Form(s) over Substance – USCIS Plunges to New Low

By Ted J. Chiappari and Angelo A. Paparelli*

U.S. Citizenship and Immigration Services (USCIS) – the agency established in 2002, with the formation of the Department of Homeland Security (DHS), to confer immigration benefits on deserving foreign citizens – has been essentially leaderless for the last year and a half. From March 13, 2008 with the resignation of its last Director, Emilio González, to the August 12, 2009 swearing-in of Obama appointee, Alejandro Mayorkas (who, like his predecessor, immigrated from Cuba), USCIS has been an agency in continuous chaos. Mr. Mayorkas will soon learn the facts on the ground at USCIS – intractable backlogs, opaque procedures, and a doubting-Thomas bureaucracy still mired in a century-old system of paper-based petitions, applications, form letters and boilerplate responses despite many failed efforts at automation.[1]

Mr. Mayorkas will clearly have his hands full, not the least because USCIS officers, enmeshed in a culture of "no," are more focused on detecting fraud than interpreting the law with commonsense notions of fairness and justice.[2] An unconscionable case in point is that of Ben Neufeld, a Canadian religious worker who serves as music director and youth pastor of a church in Gardner, Kansas. Even the most zealous supporters of a restrictive immigration policy should be asking themselves whether the administration of our immigration laws ought to be entrusted to an agency so heartless or brainless as to separate a pastor from his family over a minor technicality that immigration officers, by statute and regulation, are allowed to forgive.

As reported by The Kansas City Star last month,[3] USCIS granted Mr. Neufeld a work visa to enter the United States as a religious worker in January 2005 with his wife and infant son. With visas valid for three years, i.e., until January 2008, his church requested a two-year extension of their status in a timely fashion. But the church made a mistake when it sought the extension in 2007; it merely included his wife and child on the petition extension request (Form I-129), rather than informing the Neufelds that a

[1] For a discussion of the agency's many false starts at automation (a process it dubs "Transformation"), see Report, "U.S. Citizenship and Immigration Services' Progress in Modernizing Information Technology," Inspector General, Department of Homeland Security, OIG-09-90, Aug., 10, 2009, accessible at: www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-90_Jul09.pdf (all links in this article last accessed on Aug. 17, 2009).

[2] Blog posting by the immediate past President of the American Immigration Lawyers Association, Charles Kuck, "USCIS--H-1B Investigations Run Amok!" (Aug. 7, 2009), accessible at http://ailaleadership.blogspot.com/2009/08/uscis-h-1b-investigations-run-amok.html.

[3] Jim Sullinger, "Because of mistake in immigration form, Kansas man's family was deported," The Kansas City Star, July 26, 2009, accessible at www.kansascity.com/115/story/1347298.html. (Technically, the good Pastor Neufeld's wife and son were not deported; they left of their own volition.)

separate application (Form I-539) for Mrs. Neufeld and their child must be submitted. That mistake was not drawn to their attention until 2009, in response to adjustment of status applications filed in 2008 for permanent residence (the "green card"). Pastor Neufeld's green card application was approved, but USCIS denied the applications of his wife and son because they had been out of status for more than a year – a consequence of not having used the right form to apply for an extension of their status. The USCIS press spokesman, Marilu Cabrera, while admitting that the process is complex, showed scant sympathy:

"They were here illegally and those are the facts," said Ms. Cabrera, "I certainly understand that people can make mistakes and it seems like a pretty tough penalty to pay for a mistake but, again, there are the procedures that need to be followed."

Law-abiding people that they are, the Neufelds decided that Mrs. Neufeld and their eldest child (together with their U.S.-born children) should return to Canada rather than stay here without permission, while Mr. Neufeld would continue to work in Kansas to support his family. By departing the United States, however, Mrs. Neufeld and her son automatically triggered a *ten-year* bar to reentry for not properly extending their visa status in a timely fashion (a condition known as "unlawful presence") for over a year. Since January of this year, Mr. Neufeld has visited his family once a month in Winnipeg. Pastor Neufeld has since hired an immigration attorney to try to fix the situation, and his supporters have sought the intervention of their Congressman, Democratic Rep. Dennis Moore, and Republican Sen. Sam Brownback of Kansas, so far to no avail.

