mentioned about H-2B, that is also capped at 33,000 every six months.²⁸ They cut it in half, one for the first half of the fiscal year, one for the second half. The second half of the fiscal year involves a lot of landscaping companies and warm weather activities. The earliest date to file is ninety days before April 1st, the second half of the fiscal year. That fills up by the second or third day of January. I think last year, they received over 90,000 requests for 33,000 positions. Again, we'll start to sound like economists, but there really is a supply and demand issue in the U.S. immigration system.

Jeffrey Usman: Mr. Duong, I wonder if you have any additional thoughts here in terms of essential workers and visa issues in this intersection.

Vinh Duong: You know, with my particular practice, the essential workers that I deal a lot with are physicians and nurses. On the doctor's side, there is definitely a supply and demand issue, as Doug alluded to. We have, for example, thirty-five percent of the residency training positions in the U.S. taken up by international medical graduates. When they graduate from their residency training programs, they need an outlet or a job to find in the U.S.

Sometimes that's difficult to do because of the immigration system we have right now in place for an employer to sponsor a doctor—an

28. 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2021).

international medical graduate for example. They have to file certain cases with a state department of health. These state departments of health are limited in the number of cases that they can approve in a year. It's only thirty cases per year.²⁹ If you have, for example, physicians wanting to work in Tennessee, Tennessee can only approve thirty J-1 waivers per year.³⁰ You can imagine in rural communities in Tennessee, for example, there is a huge shortage of doctors. Oftentimes, those thirty slots are just simply not enough to fill the void in these rural communities.

In terms of the impact it has on essential workers, we see it all the time with hospitals trying to bring doctors in to place in rural communities, and sometimes even urban communities, but there's just not enough availability of visas for them to bring those doctors in under the J-1 waiver program.

Jeffrey Usman: In the audience, we have some very experienced practitioners, and we have folks who are just curious about the topic today. Ms. Sengkhounmany, I wonder if you could explain the public charge rule and its impact. What are we talking about when we talk about the public charge rule, and what is its impact on immigration issues?

Chay Sengkhounmany: In immigration law, there are these things called "grounds of inadmissibility" that bar an individual from being admitted into the U.S.³¹ One of the grounds covers those who are likely to become a public charge. The U.S. government really didn't define what is likely to be a public charge. However, there are policy memos that say if this person accesses certain public benefits, then they are likely to be a public charge.

Since 1999, the federal government had said that accessing public benefits, such as food stamps or Medicaid, will not put you under the bar. In 2018, the Trump administration changed the rules. Prior to the change, sponsors of intending immigrants would file what's called an affidavit of support, contracting with the federal government, and saying they are going to support the intending immigrant to at least 125% of poverty. That was enough to overcome the public charge bar. Unfortunately, in 2018, the Department of State changed the policy on that and said they would look at the totality of the circumstances, and so the affidavit of support was not enough to overcome that bar. Shortly thereafter, the Department of Homeland Security started making changes as well and instituted a new process where if you access food stamps, if you access certain other federal benefits, that could be a bar.³²

The overall effect created fear amongst immigrants, thinking that if they access certain benefits that they would be barred. Under the welfare

29. 8 U.S.C. § 1184(l) (2021).

30. *Id.*

31. 8 U.S.C. § 1182(a)(4) (2021).

32. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212–14, 245, 248).

laws, many newly arriving immigrants are not able to get those public benefits. In reality, the new proposed rules would not affect a great number of people in terms of immigrants accessing public benefits. It just created this sense of fear. Then DHS also instituted this new form that was twenty pages long and asked for immigrants' credit reports, bank statements, and tax returns from foreign countries. Many people who were immigrating over to the U.S., they hadn't been in the U.S. so they didn't have credit reports. You would have to go to the credit bureaus and get a letter saying that they didn't have a credit report. It was very onerous. It added hours of labor to filing a simple family petition.

