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Immigration Fundamentals for International Lawyers

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IMMIGRATION FUNDAMENTALS FOR INTERNATIONAL LAWYERS

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HISTORY, POLICY, AND FUNDAMENTALS OF U.S. IMMIGRATION LAW

PRESENTATION BY MICHAEL MAGGIO
 MAGGIO & KATTAR

I. INTRODUCTION

I am Michael Maggio, and I practice immigration law in Washington, D.C. at Maggio & Kattar, and I am an adjunct immigration law professor at the Washington College of Law. With me on this panel on immigration law are my colleagues Sheila Starkey, who also practices immigration law in the Washington area, and Larry Rifkin who has a busy practice here in Miami. What we plan to do today in about two and a half hours is to tell you everything you need to know, if you are not an immigration lawyer, about American immigration law. This is going to be, basically, a crash course in

American immigration law with an emphasis on those aspects of immigration law that relate to the movement of international personnel.

We frequently use the terms “global economy” and “age of the Internet.” These contemporary concepts are very much applicable to immigration law today. When we talk about the movement of goods and services without impediments, we cannot ignore the movement of personnel across international boundaries. When employers recruit for highly skilled workers in today’s tight labor market, they do not necessarily recruit through newspapers or even through headhunters. Instead, these employers recruit through the Internet. Indeed the *Washington Post*, the *New York Times*, and the *Wall Street Journal* routinely post their classified ads on the Internet. And when companies recruit globally, they invariably come across workers who need work visas. All foreign workers who are rendering services for a United States employer to the benefit of the United States employer and who receive some form of remuneration require a work permit, and, in most instances, this means that the assistance of an immigration attorney is required.

When I say that I am an immigration lawyer, people tend to respond by saying: “Oh, so you work with a lot of Mexicans” because of the inaccurate stereotype that most Mexicans are farmworkers or that most Spanish-speaking immigrants are Mexicans. In fact, the Mexicans our firm works with are more likely to be physicians or nuclear physicists than farm workers. Interestingly, we recently handled a case for a Mexican cook who lived very happily in the Washington area without a work permit for ten years. When he got into an automobile accident with a gentleman who happened to work for the Immigration and Naturalization Service, the INS agent decided to settle the dispute by arresting our client, and he then became motivated to obtain a lawful immigration status.

Immigration law involves an array of nationalities; it involves people engaged in all types of work, providing all kinds of services. When you go to the ballet you may be looking at the Bolshoi. What immigration lawyers see are a bunch of O-1 visas bouncing around. If you go to the hospital emergency room and you see residents who are foreign physicians, you see a foreign doctor, but immigration lawyers see J-1 visa holders. Multinational corporations, which are

not United States-based, such as Glaxco or BMW, have operations and workers in the United States, and you see them as Italian, British, or German. We see L-1s and H-1B visa holders. These are all different visa categories that entitle people to work in the United States temporarily. Of course, there are also visa categories that entitle people to work in the United States permanently. There are temporary visas, which are called non-immigrant visas, and there are permanent visas, which are often called green cards, even though they have not been green for decades.

Immigration law has a special language all of its own. There are words that defy common sense which are particularly confusing to uninitiated lawyers. Indeed, immigration law is so confusing to most lawyers that our firm does work for some of Washington's preeminent law firms that tell their clients that there is no legal problem that they cannot solve. When those firms need to hire a foreign lawyer, they hire an immigration law firm because immigration law is so specialized.

For example, most of you are familiar with the concept of "parole" as it applies to criminals. In immigration law there is also a concept of parole. It is a travel permission to enter the United States when you are not authorized to enter. A "paroled" person is physically in the United States, but legally they are considered not in the United States. We have clients physically in our office, but legally they are not in the United States because they have been "paroled" into this legal fiction. Telling these clients that they are not in the United States while they sit in your Washington office is just one example of the confusing concepts that permeate immigration law.

Immigration law also has numerous types of proceedings to remove people from the United States. The most common form of relief from deportation is known as "V.D.," Voluntary Departure. There are deportation proceedings, there are exclusion proceedings, and now there are removal proceedings. The rights available, and even the burden of proof differ in each, confirming again that immigration lawyers speak their own special language.

The purpose of this panel is not to make you an immigration lawyer, but to sufficiently familiarize you with its main concepts and themes so that you can use this knowledge in the areas of law in which you practice. Hopefully, you will learn enough to not do any

damage and to pass a client on to an appropriate solution. In addition, you may be able to impress clients with the little bit you do know because to those who know nothing at all, those who know a little bit seem like geniuses.

II. POLICY THEMES OF UNITED STATES IMMIGRATION LAW

United States immigration law has four basic policy themes. First, there is the protection of the United States labor market from foreign workers who may drive down the wages or working conditions of American workers, and the need of American employers to have access to foreign workers. Often there is a tension between these two interests. This is the first immigration policy theme, protecting the U.S. labor market while satisfying the labor needs of employers.

A second theme is family reunification. American immigration law has long had, at its core, bringing families together. The concept of “family” in the United States, however, is very different from that in most of the rest of the world. In most countries, one’s first-cousin can be closer than siblings in the United States. To tell a foreigner that his grandmother is not his “family” as far as immigration law is concerned, or that his aunts and uncles are not his “family” defies their sense of what a family is. Nonetheless, family reunification is the second historic theme in U.S. immigration law and policy.

The third theme in American immigration law is keeping out dangerous ideas. While this is the land of the First Amendment and free speech, immigration law has always been vigilant against those who espouse “bad ideas.” In fact, the very first immigration law was a law geared at keeping out what was then deemed to be a very threatening foreign ideology. The ideology was that of the French Jacobins. As some of you may recall from your high school American history class, the Alien and Sedition Act of 1798 was a law that empowered the President to deport anyone he deemed dangerous to the country’s peace and safety.

Immigration law began to exclude people in large numbers because of their ideology in response to several historical events: after President McKinley was assassinated by an anarchist; after the Bolshevik revolution; and by the thirties, as some of you may recall, after the arrest of Sacco and Vanzetti, Italian anarchists who were charged with robbery and murder in Massachusetts at a time of sub-

stantial trade union activity. Because of these ideological concerns, persons were not allowed into the United States if they harbored these "bad ideas"—such as anarchism and communism—and they could be deported because of these ideas. After decades of being denied admission into the United States, presently, communists are admitted, however, designated terrorists are now excluded.

Racial discrimination is the fourth theme that one sees throughout United States immigration policy. At different points in history, United States immigration law has excluded specific nationalities, such as the Chinese. Later, Southern Europeans were deemed undesirable, and today restrictions seek to limit immigration by hispanics and Asians, albeit in a more subtle fashion than in the past. While our country is supposed to be colorblind, in the immigration context, race has always played a very prominent role, and indeed a very open role.

III. BASIC HISTORY OF UNITED STATES IMMIGRATION LAW

America was basically an open border country with no immigration laws until 1882 when Congress placed a "head tax" on immigrants and barred "idiots, lunatics, convicts, and persons likely to become a public charge"—restrictions that still exist today. Most immigrants came freely, unlike other immigrants that were forcibly brought here as slaves. The first immigration laws were geared toward keeping out people because of criminal conduct and the possibility that they might become a public charge. This marked the beginning of the system that we still have today, where people must first show that they should be allowed in, that they are admissible.

In immigration law there is this concept of being admissible, being allowed in, and also the concept of being deportable for bad conduct that results in them being expelled from the United States. The first immigration laws in 1875 dealt with admissibility, and they were geared toward keeping out certain convicts and people who were likely to become public charges. These provisions still exist in immigration law today.

In the 1910s, a congressional commission, the Dillingham Commission, wrote an infamous forty-three volume study on the impact of immigrants on American society. This commission decided that immigrants were the worst thing that could happen to America. They

were destroying America. The “undesirable immigrants” of those days were principally Southern Europeans.

To keep out Southern Europeans, Congress established a national origins quota system, under which the number of immigrant visas available in any given year was determined by the percentage of a particular nationality in the United States population in 1910. Thus, forty-two percent of the quota under this system went to the British who then comprised only two percent of the world’s population. Thus, it was a conscious policy of Congress to keep the nation white and English-speaking. Similar voices are heard today on Capitol Hill.

In 1917, over the veto of President Wilson, an Asiatic barred zone was put into place under which you could not immigrate to the United States if you were from most of Asia. Basically, going from Saudi Arabia all the way across Pakistan, India, Malaysia, and China, anyone from that part of the world was barred from obtaining permanent resident status. The exclusion of Asian immigrants started with the Chinese exclusion laws in the 1880s, but it went into full force and effect in 1917 when Asians were actually barred. Indeed, Chinese immigrants could not naturalize until after 1952. If somehow they got a green card, they still could not become a United States citizen because they were specifically barred from becoming United States citizens.

If someone is born in the United States, they are a citizen by birth. Under the Fourteenth Amendment to the U.S. Constitution, only people who are subject to the jurisdiction of the United States are citizens. That is why the children of diplomats are not citizens of the United States; they are not subject to the jurisdiction of U.S. courts. People would come illegally from the Asiatic barred zone countries and have children here; while the children would be citizens, the parents could still not become citizens.

In the 1950s, the exclusion and deportation of communists became a national obsession. Indeed, there were a number of very famous cases in the fifties, which set forth principles of immigration law that are counterintuitive and certainly against what one learns in constitutional law and in other areas of American jurisprudence. In one particular case, a group of permanent residents who had joined the Communist Party in the 1930s, when it was legal for foreigners to

join the Communist Party, but who subsequently quit the Party, were placed in deportation proceedings because they *had been* communists twenty years before. This was an *ex post facto* law, a retroactive law. These permanent residents not only were not communists, but they were married to Americans, had U.S. citizen children, and had lived here peacefully and productively for at least twenty years. The question presented was: can they be deported on the ground that they were once communists? While this law seemingly violated the First Amendment right to freedom of association and clearly was an *ex post facto* law, the Supreme Court held that the rule against *ex post facto* laws in the Constitution does not apply in the immigration context, because immigration law is not a type of criminal law but rather principally a civil law. Thus, this basic constitutional rule does not apply.

The First Amendment argument also fell to the way side because the test for First Amendment violations at the time was different than it is now. Now it is the *Brandenburg v. Ohio* test. Some of you may be familiar with the test. You have to not only advocate unlawful action, but it has to be imminent unlawful action, and the speech has to be likely to lead to imminent unlawful action. In the 1950s, there wasn't such a restrictive test, so the Court said the statute did not violate the First Amendment.

This is but one example of how immigration law is uniquely distinct from other areas of American jurisprudence and also how politics plays a big role in immigration law. In fact, it still does. The national origins quota system was not abolished until 1965. It is the memorial from President Lyndon Johnson to his predecessor, President John F. Kennedy, who promised to get rid of the system.

In 1986, we had another substantial change in immigration law. For the first time, employers could be penalized for employing those who lack employment authorization. Historically, if a foreigner worked without permission in the United States, the penalty was against the foreigner. The foreigner could be deported, but there were no penalties against the employers until 1986. Now, if someone applies for a job and is hired, they must, whether they are a foreigner or an American, present documentation proving their identity and their right to work in the United States within three days of hire. Employers who do not comply with this requirement are subject to

civil fines. Employers who hire unauthorized foreign workers, people who don't have permission from the Immigration and Naturalization Service to work, are also subject to civil fines and potential criminal liability as well.

Another big change in 1986, as many of you may know, is the amnesty that was put into place for persons who had been illegal for many years. Under new laws, they could obtain permanent resident status by turning themselves in and proving they had been illegally in the United States for a certain period of time.

Additional substantial changes in immigration law took place in 1990. In 1990, many more immigrant visas were made available for professionals and fewer immigrant visas were made available for persons who are lesser skilled, persons whose jobs do not require at least two years of college education or experience. In short, in 1990 Congress dramatically increased the number of green cards, that is permanent visas, to professionals, while cutting back dramatically on the number of visas available to non-professionals.

