

# Imagining the Improbable: Extraordinary Immigration Solutions for the Hapless and Hopeless

***By Angelo A. Paparelli and Janet Greathouse***

Immigration lore includes a host of stories, some of which may be factual. There once was a loving wife who was called to the emergency room of an urban hospital. Her husband had collapsed and needed a new heart. The cardiac specialist who greeted her seemed unusually chipper. He let her know that the patient was stable and that, fortunately, two hearts of recently deceased men were available. She was given the choice: a young triathlete who neither smoked nor imbibed, or an overweight, three-pack-a-day couch potato who worked as an immigration officer. She chose the heart of the immigration officer. Incredulous and suspecting evil motives, the doctor asked her to explain her choice. The wife responded: "Because his heart's never been used!"

As this fictional story suggests, U.S. immigration officials are not generally known for their kindness and compassion. When it comes to considering requests to forgive immigration violations, particularly in the post-9/11, era, the popular perception is that immigration officers cold-heartedly go "by the book." Empathy and understanding, it seems, fall "by-the-wayside." As with much of life, however, appearance is not always reality. Immigration law, and the officers who administer it, as this article will show, review well-documented applications carefully and, in deserving situations, can be persuaded to provide humane relief.

## ***Immigration's Complexity Causes Many to Stumble***

Immigration law has never been for the faint of heart or the dilettante. Anyone even passingly familiar with this formerly backwater, now front-burner subject knows that it is routinely frustrating, confusing, illogical and dispiriting. Its complexity and obscurity have been assailed by the courts, Congressional researchers and even government officials charged with granting immigration benefits. Immigration law, in short, is "a mystery and a mastery of obfuscation."<sup>1</sup>

Not surprisingly, compliance with the immigration law is rarely easy. Innocent or unwitting violations frequently occur. Regrettably, foreign citizens often fall out of immigration status because of an oversight, a blunder, ineptitude, or clearly fraudulent conduct by a third party. The fault may be attributable to an

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<sup>1</sup> Statement of USCIS spokesperson, Karen Kraushaar, quoted in the Washington Post, April 24, 2001 Metro Section, in article entitled "Md. Family Ensnared in Immigration Maze – After Changes in Law, Couple Faces Deportation." See also text *infra* accompanying footnotes 32 to 34.

employer, a school, an attorney, a business partner, an immigration official who provides misguided advice, or all too often, an unscrupulous immigration consultant or notario.

When star-crossed foreign nationals lose lawful immigration status because they are unschooled in the mysteries of immigration law, make an innocent mistake or entrust their cause to an errant third party, the legal consequences can be just as harsh as for those who intentionally break the law. Loss of employment, family separation, career disruption, forced sales of businesses and property, removal from the United States and ten-year bars on reentry all may befall the well-intentioned and upright person who tried sincerely but nonetheless failed to maintain lawful immigration status.

By the time a foreign citizen in this predicament finds competent immigration counsel, the problems may appear insoluble. The situation, however, is not necessarily hopeless. Immigration law and regulation, agency discretion and judicial decisions provide potential remedies to those who, as a result of extraordinary circumstances, have failed to maintain lawful immigration status. These cases require thorough investigation of the facts, diligence in gathering documentation and zealous legal advocacy.

### ***Extraordinary Circumstances***

Nonimmigrant status is of limited duration and contingent upon very specific terms. Foreign citizens in temporary or “nonimmigrant” status must always remain diligent in complying with the immigration laws. Indeed, when a nonimmigrant seeks to extend stay or change status, the applicant must show that s/he has continuously maintained legal status. Unfortunately, a nonimmigrant can fail to maintain status for a variety of reasons, many of which involve inadvertent actions or events that are entirely out of the individual’s control. In some cases, the individual may not even be aware of a problem with status until beginning to prepare the application requesting an extension of nonimmigrant stay (“EOS”) or change of status (“COS”).