Of course, the public charge rule went through lots of litigation. As of right now, it is back to where it was in 1999, and filing an affidavit of support will overcome the public charge rule. They do look at other things besides the affidavit of support. However, the form—I think it was 944, which was twenty pages, someone called it a “financial strip search”—that has been done away with.³³ We are back to where we were prior to the change in 2018, but the Biden administration is evaluating the public charge rule, and so we may see something coming up in terms of reaffirming the 1999 policy or changing it. We're not sure what's going to happen.

Jeffrey Usman: Ms. Hernandez, do you have anything to add on the public charge rule side of things for the audience?

Rose Hernandez: I would just agree with Chay. I think the main impact of that rule was fear, and I think it drove people away from seeking healthcare. It drove people away from accessing assistance that was necessary to care for their U.S. citizen children. In most cases, I would say there were actually U.S. citizens who were probably more impacted by the Trump public charge rule than immigrants, because as Chay mentioned, immigrants by and large were not eligible to receive public benefits in the first place. Though, sometimes their U.S. citizen children were eligible. We saw lots and lots of people saying that they had withdrawn their U.S. citizen children from food stamps eligibility, for example. They were afraid that eligibility would prevent them from being able to get papers in the United States if, at some point in the future, there would have otherwise been a possibility for that. It had large ripple effects.

As far as our actual cases, it was very difficult to amass the amount of paper required to file a case under the public charge rule. God, the filings were enormous. I feel like I still have PTSD. I learned way too much about my clients' financial, private information that I don't need to know. Also, I don't think I had a single permanent residence interview at the USCIS office that actually concluded under the public charge rule. It was a colossal waste of time filing those cases properly, as of course we did, dutifully. Even the USCIS officers, when we go to those interviews now, the officer

33. Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021) (codified at 8 C.F.R. pt. 106).

and I both chuckle: “Haha, we don’t have to look at all that paper. You can throw it away. Aren’t you glad?” They’re very glad, too. They didn’t have any guidance about how to make decisions based on all the factors. We had to throw so much information at them.

Supposedly, it was a balancing test. They were supposed to look at: “Okay, well, you might be a drain on the system because of these things, but you’re a positive impact on the economy because of these things.” It wasn’t clear—were they just supposed to add four on this side, five on the other side, fill them in? There was no actual indication of how the USCIS officers or the Department of State officers were supposed to make decisions. I think they were also relieved to not have to feel their way around in the dark and make decisions under that really amorphous rule that has now been rescinded.

Jeffrey Usman: Mr. Russo, anything that you want to add with regard to the public charge rule?

Doug Russo: Well, Chay had mentioned that the current administration is taking some input or asking for some input on how they should look at the public charge question.³⁴ And I think it would be important for some administration to create reasonable regulations that are consistent with the statute. The reason I say that is because the statute does list those factors, which would be age, health, family status, assets, resources and financial status, and education and skills.³⁵

So, I will say that the prior administration went way too far on this, and just from a practical perspective, it would’ve been too much for adjudicators to adjudicate. It would have slowed down the entire process even more substantially than it has already slowed down. In other words, I’d rather have some reasonable regulation than an unreasonable regulation, and perhaps that’s why they are seeking input at this time.

Jeffrey Usman: We’ve touched over the course of the conversation on a number of areas that I think are sources of frustration as experienced practitioners in this area, and I want to open up just with that question. You’re all experienced practitioners in this area. Many of us in the audience are unfamiliar, perhaps, with the area. What is it that you would point to that you would look at and say: “This is something that I find to be a particularly frustrating aspect. It doesn’t make sense to me in terms of how we’re doing it. It needs to be reformed. It needs to be modified in approach” Let me start with you, Mr. Duong. Where would you begin us in terms of that conversation? What are you looking out and seeing as a particularly frustrating aspect of immigration law?

Vinh Duong: Gosh, where do I start? I think we touched a little bit on the H-1B, so I won’t address that anymore. From my perspective, visa

34. Public Charge Ground of Inadmissibility, 86 Fed. Reg. 47,025 (proposed Aug. 23, 2021) (to be codified at 8 C.F.R. pt. 212).