There is a new immigration law the President signed on September 30, 1996. Some of its provisions go into effect this week. In fact, my office is certain that I planned to be here during the most chaotic week of our firm's history. My staff thought that this was a very convenient time for the boss to go to Florida. I am not sure that this conference was planned with that legislation in mind, but I am certainly not disappointed to be here in Miami rather than at my desk in Washington.

This new law has a number of Draconian components. It is a bill that supposedly deals with illegal immigration, but in fact it deals very much with legal immigration, in that it hurts legal immigrants in many ways. For example, for the first time there are now extraordinary penalties, other than deportation, for persons who have been unlawfully present in the United States for a period of time. Of course, people could always be deported if they are here unlawfully. Under the new law, if you are unlawfully present for six months or more—and the six month period starts from April 1, 1997—and you leave the United States to get a visa, you are inadmissible; you are not allowed back into the United States unless you have been out of the country for three years. Under this new law, if you leave the United States to get a visa and you have been out of status for one

year, you are barred for ten years from getting a visa.

Many people who are out of status have already qualified for and are waiting their turn to get permanent resident status, and you will see in a minute how that system works. These are the spouses of permanent residents, these are the children of permanent residents, these are people being sponsored for green cards by their employers. They are just waiting for their place in line under a preference system to come up. With the new law they are faced with the choice of leaving the United States by September 28th, but if they do, besides leaving their family, they may lose their job. Often if they lose their job, then they lose the basis upon which they are obtaining permanent resident status.

Currently, there is a provision of law called section 245(i) that permits people who are unlawfully present to obtain their green cards in the United States by paying a fine. That law expires on September 30th. Remember, I said if you are unlawfully present, there is a penalty if you leave the United States to get a visa. If you do not leave the United States, there is no penalty. The law that permits illegal people to get their permanent resident visa in the United States, section 245(i), expires on September 30th. The Senate has passed an extension of 245(i); the House is debating it today. It has to go to conference and be signed to be law.

So what do you advise your clients? If you leave and the 245(i) extension is passed, well, you just went and left, you are going to spend six to nine months in another country unnecessarily, and you may not get back because the job upon which your green card is based may evaporate, or your family could dissolve. On the other hand, if you do not leave, and there is no extension of 245(i), it is going to take you three more years to come back as a legal resident.

IV. DEPORTATION FOR CRIMINAL OFFENSES

Probably the most short-sighted aspect of the new law is the expansion of the grounds of deportation for people with criminal offenses. No one likes the idea of people who have been invited into a country committing crimes, but as legal professionals we would all agree that not all crimes should result in deportation. Lawyers also believe in rehabilitation. Also, there should always be room in the law for compassion and family unity.

Historically, many foreigners who have committed crimes have been eligible for an immigration pardon, a waiver or forgiveness, instead of being deported or being denied entry into the United States. With some exceptions, in the past if you committed a crime and you had a close United States citizen or permanent resident in your family, and you had many years of residence in the United States with a green card, and if you could show rehabilitation and that the favorable factors in your file outweigh the crime, you could obtain a forgiveness. These forgivenesses or waivers have been virtually eliminated by the new immigration law.

At the same time, the definition of the worst kind of immigration crime, those crimes defined as an aggravated felony, has been dramatically expanded by the new law. If you are an aggravated felon, generally you do not need a lawyer, you need a travel agent, because it is very unlikely that you are going to be able to stay even if you are a long-term permanent resident married to an American. Prior to the new law, to be an aggravated felon, you had to do what it sounded like—crimes of violence, drug offenses, and similar crimes coupled with a substantial prison sentence. Now the definition of an aggravated felony is so broad that virtually everyone with a criminal record is included.

How about a crime of violence where the sentence imposed is one year. How does the newest immigration law deal with that? Take, for example, an Iranian student whose green card was obtained fifteen years ago. This fellow recently saw one of our associates. He said, "I've applied for citizenship and I'm concerned because it is taking so long; I really want my citizenship." So the associate reviewed the facts of the case.

When our firm obtained this man's green card fifteen years ago, he had had an arrest and conviction, but it did not bar him from getting a green card. He was at one of those demonstrations that were very common in Washington during the 1970s—"Down with Shah! The Shah is Fascist"—routine chants by Iranian students in the streets of Washington. This fellow got into an altercation. He was charged with and pled guilty to simple assault. He received no jail time; it was a suspended one year sentence. He got his green card because that conduct was not grounds of inadmissibility at the time.

Now he has an American wife, he has had the same job for the last

fifteen years, he has two American children, and he has an aggravated felony. Because the INS argues that the new law is retroactive, it does not matter to the INS that, when convicted, this man's crime was not an aggravated felony; nor does it matter that he told the INS about his conviction and that he got his green card anyway. Nonetheless, he is subject to deportation with no pardons or forgivenesses available, according to the INS interpretation of the new law.

How about a theft offense where the sentence imposed is a year or more? A Washington, D.C. school teacher consulted our firm saying, "I think I should get my citizenship. I've had my green card for fifteen years. You know, I did something really stupid," she says. "About eight years ago, I stole a dress from Woodward & Lothrop, and I got a one-year suspended sentence. Now that doesn't affect my case does it?" According to the INS, deportation, no forgiveness!

This aggravated felony provision probably is the most Draconian component of this new law. In short, with the new law it is easier to deport people and harder for people who are getting legal to get legal. This is, moreover, a law that has been going into effect at different dates throughout the year, the major dates being when it was signed on September 30, 1996, then April 1, 1997, and now the 28th of September, 1997, to be followed by another effective date on April 1, 1998. These varying effective dates compound the confusion caused by a new law for which enabling regulations, for the most part, have yet to be promulgated.

V. NON-IMMIGRANT VISAS

Remember, there are basically two types of visas. Non-immigrant visas and immigrant visas; in other words, temporary visas and permanent visas. A non-immigrant visa is a permission to come into the United States on a temporary basis. There are a lot of these visa categories; they start with A and they go to S. To give you an idea of how numerous and complicated they can be, there are A-1, A-2, and A-3 visas, which are for diplomats, representatives of foreign governments. The most common type of temporary visa is a B visitor visa. There are probably people in this room who came to this conference on B visas: B-1s and B-2s. A B-1 is a visa for business, such as going to a conference. A B-2 is "I'm going to South Beach," a visa for pleasure. There are Cs, there are Ds, there are Es, which you

will hear about today and which are for non-immigrant investors. There are student visas, which are Fs. There are numerous Hs: H-1As, H-1Bs, H-2As, and H-2Bs, H-3s and H-4s. As you can see, there are many, many types of non-immigrant visas.

Two things you should understand about non-immigrant visas are the following. First, certain non-immigrant visas require that the applicant prove that they have a residence abroad to which they intend to return, and if they cannot prove this, they cannot get the visa. Second, certain non-immigrant visas must be approved first by the INS and thereafter a U.S. consul and an American embassy or consulate issues the visa. Let us look at the initial concept first. Everybody in this room from a country other than the United States knows people who have been refused U.S. visas. Why are people refused U.S. visas? Any idea?

AUDIENCE PARTICIPANT: Is it that they cannot show that they have money to support themselves in the United States?

MICHAEL MAGGIO: Not necessarily. If I were to ask, "Tell me in one word why people do not get visas," that one word answer would be "money."

Another factor is the whim of the consul. In fact, I invite a former consular officer who is a Washington College of Law alumnus to speak to my class every year and do a little dog and pony show with his wife, who is Colombian, so students get a sense of how consuls work. The students are always totally appalled by the visa issuance system because it is so subjective. This former consular officer advises, for example, that many consuls employ a three suit rule. Not a law suit—three suits of clothing. When you apply for a visa you must present a photograph. You also have to have a passport, which contains a second photograph, and you also, in most countries must appear at the consulate in person. If the man standing before the consul has a different suit in the visa application photograph and a third suit in the passport, he's got three suits, and that means he's got the one word that means that you will be issued a non-immigrant visa, "money."

People are denied tourist, student, and other visas because they don't have enough money to prove that they will return back home. The Department of State, which is responsible for the work of consuls, believes that the best indicia that a visa applicant will not stay

in the United States is money. Someone who goes to a consul and says: "I need a visa for the United States, and believe me I'm not happy to be visiting my sister-in-law. Can you believe it? When I visit her, I've got to clear dishes from the table and wash them afterwards. In Manila, I've got someone that does my dishes, my driver is waiting outside, and I've got someone else that cleans the house." That person is going to get a tourist visa. But the single and young female who applies for a visa, who does not come from a neighborhood that is recognized as being wealthy, is virtually certain not to get a tourist or student visa.

So, when you apply for a tourist visa or a student visa, you have to show that you are going to go home. And it's totally subjective. If the consul does not believe that you are going to go home, there is no meaningful administrative review of that decision. You cannot appeal it. You can go to the consul's boss informally, and depending on the consulate you can go back perhaps every day and apply again and again, but there is no review of that decision and, indeed, decisions of consular officers are judicially non-reviewable. If consul denies the visa, you can't sue. However, if the INS denies the visa that's different. Now remember, I said that for certain visas you have to apply to the INS first. For the most common visas, B-visas, temporary visitors for business and pleasure, and F-visas, which are student visas, you do not apply to the INS, you apply directly to the consulate.

AUDIENCE PARTICIPANT: Are there any guidelines for what you are saying in terms of who to give a visa to?

MICHAEL MAGGIO: Well the State Department actually has a school, a consular school, where they talk about things like this three suit rule and where they also talk about who is more likely to remain or not. For example, ma'am, you are coming and applying to me for a visa. "I see that you are married and that you have three children, is that correct?"

AUDIENCE PARTICIPANT: "Yes."

MICHAEL MAGGIO: "What does your husband do ma'am?"

AUDIENCE PARTICIPANT: "He is an auto mechanic."

MICHAEL MAGGIO: "Thank you very much ma'am. I don't think that we'll be able to give you a visa today. You are welcome to come

back and apply in one year. Next.” If she said that her husband was a neurosurgeon, she probably would get a tourist or student visa. Now, the consul might say: “I’m inclined to give you the visa, but I would like to receive a letter from the hospital where your husband works to determine his employment, and, by the way, I’d like to see tax returns”—if you are in a country where people pay taxes—“and I’d like to also see some bank records to confirm that your husband is making that salary.”

Who gets a tourist visa is a little bit like the three of us here, Larry, Sheila, and me going to Ben & Jerry’s together to get ice-cream. We all pay a dollar twenty-five for a cone, and not only that, the company has a policy about how big the cones should be. I get a cone this big; Sheila gets a cone this big; Larry gets one this big. Three different sizes. Why? Three different people scooped the ice cream. When you go to the consul to apply for a tourist visa, it’s just like at Ben & Jerry’s. It depends on who is scooping. If you have a good guy, you get a visa, you get the big cone. You get a bad guy, you get a small cone, and you are still charged a dollar twenty-five. So I hope it is clear that there is a great deal of subjectivity to the visa issuing process.

Again, for certain visas, such as temporary work visas, you apply to the INS first and for those visas, petitions are not filed by the foreign worker, they are filed by the United States employer. One of the characteristics of work visas is that for the most part they are both employer and job specific. So if you have a work visa that was obtained for you by the MCI Corporation, you can’t take that work visa and start working over at IBM. IBM would need to file a separate petition to classify you as eligible to work for them. Likewise, if IBM promotes you from a junior programmer to a systems analyst position, you again will need a new visa petition for your new work to be authorized.

A work visa petition is filed first with the INS. It’s approved by the INS, and then it’s presented to the consul. The consul then puts a visa stamp in your passport, you present it to an immigration inspector, and then you are admitted for a period of time depending on your visa. You could be admitted for a number of days or years, or you could be admitted for what is called “duration of status,” DS, and that is indicated on the white I-94 arrival-departure card in your

passport.