Fortunately, immigration regulations provide relief in deserving cases. The failure to file the request for extension of stay before the period of previously authorized status expired may be excused at the discretion of the U.S. Citizenship and Immigration Services (“USCIS”) if the individual demonstrates, among other factors, that the delay was attributable to extraordinary circumstances beyond the control of the applicant or petitioner, and the delay is commensurate with the circumstances.<sup>2</sup> Interestingly, this section forgives the failure to file on time, whereas another regulatory forgiveness provision (pertaining to COS applications) covers both the expiration of the period of authorized stay and the failure to maintain the previous status. The distinction may not necessarily be an obstacle; however, if one considers that a failure to maintain status causes the status to come to an end, hence to “expire.”<sup>3</sup>

A policy memorandum issued by the predecessor immigration agency, the Immigration and Naturalization Service (“INS”), supports this interpretation. Specifically, in its memorandum providing guidance for H-1B petition processing under the American Competitiveness in the Twenty-First Century Act, legacy-INS

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<sup>2</sup> 8 CFR §214.1(c)(4)

<sup>3</sup> According to Merriam-Webster’s online dictionary, one of the definitions of “expire” is “to come to an end.”

states “discretionary excuse, in certain circumstances, of a nonimmigrant’s failure to timely file a request for an extension of stay or change of status” is permitted.<sup>4</sup> For example, an H-1B worker who is terminated would fail to maintain status at the moment the employment ends, even though the person’s period of authorized stay has not expired. The INS memorandum thus confirms that even though the individual is not an “overstay” s/he can benefit from the EOS forgiveness provision which by its terms requires that the individual to have remained longer than allowed.

More expansively than the EOS eligibility requirements, the provision allows for the approval of a COS application on behalf of a deserving out-of-status nonimmigrant, in cases where either the applicant “failed to maintain the previously accorded status” or his/her “status expired before the application or petition was filed.”<sup>5</sup> The immigration regulations further provides comparable factors that must be satisfied if the nonimmigrant asks to be excused for failing to file before the expiration of the period of previously authorized status. One of the factors that the USCIS will consider is whether the failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the delay is commensurate with the circumstances.”<sup>6</sup>

### *Eye of the Beholder*

The determination of whether extraordinary circumstances exist is very much in the “eye of the beholder.” Each case is assessed based on its own particular facts. By the express terms of the rule, the inquiry should focus more on facts rather than a detailed analysis of the law, given that “extraordinary” circumstances suggest that the factual situation is outside the usual. Moreover, when evaluating these types of cases, the adjudicating officer is authorized and expected to exercise “discretion” in assessing whether a regulatory pardon is warranted.

While USCIS discretionary decisions on EOS and COS applications cannot be administratively appealed, they can be the subject of judicial review under the Administrative Procedure Act (“APA”)<sup>7</sup> in those circuits that have interpreted the jurisdiction-stripping provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) as applying only to removal cases.<sup>8</sup>

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<sup>4</sup> Memorandum from Michael Pearson, Executive Associate Commissioner of the Office of Field Operations, regarding initial guidance for processing H-1B petitions under the American Competitiveness in the Twenty-First Century Act (“AC21”)

<sup>5</sup> 8 CFR §248.1(b)

<sup>6</sup> Id.

<sup>7</sup> The APA provides that, “A person suffering legal action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” (5 USC §702). The APA also provides an exception to this grant of judicial review in situations where the action “is committed to agency discretion by law.” 5 USC §701(a)(2) Nevertheless, the U.S. Supreme Court has provided important guiding principles, ruling that the exercise of discretion may overcome this presumption “where the relevant statute ‘is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Lincoln v. Vigil*, 508 U.S. 182, 190-191 (1993)

<sup>8</sup> See *Walters v. Reno*, in which the Ninth Circuit ruled that judicial review of actions taken by the Attorney General under IIRIRA did not preclude the federal district court from asserting jurisdiction on constitutional claims arising from such actions. *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998). Other examples include *Barahona Gomez v. Reno*, 97-15952 (Feb. 11, 1999)

Whether or not such review is possible, the attorney must ensure that each application is thoughtfully and accurately drafted and that persuasive evidence is compiled and submitted. In other words, every detail must be as perfect as possible – the forms must be drafted carefully and accurately, there should be no superfluous documentation, the evidence must be organized and presented in a well developed and logical progression. At the core of this presentation should be an honest and sympathetic life story detailing the extraordinary circumstances and explaining why the applicant deserves clemency for his or her immigration transgression.

### ***Flexibility Is the Mantra***

The first step in building the client's case is, of course, gathering all relevant facts. Communication with the client is critically important. The attorney must elicit much detailed information regarding the events leading to the loss of status as well as the harm suffered as a result of these events. By the end of this fact-finding mission, the attorney should have a solid understanding of the extraordinary events that led to the client's current situation and begin formulating a strategy for presenting the case to the USCIS. Based on the client's information, the attorney should be able to determine the declarations needed and the most appropriate supporting documentation.