35. 8 U.S.C. § 1182(a)(4)(B) (2021).

retrogression and backlogs are a huge frustration. For those of you who don't know what I'm talking about, our immigration system only sets aside a certain number of immigrant visas; you can look at them as green cards. It's typically 140,000 every fiscal year. In fiscal year 2021, that was increased to 262,000, and that was a result of embassies not processing immigrant visas for family-based cases.

Look at the immigrant visa categories, in India, for example, where people are waiting eight-to-ten years before they can apply for a green card because they are born in certain countries. That's a huge frustration because I have, for example, position clients from India who have been waiting ten-plus years before they can get their green card. These are professionals that bring a lot to the table in terms of the value they offer to the communities that they're serving.

Another area that is really frustrating for me is, more so now than ever, the bureaucratic processing delays that immigration practitioners have to experience on a day-to-day basis. Just our Congress' inability to update the system in any substantive way that takes into account population growth and labor market needs by employers. Lastly for me, and I think Chay alluded to this, is that changes in the administration create a lot of uncertainty, a lot of inconsistency in how cases are adjudicated by DHS. That lack of predictability makes it very difficult for us as lawyers to really advise our clients with any kind of uniformity. That is frustrating.

From administration to administration, that makes it difficult for us and frustrating for clients because they feel like the goalposts are always being moved by the immigration system, depending on who is in office. I think most employers, they want to make long-term plans with their employees. They want to be able to map out how they're going to grow their workforce, and because of the volatility of our immigration system, they're not always able to do that.

This last frustration is mostly COVID-related. Although, you saw a lot of this with the embassies slowing down in terms of adjudicating visa applications. It's next to impossible now for people to get visa appointments on a timely basis and get their visas approved. A lot of it has to do with COVID-19 and the restrictions that are in place. Those are some of the areas that are really frustrating to me. I'd love to see Congress repeal the cap on the number of immigrant visas that they make allowable for individual countries. Eliminate it altogether or increase the cap, and then maybe in some respects reform the different steps that you take to actually apply for a green card.

Doug also mentioned earlier about what's called the labor certification process. That is one of the steps that employers undertake when they want to sponsor someone for a green card. That has really become a lengthy and cumbersome process. It was not intended to be so when the program opened up years ago, but it has been, and I'd love to see that get addressed. Those are some of the frustrations that I see. You're

seeing now, with the 2021 budget reconciliation bill³⁶, an effort to make some changes, but I'd be curious to see if that will actually happen at all.

Jeffrey Usman: Ms. Hernandez, I wonder if you could offer us some of your thoughts. As an experienced practitioner in the area, what are you looking at and saying: "I don't know why we're doing it that way." It's a source of frustration to you.

Rose Hernandez: I do a lot of thinking in a wishful way about what I would change about the immigration law if I could. It's something that I talk to clients about all the time as part of trying to empathize with the conundrum people find themselves in. Number one, and this is perhaps less systemic, but it's something that really, really affects individuals, I would get rid of the permanent bar.³⁷ It's one of the grounds of inadmissibility that Chay was talking about.

We have this really punitive rule in there that says if you've been in the United States without permission for more than a year, and you leave and come back, that you're barred from getting permanent residence until you've departed the United States and been gone for at least ten years. There's no way, if at all possible, during those ten years, and it catches lots of families in a really impossible predicament. It creates a problem with immigration that doesn't need to be there because we end up trapping people in the United States. That's on the family side or on the side of individuals. It's just a cruel rule that I would get rid of if I could.

Also, some of the other grounds of inadmissibility are not waivable. It's not possible for a judge, or the USCIS, or anybody in the government to even get to the individual circumstances or the potential for extenuating circumstances that justify someone having done something that otherwise wouldn't be ideal. They can have a green card anyway. For example, having falsely claimed to be a U.S. citizen is a permanent, un-waivable bar to immigrating. I'm not saying people should falsely claim to be U.S. citizens, but there might be some circumstances that would justify that. Maybe it was a long time ago; someone's honest character has been rehabilitated since they made that false claim decades ago. Some of those grounds of inadmissibility, in my view, ought to be tempered.