For the Americans in the room, the next time you are on an international flight, look at the back of the in-flight magazine, and you will see a picture of I-94 cards, which is the card that non-immigrant foreigners must fill out. The I-94 is not a visa, the visa is a stamp in the passport. The I-94 card is basically your admission ticket for this trip. In other words, the visa, a temporary visa, is a permission to come to the United States in a certain status as long as that permission, that ticket in your passport, is valid. Once you land, INS gives you a little white piece of paper, the I-94 card, which is your permission slip for that particular trip. When you are finished with that trip, you turn in that white piece of paper. The next time you come, you present your visa again, and you get a new white I-94 card from the INS valid until a certain date.

Some people are exempt from visas. They do not need a visa to enter temporarily. Who? Canadians, Western Europeans, and certain other nationalities where the rate of visa refusal for tourist visas is less than two percent. In Latin America there is only one country, Argentina, that now is in the Visa Waiver Program where Argentineans do not need a tourist visa. All you need is a round-trip plane ticket showing that you are going to stay for ninety days or less.

AUDIENCE PARTICIPANT: Is it correct that if I come from a foreign country with a B-visa or something like that, if I get to immigration, even though I have a visa, they can still say no.

MICHAEL MAGGIO: Absolutely!

AUDIENCE PARTICIPANT: For what kind of criteria can that say no? Any criteria?

MICHAEL MAGGIO: They can say no because, for example: "Excuse me sir, I notice from the computer that you overstayed by sixty days the last time you were here. Is that correct?" Or, "Did you work when you last visited sir? You didn't. Could I see your wallet sir?" Now INS looks in the wallet and what do they see? INS sees a credit card issued by a United States bank, a Florida driver's license, and a health club membership from Coconut Grove. "Sir, it looks to me like you live in the United States and that you are only using this tourist visa to come in and out, and, under the new immigration law, you don't even have the right to see a judge, sir. You are out of here! Oh, I almost forgot, are you afraid to return to your home country.

Do you fear persecution on account of your race, religion, or political opinion? Because if you do, I'll have somebody interview you and if we determine that you have a credible fear of persecution, well, then you can stay. You may have to stay in jail, but you can stay. But if we do not find that you have a credible fear of persecution, you are out of here on the next available flight."

People always ask how much training do these INS inspectors have to make these profoundly important instantaneous decisions. You can imagine the temperament of someone who processes passengers from countless jumbo jets after a twelve hour day, and they finally get to go home when they are done with you. The joke among immigration lawyers is that when they took down the Berlin wall, INS recruited all the East German border guards to work for the INS. It is not that bad, but the reality is that you have people who are very low, if you will, on the INS food chain processing admissions at airports and land points of entry.

INS airport inspectors are one notch above border patrol agents. They are cops in a sense, and there is such a thing as a police mentality, some of which comes from the abuse the police suffer and from having been scammed. And people do lie. Everyone in this world is not a Mother Theresa. The INS encounters people daily seeking entry on a visa by every imaginable fraud—and let's remember the INS is responsible for weeding out criminals who seek admission to the United States.

Entry can also be denied if it comes up on the computer that the person has been arrested or if there is a reason to believe that they seek to enter the United States to engage in conduct that may be incidental to criminal conduct. Listen to that, a "reason to believe," not proof, a reason to believe. It's not that you *are* going to engage in criminal conduct, it's that you *may* engage in conduct that is incidental to criminal conduct. This comes up occasionally with business executives, especially from Russia and countries of the former Soviet Union where it is very difficult not to do business with organized crime. The admissions applicants make the Service Look Out Book, known affectionately as SLOB. If you are in the SLOB, they can kick you out then and there without a hearing. And when someone is applying to come into the United States, they are at the border, they have not made entry into the United States. Consequently, they don't

have a right to counsel. It is as if they are knocking on the door. The Constitution does not apply to them in every respect, only in very limited respects.

AUDIENCE PARTICIPANT: I want to go back to overstay and the penalties for overstay. If they do overstay, is the September 30th law the law that allows you to change status?

MICHAEL MAGGIO: In immigration law there is a concept called "change of status," which means going from one non-immigrant classification, such as a tourist or a student visa, to another non-immigrant classification, for example, a temporary work visa. There is also a concept called "adjustment of status," which means getting your green card in the United States. Change of status and adjustment of status are what lawyers somewhat pompously call terms of art.

AUDIENCE PARTICIPANT: But let's say that on September 30th they do re-enact the ability to get a new visa while you are within the country.

MICHAEL MAGGIO: It would only be a green card, not a new visa. This provision of law, section 245(i), permits people to get a green card in the United States, permanent residency, not temporary work visas or temporary visas.

AUDIENCE PARTICIPANT: Now if they are in the United States less than six months, can they leave even though they've overstayed less than six months? Can they still leave and the bar is not going to affect them?

MICHAEL MAGGIO: That's right. They can leave and come back. It must be 180 consecutive days in an unlawful status.

AUDIENCE PARTICIPANT: So if they go to the Bahamas it terminates the running?

MICHAEL MAGGIO: That's right, and sticking with this point, what constitutes unlawful presence has been very difficult to pin down because there are no INS rules yet. There are only a series of memoranda that have come out of the Immigration Service, which frequently changes definitions. For example, in June we were told by the Immigration Service that someone on a temporary work visa, such as an H-1 visa, an employer specific work visa, who worked for a different employer is unlawfully present. Or someone who is here

on a temporary investor visa who does not have a job besides working in his or her own home business, violates their status. As a result, we have been working to get new visas for these people.

In fact, one of the reasons I came down here on Monday was to meet on Tuesday with three employees of a multinational company who were being transferred out of the Miami office to wait, respectively, in Manila, Bogota, and Montevideo for new H-1 visas because it was recently discovered that they started working for an affiliated company here in Florida and didn't get a new H-1. It didn't dawn on them or their human resources people to get a new H-1 because the jobs were the same with related companies. So I explained to the company how we are going to get their employees back because they have violated the terms of their status. On Monday, over an electronic service that immigration lawyers subscribe to, we received a memo that INS put out to the field Friday evening. INS announced it had changed its mind. INS said Hs who work in a different job now are not considered unlawfully present. So INS redefined "unlawfully present," and these guys now may not have to leave because the bar does not apply to them. Obviously, it is a very difficult time for those practicing immigration law because people come to lawyers for answers, and they really don't like hearing, "I don't know." But often that's been the only honest answer.

A question was raised during the break and it's a common question. What can you do for people who were denied visas, such as tourist visas or F-1 student visas, because they cannot prove that they have a residence abroad to which they intend to return? She cited the example of a friend who cannot get an F-2 visa for her spouse—F-1 is for the principal, F-2 is for the spouse. Basically, they are holding the husband hostage in China to insure that the F-1 goes back. Here's one thing that can be done. Can your friend qualify for a visa that does not require proof of a residence abroad to which she intends to return like an H-1, the most common type of temporary work visa for a professional? You can go to school on an H-1. So someone can get a temporary work visa like an H-1—and Larry is going to go into this in a few minutes—they do not have to prove they are going back home. Then the spouse comes in as an H-4, and it does not matter that they cannot prove they are going to go back. It doesn't even matter if a green card application is pending. And you can get an H-visa even based upon a part-time job.

Someone asked about the alphabet soup of visas. They start with A and they go to S. It is beyond the scope of this presentation to go into all of these different visa categories. Larry is going to talk about the particulars of temporary work visas. The visas that you ought to be familiar with other than work visas are B-visas, which are visas for pleasure and business, and F-visas, which are the most common student visas.

VI. GREEN CARDS

How do people get green cards—the coveted evidence of permanent resident status? Although there are some exceptions, basically, there are three ways: family, work, and satisfaction of the definition of a refugee. Let's start with the last one first.

A refugee is someone who is outside their country of nationality, or someone with no nationality out of their country of last residence, who either has been persecuted in the past or has a well founded fear of future persecution on account of their race, religion, political opinion, or membership in a particular social group. Therefore, to qualify as a refugee the applicant must prove *either* past persecution or a well-founded fear of future persecution, and it must be on account of one of these factors: race, religion, political opinion, or membership in a particular social group.

A refugee is someone *outside* of the United States, being admitted in that status after satisfying the statutory definition of a refugee. An asylee is someone *in* the United States who satisfies the definition of a refugee. Someone who is admitted as a refugee is eligible to apply for permanent resident status after they have been here for one year. Someone granted asylum is eligible to apply for permanent resident status after one year.

The second way to obtain permanent resident status is through family. To understand the concept of family in immigration law you have to understand what is known as “immediate relatives” of United States citizens because if you are an immediate relative of a United States citizen, you fall outside of the preference system, the quota system, for green cards. There is a limit on the number of green cards available any given year *except* for immediate relatives of United States citizens. If you are not an immediate relative of a United States citizen, there are 20,000 green cards available per year for

your nation of birth regardless of whether you are a Mexican, a Filipino, or if you are from Malta, Liechtenstein, or any of those other countries that are slightly larger than a substantial suburban shopping center.

Some people think that this is not sound public policy. Why should there be 20,000 immigrant visas per year for Mexico, our immediate neighbor, and the exact same number for tiny Belize. The theory is that the system is fair because everyone is treated the same. What you have as a result of this system is long waiting lines for persons from particular countries. There are always long lines for the Philippines, extremely long lines. Sometimes there are lengthy waiting lines for Mexico, India, and China. Occasionally, there are lines for the Dominican Republic and Jamaica too. These are obviously all countries that send the most immigrants.

There is a preference system and there is a fixed number of visas available, not only worldwide, but also for each qualifying category for permanent resident status. There are family preferences and there are employment preferences, and there is a limited number of visas available under each of the family preferences and under each of the employment preferences.

Who is exempt from the preference system? Who are "immediate relatives" of United States citizens? First, the spouse of a United States citizen. Second, the children of United States citizens, however, "child" is a statutorily defined term—you have to be single and under twenty-one years of age. If you get married, you are no longer a child. If you turn twenty-one, you are then a son or daughter, you are no longer a child or an immediate relative. A child also includes adopted children if in the physical custody of the adopted parent for two years and if adopted before the child's sixteenth birthday. Child also is defined to include step-children. It includes orphans if the United States citizen is the one that is petitioning to bring the orphan in. Third, the parents of United States citizens are also immediate relatives, but you must be at least twenty-one years old to petition for your parents if you are a United States citizen. In other words, if you are born here, you cannot bring in your parents until you are twenty-one.

The first family preference is for the sons and daughters of United States citizens who are single. There is a line for most countries of

about one year, and you get a place in line by having a visa petition filed for you. That place in line is called a priority date.

There are two family second preference categories, 2-A and 2-B. Second preference A includes the spouses of permanent residents and the children of permanent residents, that is children that are single and under twenty-one. The 2-B category has fewer immigrant visas available. This category is for the adult sons and daughters of permanent residents. Today the line is so long for someone to get a green card based upon marriage to a permanent resident or based upon a permanent resident parent, that usually the permanent resident relative has to become a United States citizen before someone is going to get a green card. For example, if you marry a permanent resident, the wait is going to be somewhere in the vicinity of six to seven years before you get your green card, and you often are separated for this time from your spouse if you are married overseas—not a very good way to start a marriage.

What happens if you marry someone in your home country. Can they come in on a tourist visa to wait? No, because tourist visas require proof that you have a residence abroad to which you intend to return. It is very common for people to go home, get married, and then not be able to bring their spouse to the United States. There are several ways around this. Become a United States citizen and then the spouse becomes an immediate relative. Generally, you must have a green card for five years to be a United States citizen, three if you are married to a citizen. Perhaps your spouse can qualify for an H-visa, a non-immigrant visa that doesn't require a residence abroad to which you intend to return. Or perhaps you will be very bold, perhaps you will give up your green card and get an H-visa yourself and bring your spouse in under an H and then you get a green card all over again. This actually does happen.