By way of background, unlawful presence is a term of art in immigration law, first introduced by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208 (Sept. 30, 1996)) (IIRIRA). IIRIRA established a ten-year bar to returning to the United States, now codified in Immigration and Nationality Act (INA) section 212(a)(9)(C), for those who have accrued one year or more of unlawful presence. (INA section 212(a)(9)(B) establishes a three-year bar for those who have accrued more than 180 days but less than one year of unlawful presence.)[4]

Unlawful presence must be distinguished from a litany of other similarly sounding terms of art used to describe violations of immigration laws (all of which can result in different consequences to the offender), including unlawful immigration status; failure to maintain nonimmigrant status; visa overstay; entry without inspection; document fraud; and employment without authorization. After over 12 years (the three- and ten-year bars became effective April 1, 1997), the definition of "unlawful presence" remains elusive.

While the statute at INA section 212(a)(9)(B)(ii) includes a sparse "construction" (someone is deemed unlawfully present if "present in the United States after the expiration of the period of stay authorized by

[4] Congress too should be faulted for this debacle. It failed to include in IIRIRA an innocent-oversight exception for violating the unlawful-presence prohibition. Thus the statutory sections cited in the text include no *scienter* requirement, and therefore are strict liability offenses. If the effort at comprehensive immigration reform comes to fruition, as President Obama has predicted, a correction to the unlawful-presence penalties should be included by legislation so that unwitting mistakes that cause otherwise law-abiding foreign nationals to overstay their periods of authorized stay are not subject to the three- and ten-year bars on reentry.

the [Secretary of Homeland Security] or is present in the United States without being admitted or paroled"), no regulations have been promulgated. Rather, USCIS (and its predecessor, the Immigration and Naturalization Service [INS]) have over the years issued various informal memoranda, at times contradictory, with guidance on how the concept of "unlawful presence" would be defined, interpreted and applied. These efforts culminated in a 51-page memorandum issued in May 2009[5] by USCIS Acting Associate Director Donald Neufeld (presumably no relation to Ben, the poor Canadian soul whose troubles prompted this column).

The memorandum is problematic for two reasons. First, it does not carry the binding force of regulations published under the Administrative Procedures Act (APA).[6] The last page of the memorandum explicitly states that it is "solely for the training and guidance USCIS personnel" and "is not intended to, does not, and may not be relied upon to create any right or benefit…." Unlike regulations, the memorandum was promulgated without any opportunity for notice and comment and can be changed or revoked at any time by USCIS without notice. Moreover, administrative case law stands for the proposition that internal memoranda are not legally binding on the USCIS.[7] Second, the memorandum provides no guidance to adjudicators on how to exercise discretion when unlawful presence starts accruing because of an innocent mistake, e.g., how adjudicators can exercise discretion to stop "unlawful presence" from accruing by granting an extension or change of status retroactively. Rather, there is only a discussion of the formal waiver provisions (for which extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent must be established).

Admittedly, Mrs. Neufeld failed to use the proper form for herself and her son. If the church and the Neufelds had carefully studied the 23 pages of instructions to the Form I-129, they would have found a reference to the correct form buried deep within. The current version of the instructions has a one-sentence reference to Form I-539 for family members on page 18.

The Form I-129, itself a 26-page monstrosity, makes no reference to an extra form needed for family members, and it includes the misleading instructions: "Information about the person(s) you are filing for…. Use the continuation sheet to name each person included in this petition." The continuation sheet also has no warning that it should not be used for accompanying family members. It merely states: "Attach to Form I-129 when more than one person is included in the petition." While immigration lawyers are familiar with the forms and can readily distinguish between "petitions" by employers on behalf of their foreign employees and "applications" by accompanying family members, there is nothing intuitive or

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[5] Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, Lori Scialabba, Assoc. Dir., Refugee, Asylum and International Operations Director, & Pearl Chang, Acting Chief, Office of Policy and Strategy, Interoffice Memorandum Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act and Revision to and Re-designation of *Adjudicator's Field Manual* (*AFM*) Chapter 30.1(d) as Chapter 40.9 (*AFM* Update AD 08-03) (May 6, 2009), accessible at http://www.uscis.gov/files/nativedocuments/revision_redesign_AFM.PDF,

[6] 5 U.S. Code §551 *et seq*.

[7] *Matter of Izumi*, 22 I&N Dec. 169, (Assoc. Comm'r, Examinations 1998).

logical about this distinction. And if the Neufelds or the church had retained immigration counsel from the beginning, this mistake presumably wouldn't have happened. But that's not the point.