Then, I agree with some of the systemic issues that Vinh was addressing. Essentially, the immigration law has become so political that it cannot be updated. I wish that we could treat it as more of a field of expertise and less of a personal passion on the part of voters. I wish that we could raise or eliminate the caps on the numbers of immigrants that can come to the United States in some of the different categories. They're not keyed to economic need, and if we are going to continue to have caps, I think they should at least be tied to what the economy needs. Where are there shortages? In general, we need to have a more individual-focused

36. S. Con. Res. 5, 117th Cong. (Feb. 5, 2021).

37. 8 U.S.C. § 1182(a)(9)(B) (2021).

balance of factors when we're talking about this person who's subject to grounds of inadmissibility. Can they come in or not? I would like to see a more individualized determination and a removal of some of the obstacles to having immigrants fill labor shortages.

Jeffrey Usman: Mr. Russo?

Doug Russo: I agree completely with the employment-based backlogs being a serious issue because these individuals who come in start working on an H-1B visa. If they're born in India, you're talking about a ten-year plus wait. I think, again, a solution is increasing the numbers. Another issue on the family side is preference categories. Let's say that you have a U.S. citizen client who has a sibling in Mexico, and they'd like to sponsor that sibling. They're talking about a twenty-year wait to be able to actually have an application for an immigrant visa. In a way, it has completely written out that provision of law or that potential benefit for that particular individual.

Another thing that I didn't expect I would say myself is that the immigration system really needs an independent court. It's been a call for a long time to have immigration court as an independent court rather than administrative proceedings. I don't know that a lot of individuals understand that, first of all, it is an administrative court. I think that goes to the general public as well as immigrants. Because the due process stakes are so high, I don't know that it's fundamentally fair to have that as the case.

Jeffrey Usman: Ms. Sengkhounmany, what are some sources of frustration for you? As you look out essentially at current immigration law practices, where is reform needed?

Chay Sengkhounmany: The biggest one for me is going to be processing times. Why does it take six months to renew a work permit when that work permit is only good for a year? By the time you get your work permit, it's time to renew it again. The filing fees for the work permits are \$410, and you have to do that every year. If you don't do it at precisely the right moment, you may have a gap in where you are authorized to work. Oftentimes, people have to sit and quit their jobs, or if they have a willing employer, to take leave so they can begin work again when their work permit comes in.

The last panelist said that, in Canada, the equivalent of a green card takes six months to process. That would be a dream to have green card applications take six months. Here, it's the work permit that may take six months; it may take longer. Why does it take a year to get a replacement of your green card if you've lost it? During that year, you need your green card to apply for new jobs. You need it to renew your driver's license, and you're without it for a year because your wallet was stolen, or you lost your wallet. That is the biggest frustration for me.

The other one would be the inefficiencies of USCIS. They are rejecting properly filed applications saying: "You didn't dot your i's or

cross your t's," or "You didn't provide the birth certificate," when it was already in there. At Legal Aid, we do a lot of fee waivers, and there doesn't seem to be any consistency in how those fee waivers are being adjudicated. For instance, we had a family—mom and two kids—applying for work permits. We used the same fee waiver applications. The mom's fee waiver application was rejected, but the two kids, who are actually not old enough to work, their fee waiver applications were approved. Now they have pending work permit applications, and mom's got sent back for us to provide more evidence of her income. We used the same evidence of income for all three applications. It's just frustrating, the inefficiencies within the immigration system.

Jeffrey Usman: Immigration matters have been front and center in terms of media attention for a number of years now. Certainly a pronounced role in broader societal discussions. What are areas that you look out at and you say: "I think there is a misperception about how immigration law works, in terms of general public perception and perception among other attorneys." I wonder if you'd mind leading us off, Ms. Sengkhounmany.