The third family preference includes the married sons and daughters of United States citizens, and for this category there is a very long wait. And in the fourth preference are brothers and sisters of United States citizens. I tell people there is a thirty to forty year wait for a green card under this family fourth preference category.

Larry will talk about the employment based preferences, but I want to talk to you briefly about retaining green cards. Two of the most common misconceptions that green card holders have about

permanent resident status are related. They are as follows. First, if I have a green card, I must come to the United States every year, and if I don't come every year, then I automatically lose the green card. Not true, and the corollary to that is false also. If I have a green card, and I come to the United States once a year they can't take the green card away. That is not true either.

A green card is a permanent visa; it is evidence of status; it is a work permit. Think about your passport. If you are from El Salvador and you have a passport, that is evidence of your El Salvadoran nationality; it is a travel document. If it expires, you are still a Salvadoran. A green card is good as a travel document for absences of up to one year. If you are out of the United States for more than one year, it is no longer good as a travel document. At the same time, to maintain your green card, it's not enough to simply come back to the U.S. annually. The United States must be your residence. Sure you are allowed to be out of the country, and sometimes for a substantial period of time, but you cannot use a green card simply as a visa to come back and forth, or it will be taken away.

Remember, I said that if you engage in certain conduct, you cannot come in to the United States, and if you engage in certain conduct, you get thrown out. If you are under a non-immigrant visa, a temporary visa, and you violate the terms of your admission you can be deported. If you are on a green card and you are convicted of a crime, you can be deported. If you obtain a green card and you weren't entitled to it when you got it, you can be deported.

Under the new immigration law, the proceedings to remove people from the United States are now called removal proceedings. People who are placed in these proceedings to expel prior to April 1, 1997 are in either deportation or exclusion proceedings, after April 1, 1997 these are called removal proceedings. In these proceedings, the burden of proof is on the government. The standard of proof is clear, convincing, unequivocal evidence. The government must first prove that the person is a foreigner because the government cannot deport someone unless it proves first that they are a foreigner. Many immigration lawyers make the mistake of admitting alienage, when they should only admit alienage if the client is only applying for a relief from deportation like asylum where alienage is not an issue. In deportation proceedings there are various ways to fight deportation in

addition to making the government prove deportability—adjustment of status to permanent resident, political asylum, and also something called suspension of deportation prior to April 1, 1997, but those cases are now called cancellation of removal. It is a way of getting a green card based upon a showing of very extreme hardship, in the event of your deportation, to relatives who are United States citizens or permanent residents.

AUDIENCE PARTICIPANT: A person has a brother and that person has a non-immigrant visa. Can that person bring his brother to the United States?

MICHAEL MAGGIO: No, only a United States citizen can bring a sibling as an immigrant, and then it takes thirty to forty years. Having a U.S. citizen brother does not help at all in obtaining an immigration benefit. In fact, it can hurt you if you are applying for a tourist visa. The consul could say there is a pattern of migration in this family and, therefore, not give you a visa. People think that having citizen relatives helps, but it hurts when applying for student visas and tourist visas because those relatives can make it more difficult to prove that you are going to go back home.

I would suggest that at this point I turn the floor over to Larry to talk about non-immigrant visas, then we'll take a brief break, and thereafter Sheila will talk about getting a green card based upon a job. Larry, why don't you bring us through the complex series of temporary employment visas so that people have a sense about how that works.

TEMPORARY WORK VISAS

PRESENTATION BY LARRY S. RIFKIN
RIFKIN & ASSOCIATES

INTRODUCTION

The way I would like to conduct this part of the program is for you to interrupt me if you have any questions. There are a lot of rules, so some questions might break things up.

My practice here in Miami typically involves people coming in

primarily from Latin America, and typically they are professional people or people that own small to medium sized businesses, although we also represent several large multinational companies. The typical person coming into our office, more likely than not, ultimately wants a green card. Initially, they are uncertain if they want a green card. Normally, their primary preoccupation is that they want to work here, and they want to get their family settled here. Foreign nationals come to the U.S. for various reasons: possibly security, possibly wanting to expand their business, or wanting to give their children a different type of future. So when they come into our office, we take a history from them. We ask them about their background, whether they are married, about their spouse's background, about academic qualifications, about work histories, so we can explain to them the various options that are available to them.

Our practice primarily focuses on employment based visas and gray areas of the non-immigrant visa categories. If you are a business immigration practitioner, you are normally going to gravitate toward three types of visas, normally Hs, Ls, and Es. There are other visas available besides H-1B1s, L-1As and L-1Bs, and E-1s and E-2s, but the business immigration practitioner is usually going to seek the H, L, or E classification, so I'm going to start with the H classification and I'll work my way down. Understand that this is not a comprehensive list by any means, but something more of a practical guide.

H-VISAS

The H-1B1 visa is available to people who are going to be employed here in a specialty occupation, usually a professional occupation. When someone comes into my office and wants to know what an H-1B1 visa is, I tell them that you need four things. I break it down very simply. First, you need a United States university degree, a bachelors degree or equivalent. If they don't have a bachelors degree or they don't have a United States university degree, focus on the word "equivalent." We'll come back to that. So, first you need a United States university degree, a bachelors degree, or equivalent. Second, you have to have a job offer that relates to the course of study for that degree or equivalency. Third, the position being offered to you should require a university degree as a minimum entry requirement. And fourth, the wages being paid for the position that is being offered to you must be the prevailing wage in the metropolitan

area in which the position is located or the actual wage being paid to other individuals that are similarly employed in the company, whichever is higher. And the last test for qualifying for the H-1B1 visa was put into legislation several years ago, that the foreign worker will not negatively impact United States workers in the immediate metropolitan area, bringing wages down.

To review these four rules let's take an example. There is a bank here in Miami that wanted to employ somebody. This person comes to my office, they have a job offer from the bank in Miami. Normally, the prospective employee is the one that comes to me because he or she is looking for a job. We'll explain to their potential employer what an H-1B1 is and why it's good for them to hire the person, that is, we will try to highlight for the company the positive aspects of hiring the person.

This person comes to our office, and he has a degree in accounting and has been offered a job by the bank as a teller. Well, accounting does relate to employment as a teller at a bank, but we are missing something very key in our formula of what would qualify someone for an H-1B1. Do you need a university degree in accounting to be a bank teller? No. So that is something that wouldn't qualify, but remember, a key component to getting an H-1B1 visa is that you need a university degree, a bachelors degree or equivalent, and that the position must relate to the course of study. So, basically, you are looking for situations where the person is going to be employed in a field where there is a history of requiring a bachelors degree. Sometimes it is evident if the position is for an engineer or a teacher, but it may not be so evident in the hospitality field or in other areas. Consequently, you have to look for resource publications like the *Occupational Outlook Handbook*, which is published by the Department of Labor, to see what the professionals say and to discover what industry trends are because you have to educate the Immigration Service when you file the visa petition. In this type of situation for an H-1B1 visa one needs to file a visa petition with the Immigration Service and have the visa petition approved before the beneficiary or alien can seek issuance of the visa.

Let me go back again to the number one rule about the bachelors degree or the United States university bachelors degree equivalent; let me focus on equivalency. A lot of people that come to our office

are not foreign students graduating from the University of Miami or a local university. Perhaps they have a degree from a university in Venezuela, or a university in Peru, or Bolivia. Generally, if it is a four year program or a five year program, it is going to be equal to a United States baccalaureate degree. How do we determine that?

Well, there are what are called credentials evaluation services. These are organizations composed of members of the university community who have the authority to grant credit in a specific discipline, and they will review the person's credentials and render a professional opinion.

It is easier if the person is coming from a situation where you are submitting an evaluation for a university or academic degree program. It gets a little bit tougher, though, when you submit something less. Sometimes people have only two years of studies, or maybe they went to an institute in Venezuela that gives a three year degree in marketing, not quite a full four year program, but a little bit more than an associates degree. So you have someone perhaps coming from an institute or someone with a partial university education, and they may have several years of professional work experience in the discipline.

Sometimes you have people who have no university degree; they are self made in their field. Under these circumstances, the credentials evaluation services are very important because the Immigration Service has built into its regulations a methodology where individuals who do not have university degrees or who have only partial university degrees can obtain equivalencies. In other words, you are getting credit for life experience. The regulations speak to a three year rule—three years of progressive work experience with professional experience in the discipline equals one year of university education. So you have many individuals with twelve, thirteen, fourteen, or fifteen years of progressive, professional work experience in the discipline who obtain an equivalency to a bachelors degree for immigration purposes. I always tell them that the equivalency is for immigration purposes because someone may want to apply for a masters program based on these evaluations. I tell them, "I don't think you are going to be accepted for the masters degree program," but evaluation is accepted by the Immigration Service. There are also people that have gone to school for maybe two years in marketing,

but have worked in the marketing field for a period of ten years thereafter. We receive professional evaluations for these individuals too. So you not only have people with full university degrees, you have people with partial university degrees, you have people graduating out of schools of higher education where full bachelors degrees are not offered, and you have people with pure work experience who can all qualify for H-1B1 visas.

In order to get an H-1B1 visa, the foreign national must have an offer of employment. A lot of these individuals first have to go out and interview for a position, and as the attorney you have to educate the employer as to their responsibilities when employing the individual. You have to also educate the individual as to their responsibilities because once an H-1B1 visa is obtained—either through a change of status, if approved by the INS, or if the person goes abroad, obtains the visa, and returns—they must be employed by the organization that has sponsored them at the wage indicated in the visa petition and stated in something called a Labor Condition Application.

The individual being sponsored for the H-1B1 visa has to be paid the prevailing wage in the metropolitan area where the individual is going to be employed or the actual wage paid to other individuals similarly employed in the company, whichever is higher. The reason for this rule is that when this legislation was drafted several years ago, there was a concern that individuals coming from other countries might be a drag on United States workers as far as their salaries were concerned. There was a concern, for example, about someone coming here to work as a systems analyst if the prevailing wage in the community is thirty-five to forty thousand dollars a year, and this person accepting employment for twenty-five thousand dollars a year.

AUDIENCE PARTICIPANT: How long does it take this person to get the visa?

LARRY RIFKIN: That question comes up a lot in our office, and we try to give an estimate to clients. Visa petitions are processed at four regional processing facilities around the United States based on the geographical location where the job is located. In the South you file with the Texas Service Center. In the West you file with the California Service Center. In the North you file with the Nebraska Service

Center, and in the East you file with the Vermont Service Center. Right now I am telling clients in Florida to expect, if we need to do a credentials evaluation, anywhere between eight to ten weeks, and then we break things down on how we feel the processing will go. However, when Congress amended the regulations in the H-1B1 visa classification back in 1990 they put cap of sixty-five thousand visas per year, and this year was the first year that they reached it. In August, they stopped processing cases for about two weeks because they had to count to make sure that they didn't issue too many. So my predictions of when things were going to come to fruition in a client's case went right out the window.

We always caution clients that we are giving them an estimate. This is an administrative practice and sometimes a very difficult administrative practice. Immigration examiners sometimes make incorrect decisions. Sometimes they ask questions that are not appropriate because they are not too well versed in the law, and sometimes things get misplaced at the service centers. In our office we try to make the applications walk by themselves. It's not just filling out a piece of paper and putting some documents together. We try to create. I tell my staff it's like creating a school project at elementary school. You have to make it neat and pretty and clean and readable and to the point. Sometimes we have to lead the immigration examiner through the process, to show him or her how to approve the case, and why they should approve the case. In one egregious circumstance recently we had a case that was denied and then reconsidered because the immigration examiner brought his own twist and interpretation to the rules on a very simple case for a marketing director. We faxed the decision to the director of the service center with our motion to reconsider, and asked him if he would expedite the reconsideration because the decision was so egregious. We were told to do this because the INS uses these types of cases or decisions for training afterwards.