An innocent and trivial mistake by law-abiding people who are otherwise eligible to be here and who have been trying to comply with the law should not produce the draconian consequence of a ten-year bar to reentry to the United States. This kind of nonsense undermines the rule of law, and makes it hard to take seriously an agency that issues these kinds of asinine decisions. It apparently is too tall an order (although it really should not be) for USCIS to translate a large and admittedly complex body of statutes into forms and instructions understandable to a lay person. Indeed, as discussed above, USCIS cannot even promulgate regulations to interpret new immigration laws in a timely fashion.

If the agency Mr. Mayorkas now heads cannot publish clear instructions, forms and regulations, at least its adjudicators deciding requests for immigration benefits must be instructed on how to exercise wisely the discretionary authority they possess to forgive the mistakes that inevitably happen. It is also imperative that the adjudicators' managers be required to review and override poor decisions before a family's life and a church's congregation are upended. Unfortunately, that is not happening. On the contrary, immigration lawyers across the country report that USCIS adjudicators seem to be encouraged of late to err on the side of extreme distrust and denial of petitions and applications rather than approval.[8]

Solving the Neufelds' problem shouldn't involve Congressional intervention or a waiver application documenting extreme hardship to Mr. Neufeld. The USCIS officer adjudicating their green card applications should have recognized that the "unlawful presence" of Mrs. Neufeld and her son was the result of an innocent mistake. The adjudicator could merely have applied a forgiveness provision contained in the section of law allowing USCIS to grant green-card status despite minor errors committed for "technical reasons," INA section 245(c).[9] Alternatively, given that the Neufelds would have clearly been entitled to this status, the officer could have just had them submit the necessary I-539 work visa extension application form late and then exercised discretion favorably to grant the status retroactively.

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[8] As noted in a recent blog of one of this column's co-authors, immigration lawyers are reporting a marked increase in requests for additional evidence, notices of intent to deny and denials (Angelo A. Paparelli, "Immigration Gaming – USCIS Style," www.nationofimmigrators.com, June 26, 2009). Anecdotally, one of the co-authors earlier this year had to advise a Japanese executive and his wife to leave the United States on short notice because they had inadvertently overstayed the expiration dates on their Forms I-94 arrival-departure records (a handwritten, index-size card stapled into the passport by the customs and border protection officer at the airport upon entry) because they were looking at the still valid expiration dates of the visa stamps (a computer-generated document, with photograph and fingerprint, laminated onto a page of the passport by the U.S. embassy or consulate abroad). Even though the visas were still valid and the mistake an honest and harmless one, the USCIS refused to forgive the mistake and grant a retroactive extension to the couple. As USCIS allows itself at least six months to adjudicate motions to reconsider such decisions, there is no meaningful opportunity for timely review of such decisions, and the Japanese executive had no choice but to leave in order to avoid the risk of a three-year bar because of the "unlawful presence" he had accrued.

[9] The regulation, 8 CFR section 245.1(d)(2), defines "technical reasons" restrictively, but the regulatory definition is still broad enough to encompass the Neufelds' situation.

This process is provided for in the regulations, 8 CFR section 214.1(c)(4) for extension of status and 8 CFR section 248.1(b) for change of status..[10]

An inexperienced or overzealous adjudicator might not come up with these solutions alone, and even a sympathetic experienced supervisor would, in light of the current enforcement mentality at an agency housed in a department called "Homeland Security," might demur. That is plainly wrong. It should be the responsibility of the leaders and managers at USCIS to train the adjudicators to exercise their discretion favorably in appropriate cases and review denials before they are issued. Only then will the USCIS avoid cruel and stupid decisions before they wreak havoc on innocent people. Only then will Mr. Mayorkas's commitment, when taking the oath of his new office,[11] be realized, namely, to administer "our country's immigration and naturalization laws efficiently and with fairness, honesty, and integrity."

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[10] For an extensive discussion of curative strategies for individuals who have fallen out of lawful immigration status, see Angelo A. Paparelli and Janet Greathouse, "Imagining the Improbable: Extraordinary Immigration Solutions for the Hapless and Hopeless," accessible at www.seyfarth.com/dir_docs/publications/AttorneyPubs/Imagining%20The%20Improbable.pdf.

[11] USCIS News Release, "Alejandro Mayorkas Sworn in as USCIS Director - Mayorkas Becomes Third Director to the World's Largest Immigration Service," Aug. 12, 2009.