Chay Sengkhounmany: Sure. There is this perception that the immigration process is available to everyone equally. That anybody can come in and access the same forms of relief, and that they can come in just as long as they go about it the proper way. There are many people who don't have access to our immigration system. You know, I think immigration is not the type that can be explained in sound bites, and that's what we're seeing in the media. It's so easy to say "X, Y, and Z" about the immigration process, but when you dig deep down, we couldn't hold anybody's attention on the news if we were to explain grounds of inadmissibility and all that.

The other misconception, more on the legal side and maybe the client side, is that immigration is just about filling out forms. There's nothing that irks me more than people thinking: "Well, I could just fill out the forms and file it myself." Well, maybe, but there may be consequences to that. Other practitioners in other fields, they think immigration is just about filling out forms. They don't realize it could lead to adjudications of fraud, determinations of fraud, or misrepresentation. That would be the biggest misconception that I'd point out—the "filling out forms" mentality.

Jeffrey Usman: Thank you. Mr. Russo?

Doug Russo: Related to Chay's first point, I think a lot of what I hear from individuals in the general public, including my grandmother, would be: "Why don't they just apply for citizenship?" or "Why don't they just apply for a visa? I don't understand why these DACA individuals can't have permanent residence or a green card." A lot of it is related to some of the provisions that Rose has discussed, where they're basically stuck in a very difficult place because some of these individuals, if they leave, they'll trigger a three-year bar, a ten-year bar, or they might be permanently barred.

In terms of citizenship, it's not something that happens overnight. A lot of times, an individual needs to go on a path where they're first a nonimmigrant. They might have to wait many years to become a lawful permanent resident. Then, after becoming a permanent resident, they might have to wait three or five years. It's not something that happens overnight. The whole "Why don't you just file papers?" or "Why don't you just get a green card?" mentality really doesn't work out in reality.

Jeffrey Usman: Ms. Hernandez?

Rose Hernandez: Something specific I've been thinking about right now: The U.S. consulates around the world remain pretty much closed, and they have been for a year and a half now. For a long time, we all thought: "Yes, that's natural. COVID, the pandemic is very dangerous. Of course, consular officers don't want to sit feet away from applicants." I don't think it's just about the pandemic anymore, but we don't really know what it's about. I would love to see the media push the Department of State on why all the consulates remain closed for business.

I'd like to hold the immigration apparatus accountable for being as completely shut down as it is. Right now, we're all frustrated with processing times, and, in a similar vein, that's all been attributed to the pandemic. But there's been a significant breakdown of the ability of the immigration agencies to do their work. I'd like to see some transparency, maybe push through the media, on the big functional problems that our immigration system is experiencing right now.

Jeffrey Usman: Mr. Duong, I wonder if you can offer us a final thought here in terms of an area, perhaps, of misperception.

Vinh Duong: Our immigration system, people say it all the time, is a broken system. When I try to explain to people about how our immigration system works, I break it down very simply: "We reward people with education. We reward people with money. Outside of that, you're going to have a really hard time getting into the United States." It's not as easy as people think. Even people with education and money, they still face tremendous obstacles to get a green card.

To me, one of the biggest misconceptions, and I heard this a lot during the Trump administration, was the use of the term "anchor baby," for example. I hear it from people all the time. If they have a U.S. citizen kid, they can get a green card that way. It's not always that simple. You're talking about a child, for example, being born in the United States. Before they can sponsor a parent for a green card, they have to turn twenty-one. You're basically saying that the parents are going to have to wait twenty-one years before they can avail themselves of this "anchor baby" idea.

It doesn't always work that way either because sometimes the parents enter without inspection, and they don't always have such a clear path to getting permanent residency. If you hear the term "anchor baby" thrown around and the term "amnesty" thrown around, those are two of my

biggest pet peeves. It isn't always as easy as the media makes it out to be when it comes to those types of matters.

Jeffrey Usman: Thank you to all of our panelists for being here today and offering insights from their experience. That was terrific.

Panelists: Thank you.

Nicole Chanin: Thank you so much to all of our panelists, we loved having you. Of course, we wish we could have hosted you in person, but I think this discussion was really insightful. I've been getting a lot of feedback that everyone who is attending is enjoying the discussion. Thank you so much for being here today. We really do appreciate it.