The Immigration Service is not a true "service" facility. It should really be split into two parts: a section for border enforcement and a section for service. If you are going there expecting help and the correct answers, very rarely will you get the correct answers or the help that you seek. It is like going to the Internal Revenue Service. If you are requesting help in filling out your tax return, and expecting the right answers, and expecting the IRS to save you money, you know

that's not going to happen. There are some very fine people that work in the INS, and a lot of them do try to assist people, but sometimes they don't have the training or background because their training and their duties are very segmented.

So your job as the attorney is to educate, and a lot of the things that we will talk about here today are things you are not going to learn in books. It is learning by practice. I know that when I send certain clients abroad to get an H-1B1 visa, it is really like an automatic visa issuance at the embassy, unless the consul feels that the petition is fraudulent or unless my client is a suspected narcotics trafficker or has been convicted of a crime about which he has not told me, which sometimes happens. However, we prep our clients before they go abroad to apply for their visa because we know that certain consular posts have a reputation for being problematic.

For example, we know it is sometimes a little bit more difficult in Buenos Aires, or in Bogota, or Manila than other places. Montreal too. Brazil for a time was a problem. There was once a consular officer in Sao Paulo who was extremely difficult. He was eventually transferred out of the position. We represent a lot of Brazilian clients who have not had problems.

A lot of immigration lawyers think that their job is done when the petition is approved for the H or the L. It's not done when it's approved by the INS; it's done when the visa is issued to your client. It is very important that you sit down with your client and review the non-immigrant visa application. Make sure the client has an understanding of the process and how to present themselves so that it is a very clean process for everybody concerned and so you don't get a call from your client abroad saying there is a problem at the consular post. It is very difficult to fix those things a few thousand miles away.

In some places like London they encourage everything to be done by mail. As another example, several years ago the visa issuing post in Willemstad, Curaçao was closed, and we were allowed to process visa issuance by mail. That is at the Department of State's discretion. It is very rare that they will let you apply by mail because they want you there in person, but they sometimes will allow it. The key thing to understand is that this is an administrative process whether it is with the post abroad or with the INS, and because it is an adminis-

trative process it is subject to a lot of discretion and vagaries. When we are consulting with our clients and planning their non-immigrant visas we try to take as much discretion away from the consular officer or the Immigration Service as possible. For example, I spoke to you about a foreign university degree. You don't necessarily need a credentials evaluation in order to file your case. You can let the service officer determine whether he or she thinks it is equivalent. We do not want to leave it open to that discretion. We would rather spend a hundred and seventy-five dollars, or whatever it costs, to get that credentials evaluation. We want to leave as little discretion to the INS as possible.

We try to anticipate the INS's answer based on the behavior of other immigration examiners in the past—things tend to be cyclical at service centers—based on past decisions and other factors. Sometimes they get into a mode where they ask a lot of questions because they are training new people, and you can tell that they are training people. So you must prepare your cases accordingly.

That is essentially the basics of the H-1B1 category, and the key again is the university degree or equivalent. Equivalency can be obtained by progressive professional work experience. You also need the job offer because it is particular to the employer. If a person is going to leave that company and seek a new employer, they will need a petition approved first because as soon as they leave that company or are terminated, they have to leave the country in ten days or they have to change their status to another classification.

MICHAEL MAGGIO: Larry, how would you solve this problem? You said that you need a degree to get an H-1B1. Let's say someone came to you and said, "We want to hire this person to be the president of our company. Our company is a hospitality company, and we have twenty-five restaurants, which are a series of limited partnerships, and we are the general partner. We also do not own any of our real estate; we have very complicated leases that we engage in for the various premises where our restaurants are conducting business. This gentleman we'd like to hire is an outstanding candidate for this executive position. You just told me about the requirement of having a degree related to his job duties. This man made the mistake of getting a degree in law, and he's got an LL.M. from the Washington College of Law. Can you get an H-1B1 for this gentleman to work as

the president of this hospitality company?"

LARRY RIFKIN: How many years of experience does he have?

MICHAEL MAGGIO: Well, he's worked about six years in the industry as an executive.

LARRY RIFKIN: Yes, I could get an H-1B1 for this gentleman. When we're looking at education, the first year or two in any university program is not really geared toward any major, it is geared more toward general course requirements. It is in the last two years that people tend to specialize. We would look at the six years of work experience and whether it is progressive in a business type position. I believe that the person would be eligible for an equivalency in a business related degree and would, therefore, be eligible for the position as president.

MICHAEL MAGGIO: What would be the equivalency? A masters degree in business or a bachelors degree in business?

LARRY RIFKIN: I believe it would probably be a bachelors degree in business. You would rely on equivalency to a business major bachelors program and, hence, equivalency to a bachelors degree from the credentials evaluation service.

AUDIENCE PARTICIPANT: Is the issuance of an H-visa based on the premise that this skill that this immigrant would bring is not obtainable in the United States?

LARRY RIFKIN: No, it's not, but the nexus in getting an H-1B1 visa is relating the offer of employment to the degree. It is not based on any labor shortage. In other words, if you are going to bring in a civil engineer, you do not need to test the labor market to make sure that there are no United States workers that qualify for the position.

AUDIENCE PARTICIPANT: Who does this test?

LARRY RIFKIN: Oh, there is no test. The sole qualification, the nexus in getting the H-1B1, is that you have a job offer that requires a bachelors degree as a minimum for entry to the position, that the person has the degree and will be paid the prevailing wage or the actual wage being paid by the company to others holding the same position.

Let me talk about the prevailing or actual wage criteria for a minute. Imagine a situation where there is a small company wanting to

hire someone as a finance manager because there are no finance managers employed by the company. As a condition of employing this individual as a finance manager, we have to find out what the prevailing wage is for a finance manager. The company is located in Miami. How do we find out what the prevailing wage is? Well, the safest thing for the employer to do is to obtain a prevailing wage determination from the state's department of labor. The state's department of labor has a section set up specifically for this. You send to the labor department a job title, a description, and the requirements of the position. The labor department has a methodology, which has undergone changes from time to time and will be undergoing changes again very shortly. The state department of labor will send back to you what they believe (based on the methodologies that they have developed) is the appropriate salary for the position, specifically for the metropolitan area. The employer has to pay this amount or be within five percent of it. In the case of the finance manager, the state department of labor estimated a salary of thirty thousand dollars a year. Therefore, the company would have to offer the position at thirty thousand dollars a year, or be within five percent, which would be a salary of twenty-eight thousand five hundred dollars per year.

We represent a university here in Miami that from time to time wishes to do H-1B1 visas, but the problem with the university is that they don't pay within five percent of the prevailing wage. They don't seem to be competitive. It can get a little more complicated. Let's say you have a computer company and they want to employ a software engineer and they have three other software engineers that are now working. But there is a salary differential; they want to bring in this new person at say thirty thousand, but they have three other software engineers working there that are making forty-five or fifty thousand. Remember, the standard is the prevailing wage, or the actual wage being paid by the company to people similarly employed, whichever is higher. Well, you have to look at the other factors. When we have this situation, normally what we do is have our clients chart it out because you have to keep a file, a public inspections file. Anybody who wants to take a look at this file may, and anyone can file a complaint with the Wage and Hour Division of the Department of Labor if they do not think that an alien is being properly remunerated. So what other factors can be considered. Well, you can look at the qualifications of the other individuals. What are they doing?

What are their *exact* job descriptions? You have to show differentiation between software engineer B, C, and D and software engineer A, the one you're bringing in at a lower salary. If you can't show a differentiation in responsibilities, qualifications, or education, then a company can suffer severe penalties.

MICHAEL MAGGIO: What if someone comes to you and they say that they've been offered an H-1 job as an environmental engineer. But rather than working for Mobil Oil they've been offered a job with Greenpeace, and they are very happy to work for Greenpeace for a wage that is substantially lower than the prevailing wage? Or let's say you have someone working for Human Rights Watch or Amnesty International as a lawyer. The prevailing wage for a lawyer may be fifty thousand, yet this individual is willing to work for thirty-five thousand. Can he or she get an H-1 for that job claiming they are getting psychic income working for a non-profit so that it would be treated differently than for-profit organizations?

LARRY RIFKIN: No. That is a very good point to bring up, Michael. It has to be pure salary remuneration. You can't look at in-kind of benefits like housing, a car, or payments for your child's schooling. It's the pure money the person will receive that counts. Sometimes this can be an obstacle for employment because the employer is not willing to pay the prevailing wage or be within five percent.

L-VISAS

In addition to the H-1B1 visa, another visa that we utilize quite frequently in our practice is the L-visa—the international manager or executive visa. This is the category that all the big multinational companies use, but you don't need to be a big multinational company to use it. You can be a small company with only a few employees to use this visa to bring yourself over here and open up a subsidiary office to carry on business.

Let me give you an example. A client comes to us from Venezuela. This person has a small manufacturing company in Venezuela with twenty-five employees, and they are looking for a market so they decide that it would be a good idea to open up an office here in Florida. What are the requirements for an L-1 visa? The owner of this company in Venezuela comes to me. What do I tell him? What can he do?

Well, in order to qualify as a manager or an executive to obtain an L-1 visa, one must have been employed by the company abroad for at least one year in any one of the last three years. It does not have to be immediate past employment; it is employment for at least one year in any one of the last three years. We had a situation where someone had terminated his employment with the company, yet the company maybe a year or two later, wanted to bring this person to the U.S. company as an L-1 in a reconciliation. But in our hypothetical situation, we have a simple case. We have the owner of this foreign company that has twenty-five employees who wants to open up a U.S. branch operation to distribute his goods. This individual has to have been employed with the foreign company for at least one year, and he has to be receiving a salary for his efforts. If this person has been employed with the foreign company for at least one year, and he is the president of the foreign company, you automatically assume you have to employ him as an executive or manager.

What is the definition of executive or manager for immigration purposes? That has changed throughout the years. Sometimes it has been interpreted very narrowly. Sometimes it has been interpreted broadly. Right now it is in the middle. To simplify it for my clients, I tell them there are basically two definitions. One is the traditional line definition that we are all familiar with, the factory. You've got the president of the factory, you've got the vice presidents, you've got the managers below them, and you've got the supervisors and skilled workers below them. This is the traditional line definition, but most companies do not operate this way.

In service-type organizations and smaller companies you typically have what is called the central function manager or executive system. This is the other definition. Is the person essential to the operation of business? Are they involved in essential activities of the company? Now, either under the line definition or the essential function manager or executive, remember they've got to *function* as a manager or executive. They can't be sharpening pencils and typing letters and getting coffee. There normally must be other employees to qualify for an L-visa. You also have to look at the type of business they are engaged in. My example is a manufacturing company, but you could have an import-export company in Venezuela, for example, with one to three employees. Sometimes it comes down to an interpretation of what is traditional in the industry, and a lot of this is good old com-

mon sense. I tell my clients they should use a little bit of common sense in this process. A lot of immigration law is common sense because the people that are adjudicating these cases are people that are probably not as well versed in the law as you are. Consequently, if the case looks bad to you, it is probably going to look bad to them.

Getting back to our hypothetical, we've got the company in Venezuela with twenty-five employees, the individual has been working there for more than a year, and he satisfies the line definition of manager. If he wants to open up a company here, what do you need to do? Well, you file a petition with the Immigration Service. In your filing with the Immigration Service you have to prove corporate relationships. People often come to my office after they have been to another law firm, and they bring in a list of documents, and they present this list of documents. I tell these clients that there is no such thing as a standard list of documents that can prove relationships. The list is going to be different from one client to another. For a multinational company, we may only need an annual report. There is no standard list of documents because what you are trying to do is to prove a corporate relationship.

What creates a qualifying multinational organization? Well, you can have a parent subsidiary situation where the company in Venezuela owns the company here in the United States as the majority shareholder. Or the company in the United States could be the majority shareholder of the company in Venezuela, although that is less likely to occur because the foreign company is usually going to be the majority shareholder. So the foreign company owns at least fifty-one percent of the company here. In some cases, I tell my clients to seek tax counsel when the situation has important tax implications.