When gathering information and supporting documents, flexibility should be the lawyer's mantra. Since these types of cases are driven by the facts, one should not even consider developing templated documents but rather preparing customized documents necessary to support the relevant facts. The following real-life case studies (all of which proved successful) demonstrate the impracticality of a "checklist" approach.

### ***Identity Theft***

What happens when your client has hired a law firm that doesn't exist? Consider an individual who retains a "law firm" to file her extension of L-1 status. She thinks she had a consultation with an attorney, signed a retainer agreement and obtained a business card with the firm and attorney's name. She later has difficulty in contacting the attorney, and in obtaining information related to the filing of her extension application. Her difficulties reach a crisis when she learns that the "lawyer" she retained was not a lawyer and had actually assumed a real lawyer's identity. Predictably, her request for extension of stay was never submitted.

A strong argument may be made that this is indeed an extraordinary circumstance. The documentation must be clear on two levels – that this elaborate ruse in fact occurred and that the individual reasonably believed that she had hired a legitimate law firm and licensed attorney to file an extension of stay. In demonstrating the fraud, the immigration attorney could turn to the other victim in this case – the lawyer whose identity was stolen. When the poseur "attorney" closes operations, there would undoubtedly be numerous "clients" who track down the victimized *de jure* lawyer seeking answers. The real lawyer may have documentation of these complaints and will likely have filed a police report. A copy of the police report and affidavits from the true attorney would certainly be powerful evidence showing the scope of the fraud.

The client may also have copies of the fraudulent retainer agreement and business card, and can provide detailed information on her contacts with the scoundrel who posed as an attorney, which could include written correspondence. The client should sign a declaration that details how she found the “attorney,” an account of the contacts she made with the attorney’s fraudulent office in what she believed was the course of the preparation of her case, and the harm that was done to her as a result of her unfortunate reliance on this attorney.

The description of the steps taken by the client in preparing for the extension filing should convey, truthfully, that the client had taken all necessary steps to comply with the immigration laws in that the client hired a person whom she thought was a lawyer and had gathered documentation that would support the extension. The documentation regarding the fraud itself, such as a police report and fraudulent retainer agreement, would show that the client acted reasonably in believing that the attorney she hired was in fact an attorney.

### ***Running Out of Time***

Maintaining nonimmigrant status may often require coordination of information and documentation among numerous parties. As a result, miscommunication can sometimes lead to an individual’s unwitting failure to maintain lawful immigration status. For example, an H-1B employee’s immigration documentation confirming prior admissions to the U.S. and the periods of authorized stay may be maintained in the sponsoring employer’s records to ensure, among other things, that extensions of stay are submitted on time to the USCIS. The retained immigration firm may also store the employee’s information in its docketing system.

For various reasons, however, a misunderstanding or miscommunication may arise among these parties resulting in either the employer or immigration counsel relying on inaccurate information regarding the period of authorized stay of dependent family members. Consequently, at the time the employer and immigration counsel begin preparing an extension of the employment-based nonimmigrant-worker petition and extension of stay, they may learn for the first time that a family member’s expiration date noted on the Form I-94 (Departure Record) is earlier than expected and that the deadline for filing the extension application has already passed.

Generally, when a foreign citizen enters the U.S., if his or her passport is set to expire before the maximum allowable validity period of nonimmigrant status, the U.S. Customs and Border Protection (“CBP”) officer will issue a Form I-94 with a shortened expiration date that corresponds to the date of passport expiration. Individuals often mistake the visa stamp expiration date or the period of nonimmigrant visa petition validity (shown on an I-797 approval notice) as the date that determines their authorized period of stay in the United States. As a result, an individual may not pay close attention to the Form I-94 expiration date issued on last entry by the CBP officer. If this I-94 is not forwarded to immigration counsel or forwarded too late, the individual would not be alerted to the problems created by

the abbreviated expiration date. Such a chain of events creates a serious problem, because the act of remaining in the United States beyond the expiration date of a Form I-94 results in very harsh penalties.<sup>9</sup>

In this case, several issues must be addressed. First, there should be an explanation sought of the reason the individual either did not notice or did not make further inquiry with the appropriate parties as to why the Form I-94 expiration date did not match the petition validity period noted on the visa stamp or in the USCIS approval notice. Perhaps the CBP officer did not explain the importance of addressing the shortened Form I-94 expiration date or the individual may have believed that the Form I-94 date did not determine the period of authorized stay. For example, a person may have received a “clip-out” Form I-94 (as part of an I-797 approval notice) in the mail with a longer period of authorized stay and believed that the longer period controlled.