My fictional client that owns the company in Venezuela can create a qualifying affiliate situation because he owns one hundred percent of the company in Venezuela and at least fifty-one percent of the company here. Changing my facts slightly, you could have a situation where the owners of the company in Venezuela—say there are three owners of the company in Venezuela who each own a third of the company in Venezuela—want to create an affiliate situation here in the United States because of the tax implications and other issues. Those three owners, Mr. A, Ms. B, and Ms. C have to be the same owners of the company in the United States in “approximately the

same percentages.” Since I’m very conservative, and I don’t know what “approximately the same percentages” really means, I always tell my clients to make the percentages the same. All of my clients want some sort of a guarantee. If they don’t ask for it directly, it is usually implied, but they always want a guarantee. Consequently, we try to give out our advice as conservatively as possible and let them know where there might be problems because we do not give guarantees.

So, we’ve got our qualifying situation because we have either a subsidiary or affiliate situation. What do you need now to prove the relationships? As I mentioned earlier, there is no laundry list of documents. What do you need? If you are trying to prove an affiliate situation, you have to show that there is an affiliation between the two companies. You have to incorporate the company in the United States. You have to rent office space because the Immigration Service will look into this at the visa petition stage. Renting space is very key. And when my clients ask me if they can use my apartment, I tell them, “No, you can’t use my apartment.” Remember the common sense rule. It has to be a legitimate business situation. So they need to rent space, and they’ve got to have a business plan. The Immigration Service will focus on this in the adjudication of the visa petition and say, “There is no doubt that this person is an executive or manager in Venezuela, but it’s a brand new office in the U.S.,” and, consequently, they don’t want to give you a visa for more than one year.

So when it’s a new office, they are going to give you a visa for one year, and at the end of the year you have to prove a business pace, so you better be ready to start doing business in a hurry. Therefore, before we do the visa petition, we need a business plan to know what you are going to do. The client needs to rent that space and put sufficient money in the bank for business startup. You can’t simply put a hundred dollars in the bank for a corporation. That’s silly. You must deposit enough for startup. There is no minimum deposit amount that you have to show; it could be stated that funds are going to be transferred in from the parent company. It goes back to the common sense rule. I’d like to at least have my client show a five figure balance when they are filing. Do I say it is a requirement? No, but my clients, remember, are asking for a guarantee.

The petition is approved by the INS here, but the client at some

point has to go abroad and pick up the visa. In Caracas, until recently, every L-1 visa that was applied for was being investigated. It used to be stamp, stamp, approval, but for awhile they were investigating everything because there were allegedly a lot of fraudulent L and H petitions there. If the place where you say the corporation is located in Venezuela turns out to be a vacant lot, that is going to be a problem. That has been a problem with a lot of these Russian L-1s today. The consuls are concerned about Russian mafia action. I try to educate the Russian client when they come in and tell me that they can provide the paperwork. Perhaps they are going to spend a few thousand dollars for a service to get a visa that may not even get issued, and then, in the end, the individual may be caught for visa fraud and be barred from the United States for life. I'm not doing the client a service by helping him to do that. So we do it legitimately because that is ultimately in the client's interest as well as mine. If it is done incorrectly, the client may end up with a lifetime bar to the United States based on visa fraud.

AUDIENCE PARTICIPANT: Doesn't this visa also require that you show something about the parent company in Venezuela?

LARRY RIFKIN: Yes. Normally, for a medium size company, we're going to want mercantile registration, financial statements of the last years, schematic employment diagrams of the business, and a list of employees. I have found that pictures are very helpful in L-1 visas. One picture is worth a thousand words, and sometimes I think the INS examiners don't read the application as much as they look at the pictures.

Now, the client can also buy a company, and sometimes that is a lot easier for the client. In some circumstances, we have companies that will get several L-1 visas because their employees are traveling back and forth because they are working in Venezuela and they are working in Miami. So they don't have to be working full-time in the United States for the company. The real focus of the examiner is on legitimate business operations. In order to maintain the element of authority, you have to have the company doing business here and doing business abroad.

Some of my clients have said to me, "I want to buy a business here, and I heard from a friend of mine who has an L-1, that he got an L-1 for three years because he had an existing business here. So,

if I buy a business here can I get my L-1 for three years?" There used to be a loophole in the regulations allowing this, but they closed that. Now, even if you buy an existing business here and you get an L-1, it is only going to be issued for one year because it is going to be considered a "new" office.

The L-1 visa is a very useful tool for clients that may want to immigrate (green card) because you do not have to obtain a labor certification. Generally, most people that are getting employment-based green cards are going through the process of labor certification, which involves a test of the United States labor market. The process has gotten increasingly more narrow over the years, where the decisions by the Labor Department are more skewed toward the U.S. worker applicants and less with the U.S. employer. Getting an L-1 visa or qualifying as an international manager or executive obviates the need for certification of a labor shortage in the United States. If a United States corporation at some point says that the person's services here are essential and the multinational organization still exists, that person gets an immediate visa and is quickly eligible for a green card. This can be an important strategy to remove as much discretion as possible from the INS or the Labor Department. Consequently, we try to do L-1s whenever possible.

AUDIENCE PARTICIPANT: How long does it take to get a green card with an L-1?

LARRY RIFKIN: It depends. Let's say that we have a multinational company that has been in operation for several years here, and they want to bring one of their executives over, permanently. We first file an immigrant visa petition with the appropriate service center where the company is located. Generally, at the Texas Service Center, which is the one that we are most familiar with because we work with this service center the most, the processing time currently ranges from thirty to ninety days, depending on the allocation of the service center's resources because they allocate their resources around from time to time. Consular processing, at the moment, normally takes about six months, but things can be expedited if one has contacts with the consul.

If the company is not sure that it wants the person here on a permanent basis, and the company needs the person immediately, then they can process an L-1 visa, which by regulation is supposed to be

adjudicated in four weeks. So, the company can bring the individual over on an L-1 and then seek an immigrant visa afterwards. However, I would not tell a company to seek an L-1 visa asking for someone to come here on a temporary basis as an executive or manager and then file for an immigrant visa petition a few weeks later because the INS may have a problem with that, and it may be difficult. There can be a dual intent situation with L-1 visa holders, where they can have the intention to be a non-immigrant and an immigrant at the same time, but I think that comes more into focus once you seek an L-1 extension and/or file an immigrant visa petition. You don't want the INS or the consular officer to think you are trying to circumvent the normal immigrant visa processing because you don't want any potential issues of fraud. Sometimes I'm more conservative than the INS because I know that there is a lot of discretion involved, and if something goes the wrong way, my head is going to be on a plate! You want to deliver services quickly to clients, but you need to be conservative in the delivery of those services. I tell my clients that I have an incentive to deliver services and make the clients happy, but I also don't want them to have any problems with the United States Department of Justice.

E-VISAS

The other visa that I want to talk about is the E-visa. The E-visa comes into play only in certain countries where we have treaties of reciprocity whereby United States citizens can go over and do similar activities. Therefore, E-visas are not available for every country. No, I don't know the entire list of countries, even though I've been doing this for eighteen years, because new countries are added once in a while.

There are treaties with certain countries that allow two types of visas: E-1s and E-2s. The E-1 is based on trade in goods or services. The qualifying services are defined in the regulations and include such things as banking, telecommunications, insurance, travel, and other services. When most people think of E-visas, they think of the old import-export company, but E-1s can also work for a number of services. We represent a multinational bank here in Miami, where there is a treaty with the bank's home country, and we bring their executives over on E-1s because it is quicker. We simply go to the consul and apply for the E-1. You don't have to go through the more

complex L-1 process, first filing a petition with the INS. So, often you can go for the E-1 because it is more expedient. Again, the E-1 visa is for trade in goods and services.

The E-2 visa involves something called “substantial investment.” For the E-2 visa, the INS regulations and the State Department guidelines are chock full of discretion. I don’t know exactly what “substantial investment” means because it is not defined. The State Department has a guideline, so I can give the client a vague idea of what “substantial investment” means. The guidelines also require individuals to have their funds “at risk” before the investment will qualify. Isn’t that awful? That someone can invest money and still not know if they are going to get the visa. Remember, I can’t and I won’t give any guarantees. It’s written into my retainer agreement that I won’t guarantee because the client is going to be pretty upset if I tell them to invest money in this restaurant, for example, and they don’t get the E-2 visa.

So the E-2 is sometimes not the best basis for bringing people over here. I prefer a visa basis where I have a little bit more control. For example, when doing an E-2 visa when you know the person really wants to invest money here, if they are from a treaty country—like Italy or Costa Rica, (but not Venezuela because there is no treaty with Venezuela)—the person can buy an existing business and invest money in the existing business and put as the terms of the contract that the funds be held in escrow, which will put the funds at risk. The sale can then be conditioned on the issuance of the E-2 visa. This is acceptable, and I feel more comfortable doing this rather than having my clients simply come in intent on an E-2 visa and intent on starting up their own business.

I feel more comfortable doing it this way because under the “substantial investment” criteria of the E-2 visa, the first thing that the consul is going to look at if you are buying an existing business is whether it was an arms-length transaction. Here we go back to the common sense rule. You can’t simply buy your brother-in-law’s business for five dollars, or fifty dollars, or even a hundred dollars. That won’t work. It must be an arms-length transaction, a real business deal. For example, is the purchase of a restaurant for two hundred thousand dollars an honest transaction? Well, it obviously is if they are going to spend that amount of money, but if they are not

buying an ongoing business and they are, instead, going to start their own business then they are going to have to put the funds at risk and document leasing space and perhaps doing some remodeling, etc. That is easy for a restaurant since they need to buy the equipment for the kitchen and everything else.

However, the test is whether it is going to be a viable business. Have they invested enough money to make the business viable? Although the standard is supposed to be "viable," in practice it is more like an "operational" standard. The consular officer is actually going to examine the business to determine if it is "operational," not simply "viable." How do you show that a business is going to be "viable," by income projections, by financial statements? That is not enough. That is not going to be accepted. You need to get people from an industry association, in this case the restaurant association, to state that the amount of investment for this type of business is the amount of investment one would need to make in order to make the restaurant viable. Perhaps you should also gather information from the trade association about other restaurants of similar size and capacity in the area. You have to gather enough information to show the consular officer that this is going to be a viable operation. This is easier to show when the person is buying an existing business because you can show that it is an arms-length transaction, and you can show that it is an ongoing business.

With an E-2 and an E-1 visa you have a choice of applying with either the INS or with the State Department consular officer. We go right to the consular officer and apply. We don't waste our time at the INS, at least I don't, because whatever the INS decides is going to be re-adjudicated by the consul. The consul doesn't care if the INS approved the E-2 visa. This is the one situation, where even if the INS approves the E-2, the consul may look at it, but he doesn't have to abide by INS's decision, *per se*. It is not like an H-visa petition or an L-visa petition where they have to accept the INS's approval, and where if they don't accept the approval they have to have a very strong reason to reject it, for example, if they suspect that the petition is fraudulent or that there is something wrong with the person, such as if they are a suspected narcotics trafficker. Under an E-2, the consul can disagree with an INS approval and cancel the individual's visa.

How much do you have to invest for an E-2 visa? When I was starting out in immigration law there was a rule of thumb that it must be at least one hundred thousand dollars because the INS or the State Department will reject the application on marginality or they'll say its not substantial enough if it is less. How much do you tell your client to invest? If the restaurant, for example, is going to cost a quarter of a million dollars, can you invest fifty thousand dollars? What is the consul going to accept as an acceptable debt ratio? There are guidelines in the notes of the foreign affairs manual, but, as you know, guidelines eventually becomes rules. So we look at them as rules. I really do not like to deal with anything less than a hundred thousand dollars because it would concern me. For this amount you need to put at risk about ninety to one hundred percent of the funds. For amounts up to a half million dollars, you need to put roughly sixty percent at risk. So these are the basic guidelines that I use. You have to put a certain percentage of the funds at risk in order to make a good case, and the funds have to be your own funds. You can't use the collateral of a business. It has to be funds that you are putting at risk, that you could lose if the investment goes awry.

The third thing that you are looking for on the E-2 is marginality. The idea of getting an E-2 visa is that you are coming in as an investor, to create a business, to create profit. It is not meant to be a way of engineering a visa for you and your family to open up a small restaurant where you are the only one that is going to be employed. There are three things to look at with marginality. If you are coming in to create an investment that is going to generate a profit, are you going be dependent on the income of that restaurant? Because if you as the alien are going to open this up as an investment to get profits, which will create growth in the area, and you have your own source of income, that is great. You may satisfy the test of marginality because it is not a marginal investment. If you are going to receive income from the business and the business is already ongoing, what is going to be left? Are there going to be employees? Is it going to create employment? Finally, the business's impact on the community will be examined. Maybe it won't create a lot of jobs, in and of itself, at the place of employment, but will it help create other jobs in the area?

So, for an E-2 first you've got to make sure it is a substantial investment. And remember this test is easier to satisfy if you buy an

existing business rather than if you start one up because of the issue of viability. Remember the actual test is whether the business is "operational"; viability is actually a lower standard. Second, are you investing a sufficient amount of money in the business. Again, we look at the foreign affairs manual guidelines, which have essentially become rules. This is the area where the consular officers can exercise a lot of discretion, and it can differ tremendously from one consular officer to another like Mike's example of the scoop of ice-cream and the three different cones. So for an E-2 visa you need to make sure that the amount of money you are investing is substantial and that it is not a marginal investment, and there must be a treaty with the country allowing for the E-visa.

E-1s, remember, are given based upon trade or on exchange in service. You are looking for substantial trade, you are looking at the dollar amount. Will this company require the services of someone here in an executive capacity to run the business? The trade has to be more than fifty percent with the treaty country, and the person that is coming in, of course, must be coming in to function in an executive capacity of that business.

One thing I skipped over on the E-2 is the required ownership percentages for treaty country nationals. You can get an E-2 or E-1 visa with the treaty country national owning only fifty percent of the company. However, if it is only fifty percent, then you have to show that non-treaty country nationals don't actually exert control over the company with the remaining fifty percent ownership. In other words, if fifty percent of the owners of the E-2 or E-1 company are Italian and the other fifty percent are non-Italian, you have to show that the Italians are the ones that are actually controlling the business. So, it is easier to deal with a majority ownership situation than a fifty-fifty situation.

The person on the E-2 is usually coming to direct the investment, but you can also bring in people on E-2s who are in supervisory or managerial positions. Again, you use common sense rules. Does the company really need this person's services in a supervisory or managerial capacity? A third category of E-2 worker is someone with essential skills to assist with the investment. These workers are not coming to direct investments, and they are not in supervisory or managerial positions. For example, if you are opening up a bakery,

this person may be a specialist in a particular type of pastry-making, and this particular type of pastry is essential to the business, so this person's skills are essential to the business. Sometimes you can manage to keep these people in the United States for a very long time, and sometimes the company must start training U.S. workers to do that type of work.

O-VISAS

The other two visas that I want to touch on briefly are the Os and the Ps. The Os are for people that are involved in the arts and sciences, business, athletics, or entertainment, or of extraordinary ability of international or national renown. Within the definition of extraordinary ability for O-visas—you know artists—the standards are a little bit lower. The individual has to be someone of prominence. For people involved in the motion picture or television industry there is yet another standard.

The regulations spell out the criteria of what you have to demonstrate to get an O-visa. For example, we had a case where we had this restaurant that wanted to bring in this very well-known chef from Spain. We sought an O-1 visa for this chef. This chef was very renowned, and we submitted books that showed that the chef's restaurant was very well-known in Europe. We managed to bring him in as an O-1 chef. Cuisine, in essence, was his art.

P-VISAS

P-1 visas deal with groups of international renown—athletic groups or musical groups. The INS can waive the internationally renowned standard in terms of music groups because sometimes certain geographic situations alleviate against that standard. Consequently, music groups can sometimes be only nationally known and still get a P-1 visa. There are many more details about these and other visas that time simply does not permit me to discuss. You will have to read the regulations. I've talked too long. I apologize Sheila.

MICHAEL MAGGIO: Thank you Larry. Instead of a break we are going to put Sheila to the test of giving her presentation very quickly about green cards based upon work.

PERMANENT RESIDENCE THROUGH EMPLOYMENT

PRESENTATION BY SHEILA T. STARKEY
MARTY, LA MADRID & STARKEY

I. INTRODUCTION

I am going to focus on permanent residency through employment. There are generally two types of employment-based immigration cases. One type requires a test of the United States labor market for qualified United States workers through the running of an advertisement. This is called the labor certification process. The other type does not require one to undergo the labor certification process. I am going to begin with the types of cases that do not require labor certification.

II. FIRST PREFERENCE CATEGORIES

A. Persons of Extraordinary Ability

There are three categories of first preference or priority cases. The first category is persons of extraordinary ability. This category is for persons with extraordinary ability in the sciences, arts, education, business, or athletics. This extraordinary ability has to be demonstrated by sustained national or international acclaim and the achievements must be evidenced through extensive documentation. This permanent residence category has many of the same requirements as the O non-immigrant category.

The greatest benefit for persons of extraordinary ability is that the applicant does not need to undergo the labor certification or advertising process, nor does he or she need a petition from an employer, or an offer of employment. A person can petition for himself or herself. The petition goes directly to the Immigration and Naturalization Service. Although the applicant does not need a job offer, he or she does need to document plans to enter the United States to continue work in the field. This can be done through contracts to perform work here in the United States or through a personal statement detailing plans to work in the field in the United States.

The extraordinary ability category is intended for the small percentage of people who have risen to the very top of their field. It can be someone who has won a one-time major achievement award like the Nobel Prize, or a person who satisfies three or more of the following ten categories:

Documentation of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor

Documentation of membership in associations in the field of endeavor which require outstanding achievements of their members, as judged by recognized national or international experts in their fields

Published material in professional or major trade publications or major media about the alien and relating to the alien's work in the field of endeavor

Evidence of participation, on a panel or individually, as a judge of the work of others in the same or an unrelated field of specialization

Evidence of original scientific, scholarly, or artistic contributions of major significance in the field of endeavor

Evidence of the authorship of scholarly articles in the field, in professional journals or other major media

Evidence of the display of his or her work in the field at artistic exhibitions or showcases in more than one country

Evidence of performance in a lead, starring, or critical role for organizations or establishments with distinguished reputations

Evidence of having commanded a high salary or other significantly high remuneration for services in relation to others

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales

One may present comparable evidence if the above types of evidence do not readily apply to an alien's occupation.

Just to give you an example of someone who successfully petitioned in this category, one of my clients worked as a research scientist at the University of Minnesota. This individual had designed the special suits worn by scientists going into Chernobyl after the disaster. We were able to document the applicant's extraordinary ability by presenting strong evidence in three of the ten categories. This person wanted to work as a consultant for NASA in the development of space suits, but he also wanted to have the freedom to

work as a consultant for other organizations. Therefore, the category of persons of extraordinary ability was a good one for him because it did not limit him to one employer. His petition as a person of extraordinary ability was approved.

Now, of course, not everyone is a person of extraordinary ability. There are other possibilities that also enable the beneficiary to avoid undergoing the labor certification and advertising process. Another is the Outstanding Professor and Researcher Category.

B. Outstanding Professors and Researchers

To qualify in this category, the applicant must be recognized internationally as outstanding in a specific academic area, and the applicant must have three years of experience teaching or conducting research in that area. Again, the applicant does not have to undergo the labor certification process, but unlike persons of extraordinary ability, the applicant in this category does need a permanent full-time job offer, and the employer must petition for this person. Professors must have a tenured or tenure-track position. For researchers, it must be a comparable position, one of indefinite or unlimited duration. The position does not have to be with a university; it can also be with a private employer if the employer has at least three full-time researchers and has achieved documented accomplishments in an academic field. The organization or the private employer itself must be able to document its accomplishments in the field. Outstanding professors and researchers must document that they satisfy at least two of the following six categories:

Documentation of the alien's receipt of major international prizes or awards for outstanding achievement in the academic field

Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members

Published material in professional publications written by others about the alien's work in the field

Evidence of the alien's participation, on a panel or individually, as the judge of the work of others in the same or related academic field

Evidence of the alien's original scientific or scholarly research contributions to the academic field

Evidence of the alien's authorship of scholarly books or articles in scholarly journals with international circulation

It is not the quantity of evidence that is submitted; it is the quality of evidence submitted that determines whether a case will be approved. The examiner is going to weigh and evaluate the evidence that you present. Just because you have evidence in two categories does not mean you will necessarily qualify.

C. Multinational Executives and Managers

There is a third category of priority workers who do not need to undergo the labor certification and advertisement process. This category is reserved for multinational executives and managers. The criteria are very similar to the criteria for obtaining an L-1 non-immigrant visa. In fact, many L-1s later obtain permanent residency in this category.

The employer must be conducting business in two or more countries, one of which is the United States, either directly or through an affiliate or subsidiary. To qualify in this category the applicant must have worked one of the preceding three years as an executive or manager with the overseas affiliate. The individual must be coming to work in the United States in a managerial or executive capacity. The U.S. employer must have been doing business in the United States for at least one year. "Doing business" means the regular, systematic, and continuous provision of goods and/or services. It does not mean the mere presence of an office. Although there is a requirement that the U.S. employer has been doing business for one year, there is not a requirement that the qualifying relationship between the U.S. and foreign entity has existed for one year.

The definition of "managerial capacity" requires (1) management of an organization, department, component, or function; (2) supervision and control of other supervisory, managerial, or professional personnel or management of an essential function; (3) authority to make personnel decisions or functioning at a senior level if a function is managed; and (4) exercise of discretion over operations or a function. The definition of "executive capacity" requires (1) management of an organization or major component or function; (2) authority to establish goals and policies; (3) wide latitude in discretionary decision-making; and (4) only general supervision from

higher executives, the board of directors, or stockholders.

For all three of the above categories, once the petition is approved the individual proceeds to the final step of obtaining permanent residency here in the United States, adjustment of status to permanent resident. If the beneficiary is outside the United States or, for some reason, has to or chooses to engage in consular processing the approval is sent to the appropriate consulate. An application for an immigrant visa is submitted to the consulate, and the foreign national is notified of his or her interview date. At the point where you either adjust status here in the United States or engage in consulate processing abroad, you do have to show that you do not fit into any one of the exclusion grounds.

III. SECOND PREFERENCE CATEGORIES

A. Advanced Degrees and Exceptional Ability

The second preference includes members of the professions holding advanced degrees or foreign nationals of exceptional ability. Normally, applicants in these two categories do have to undergo the labor certification process. However, it is possible to avoid that process if one qualifies for a national interest waiver.

The first category is persons with an advanced degree, defined as a degree beyond a bachelors degree that requires at least one year of graduate study.

The second category is persons of exceptional ability in the sciences, arts, or business. It is a slightly different or lower standard than that applied for persons of extraordinary ability. To demonstrate exceptional ability, the foreign national must have a degree of expertise above that ordinarily encountered in his or her field. The INS regulations require at least three of the following types of evidence to establish exceptional ability: a degree in the field, ten years of experience, a license to practice the profession, a very high salary in relation to others in your field, memberships in organizations, and evidence of recognition for achievement and significant contributions to the field.

B. National Interest Waiver

Obtaining a national interest waiver enables the applicant to avoid the labor certification process and waives the job offer requirement. The national interest waiver is an elusive concept. Perhaps there is an interested United States government agency that is willing to say that the applicant's work is in the national interest.

Another way to get a national interest waiver is for the person to show that he or she is engaged in improving some aspect of the United States, including the arts, the environment, or the economy. If the individual can show one of these, he or she might successfully argue that the job offer and labor certification requirement should be waived in the national interest.

III. THIRD PREFERENCE—CATCH-ALL CATEGORY

The next category is a catch-all. If someone does not fit into either of the two preference categories that I have mentioned, and they have a job offer in the United States, they must fit into the third preference, which is for skilled workers, professionals, and other workers. Skilled workers and professionals are the most relevant categories to us. Professionals have at least a bachelors degree and skilled workers are coming into the United States to work in a position that requires at least two years of training or experience. Labor certification is required of all applicants in this third preference category. The petitioning employer must be offering the foreign national a permanent, full-time position.

A. Labor Certification

Labor certification is a detailed, government monitored advertisement and recruitment process, involving the employer, the state employment service in the state of intended employment, and the United States Department of Labor. The purpose of the labor certification process is to ensure that there are no qualified United States workers available, able, and willing to fill the position.

The process generally involves placing an advertisement in a newspaper of general circulation for three consecutive days. For some professional positions, the advertisement may have to be placed in a trade journal. The job opportunity must also be posted at

the work site. The employer then has the responsibility of interviewing any minimally qualified U.S. applicants for the job. These U.S. applicants may be rejected only for lawful job related reasons. It does not mean the United States employer must hire the applicant, but if there is a qualified applicant who cannot be rejected for lawful job related reasons, then the labor certification simply cannot be granted for the foreign national.

The U.S. employer also cannot place any restrictive requirements on the position without justification. For example, if the employer is requiring a foreign language as one of the job requirements, then the employer will have to justify this restriction by showing that it is a business necessity. In the same vein, the employer cannot tailor the job offer to the particular foreign national. For example, the employer cannot require someone who speaks Swahili for a job as a mechanic simply because the applicant happens to speak Swahili. In addition, the pay for the position must be offered at or within five percent of the prevailing wage for the specific position in the intended area of employment.

B. Reduction in Recruitment

Labor certification is a lengthy process, taking several months or even years to complete. There is, however, a possibility of speeding up the process. It is called reduction in recruitment, and these cases are given priority processing. Under reduction in recruitment, the advertisement is run initially instead of the long wait for advertising instructions. However, it can only be done when there is little or no United States worker availability in that particular occupation and that particular geographic region, or where the employer can show a pattern of recruitment over the previous six months. The employer cannot have restrictive requirements. If the employer had restrictive requirements and had to show business necessity, then the usefulness of the reduction in recruitment would be eliminated. And again, the job has to be offered at a prevailing wage.

IV. FILING THE PETITION

To summarize, persons with a bachelors degree and nothing more and persons in a skilled position that requires at least two years of experience or training fall under the third preference category and

must undergo this labor certification process. Once that process is complete and the labor certification has been received and approved, then the individual can proceed to the second stage of processing where the employer presents the preference petition to the INS Service Center. In those first categories that I mentioned—persons of extraordinary ability, outstanding professors and researchers, and multinational executives and managers—they proceed immediately to the filing of the preference petition.

The petition must be accompanied by evidence that the United States employer has the ability to pay the prevailing wage. Acceptable evidence includes tax returns or financial statements from the year in which the labor certification application was submitted, or the beneficiary's W-2 form from that year, if he or she was already being paid the prevailing wage. The petition must also be accompanied by evidence of the beneficiary's education or experience. Once the petition is approved, the beneficiary undergoes an adjustment of status or consular processing. Family members, which include spouses and unmarried children under twenty-one years of age, may gain derivative status through the principal applicant.

GENERAL DISCUSSION

AUDIENCE PARTICIPANT: Is it a problem for someone to try several types of petitions at once?

MICHAEL MAGGIO: You can seek permanent residence status in as many ways as you are eligible. You could try based upon labor certification, without labor certification, or a family petition simultaneously. There is also a green card lottery for countries that are supposedly under-served, countries that did not get enough immigrant visa numbers historically. The lottery is a bit of a joke because it includes pretty much all of the countries in the world. There is, however, a heavy tilt toward Ireland.

There is also a possibility of getting permanent resident status through an investment of either a half a million dollars in an area of high unemployment or a million dollars anywhere else in an enterprise that is going to create at least ten jobs within a two-year period. There are actually organizations that specialize in helping people

make those qualifying investments, in which case the out of pocket costs can be substantially less than a million dollars.

I. LENGTH OF THE PROCESS

AUDIENCE PARTICIPANT: How long does a labor certification take?

MICHAEL MAGGIO: You heard about the three suit rule and the three scoop rule. How long things take is like the three scoop rule with the ice cream. Sheila said labor certification takes six to twelve months. Well, that is in Region III of the Department of Labor where Sheila and I principally practice, but under the jurisdiction of Region II, which is New York, it can take two years merely to get the initial advertising instructions. That means that the labor certification process can take up to three years. Remember, labor certification is not only for a specific employer, it is for a specific job, and you frequently encounter employees who are particularly hard working and ambitious and are being rewarded with permanent resident status by their employer. Actually, on occasion, they will promote themselves right out of their own case.

For example, we had a case for a bank in New York and because the processing time was so long there, this fellow not only got a promotion, but he was then awarded a scholarship to get an MBA from Harvard. When he finished that MBA there was no way in the world that he was going to be taking the job for which his labor certification was filed. So, basically he and his employer wasted a lot of time, at least with respect to labor certification for this gentleman.

LARRY RIFKIN: There were problems in the fall last year related to the issuance of new guidelines at the Department of Labor and commensurate with budget cutting and funding programs nationally, they closed all the local offices. We used to file the labor certifications either in Miami, Fort Lauderdale, Orlando, Tallahassee, or Naples, and the cases were examined there to see whether they satisfied the prevailing wage requirements, and they gave you instructions to advertise depending on where you filed. Sometimes it would take six to twelve months just to get a job order.

I was at a meeting in June with Linda King, Administrator, State of Florida, Department of Labor and Employment Security. She's really a dynamic person who has a take charge attitude. She says that by the end of the year they should be done with their backlog of

cases. Beginning in early 1998, they are supposed to be doing everything by computer and offering various things on the Internet. But until that occurs, and until these things come to pass, I am telling clients right now to anticipate two years to get through the labor certification process, but I think that eventually will substantially decrease. I think Florida will eventually be a showcase for the nation as far as state offices are concerned, if what Linda King says comes to pass.

II. ETHICAL ISSUES IN IMMIGRATION LAW

MICHAEL MAGGIO: Before we break, I want to talk about something that really is a good example of last but certainly not least. That is how complicated the practice of immigration law is ethically.

First of all most immigration cases involve dual representation. During a labor certification case, we could be hired by the employer or the employee, but you cannot go forward with the case without being the employer's lawyer because only the employer has standing to file the case and see it through. So, Mr. Smith hires you to do a labor certification for him to work for company Y. You are in a shotgun marriage with company Y, or more accurately, company Y is in a shotgun marriage with you. You are their lawyer, and you have all the duties of loyalty, et cetera, to both clients.

There can be problems, for example, when an employee says, "Boy, I can't wait to get that green card because I'm out the door." The law only requires that the employee work for an employer for a reasonable period of time after getting permanent resident status. The employee does not have to work there forever. It is a reasonable period of time test. There are deportation cases that I have been involved with where the employees didn't even work for the employer. It was deemed reasonable and they were not deported because the employer would not give them the same job they were promised; their green cards were maintained.

When you are involved in a family case, for example, you represent the husband and the wife. What do you do when you are hired by the husband who is your classmate from law school, and the wife comes in and says, "Help me." You must withdraw.

In addition, and Larry touched upon this throughout his presentation, clients often ask lawyers to lie. Clients often expect that you will go along with lies. They expect this because they think that is

what lawyers do. “Lawyer” sounds an awful lot like “liar,” and a lot of people think that lawyers are professional liars. They also think that the attorney-client privilege and its secrecy means that you can engage in a conspiracy to lie together. Sometimes it is cultural. Many people come from countries where lying to the government is a national pastime. In many of these countries, nobody pays taxes; it’s not like the United States where virtually everyone pays their taxes. Some clients also have an attitude that the biggest liars in the world are governments, so what’s wrong with telling the government a lie?

Clients should understand that lying to the government, however, is a crime, and lying on immigration documents is a separate crime. Indeed, the first crime of the United States Criminal Code—18 U.S.C. § 1001—is submitting false statements to the government. So lawyers have to be vigilant and educate their clients, and they have to do this throughout the process. In our retainers, for example, we say that clients have to tell the truth to both us and the government.

AUDIENCE PARTICIPANT: What does your retainer say?

MICHAEL MAGGIO: That you must tell us the truth or we’re out of the case. If you lie to me, I’m not your lawyer. If I find out that you are lying to me, I’m out. And you must tell the truth to the government if you want our firm to represent you.

AUDIENCE PARTICIPANT: Do you write this down?

MICHAEL MAGGIO: Frequently, yes. We let all of our clients know, without sounding preachy or suspicious of their integrity, that there is an obligation to tell the truth to us and, more importantly, to the government. In marriage cases, for example, we also have a joint declaration. It is like a sworn statement, an affidavit, but it does not have to be signed before a notary. We ask both spouses sign it. The joint declaration states that we have advised them that it is a crime to engage in marriage fraud and that they must be marrying because they love each other. Look, you can marry someone because you love them *and* you want a green card. People have gotten married for a multitude of motivations since the beginning of the institution of marriage—for money, power, sex, a better house, to get away from parents—and they always will. But you can’t marry *only* for a green card. So we require spouses to sign this joint declaration. We want that declaration signed before they sign the retainer, before they start filling out any forms, because we want clients to be on notice from

the beginning, and the joint declaration also gets rid of, if you will, the garbage. Some people read the declaration, and even though you explain it to them, when it comes time for them to sign it, maybe one spouse will sign, but the other one will walk out. That is fine with us because no good lawyer wants to be tainted by immigration fraud, which, unfortunately, is very prevalent.

LARRY RIFKIN: There has also been increased funding to the INS for investigations, and from time to time during my practice—and I'm sure that Michael will agree because he has been in practice longer than I have—sometimes the INS turns its guns on attorneys. The rule in my office is that if you don't want to see it in the *Miami Herald*, then don't say it to a client. There is nothing worth losing your license over. You have to be a professional. Sometimes things get very difficult when you like the client, and they want you to bend the rules. But you simply can't. You have to be very careful.

MICHAEL MAGGIO: That's a very important thing to keep in mind. People who do immigration work are usually motivated principally because they care about people and want to help them. This is not an area of law that people go into because they think they are going to be able to pay off their law school loans sooner than anyone in the class. People are motivated to go into immigration law because they want to help people, because they like working with folks from numerous cultures. The most common avenue into this field is through asylum and refugee work, and you don't work with refugees thinking that you are going to get rich. You can't let that compassion, that desire to help someone, let you fall into the trap of making a misrepresentation. You've got to protect yourself. You have to always be conscious of this.

This is a practice where an attorney handles a relatively high volume of cases. For example, in our firm, with five lawyers, we will open up more than five hundred cases this year. We have approximately two thousand cases kicking around at any one time. That's a lot of people to keep track of. That's a lot of information and documents to file. You must always be alert to the ethical issues that are involved in the practice of immigration law. If you are, it will take you very far because the Immigration Service knows which lawyers play it fast and loose and which ones do not.

If you have earned a reputation for being honest, you can bring in

the most bizarre case and get it approved because it's true. For example, our firm represented a twenty-seven year old guy who was married to someone literally old enough to be his mother. This guy had the necks on every secretary in our office twisting whenever he walked in because he is so good looking. The case got approved because it was a real, albeit unusual, marriage.

Immigration attorneys also must be very vigilant and conscious of the various conflict questions that come up and your obligations to represent both clients zealously, the employer and the employee, the petitioner and the beneficiary, whatever.

We've gone on longer than anticipated. I hope this overview of immigration law proves useful, and I thank you all for your perseverance and attention.