Second, the employer and immigration counsel should provide further explanation of why the individual was not alerted sooner to the need to address the shortened Form I-94. If there is a system within the employer’s organization or the immigration attorney’s office by which the individual is normally expected to provide copies of new Forms I-94, it is important to explain why the system malfunctioned. An honest miscommunication among the parties should be explained clearly and succinctly, with acknowledgement of any glitches in different monitoring systems or any lost documents. Moreover, the immigration lawyer should submit evidence showing that prompt efforts made to correct the problem and that information confirming the expiration of the period of stay was received too late to allow any meaningful action to rectify the situation.

### ***The Ugly Aftermath***

Finally, the documentation should also explain the harsh consequences the individual will likely face if relief is not granted. Technically, the “extraordinary circumstances” in the regulations must relate to the action leading up to the individual’s failure to maintain status. Nonetheless, it may be helpful to present evidence to show that the single immigration dereliction will result in disproportionately adverse consequences to the applicant and family members.

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<sup>9</sup> INA §212(a)(9)(B)(i) provides that if an individual is “unlawfully present” in the United States for a period of more than 180 days but less than 1 year, voluntarily departs the country and seeks admission within 3 years of departure is considered inadmissible. Moreover, if the individual is unlawfully present for more than 1 year, and seeks admission within 10 years of the date of departure, she is inadmissible. An individual is considered unlawfully present in the United States if s/he is present “after the expiration of the period of stay authorized by the Attorney General.” (The statutory reference to Attorney General is now replaced by the Secretary of Homeland Security.) According to legacy INS, for inadmissibility purposes, a nonimmigrant’s unlawful presence “includes only periods of stay in the United States beyond the date noted on Form I-94, Arrival/Departure Record.” Memorandum from Office of Programs on “Section 212(a)(9)(B) Relating to Unlawful Presence” Paul Virtue, Acting Executive Associate Commissioner (September 19, 1997) AILA InfoNet Doc. No. 97092240 (posted Sep. 22, 1997). Moreover, if the nonimmigrant files a change of status or extension of stay application prior to the expiration of the date-certain on his or her Form I-94, the first 120 days beyond the expiration date of the Form I-94 will not be counted toward the 3-year bar. INA §212(a)(9)(B)(iv). See also Memorandum from Michael A. Pearson, Executive Associate Commissioner Office of Field Operations on “Section 222(g) of the Immigration and Nationality Act (Act) (IN-0014), HQ 70/12 P IN 00-14 March 3, 2000. In addition to the 3- and 10-year bars, the INA in § 222(g) operates to (1) void any preexisting visa in the passport of any foreign national who has overstayed even by a single day the period of authorized stay granted at entry or upon extension of status, and (2) require the person to apply for any future U.S. visa solely at the U.S. consular post in his country of nationality or last residence, unless extraordinary circumstances are established.

Thus, the attorney should provide abundant evidence of the adverse consequences to the applicant if his or her status is not restored such as the unlawful presence penalties of visa voidance and 3- and 10-year bars on reentry. If the case involves a child of a principal nonimmigrant, the consequences may be especially heart-rending. As part of this explanation, supporting documentation in the form of declarations and evidence should be gathered showing that the individual has been abiding by the terms of his or her status. In assessing the adverse consequences to the client, it is important to focus on other sympathetic factors such as whether the client is a dependent family member who is a star pupil at his or her school, the cost of a U.S. education, the falling behind in academic progress if the person must start over in the home country, etc.

### ***Protecting Business Interests***

Often, an individual enters the United States with high hopes of furthering one's career and improving the quality of life for the individual and family members. Unfortunately, plans may go awry due to the unforeseen, corrupt actions of untrustworthy business associates.

Consider, for example, an individual who enters the United States to manage a business under the terms of his L-1 (intracompany transferee) visa status. Problems then arise in the business with a miscreant partner. In order to shield himself from financial liability caused by the fraudulent activities of his partner, the L-1 manager starts another business and engages in the same activities for this business that he performed in his initial L-1 business.

In his naïveté or haste, the L-1 manager does not know or remember to submit a change of employer petition as required by the immigration laws. When he subsequently tries to extend his L-1 status, he finds that he is technically ineligible for an extension because he failed to maintain his status by not remaining with the petitioning employer. To overcome this issue, he must rely on the contention that his actions, while perhaps constituting a technical violation of the terms of his nonimmigrant status, were necessary to protect his legitimate business interest. The taking of steps to manage one's investment in a business enterprise does not constitute a violation of the laws against unauthorized employment because such actions do not compete with the job opportunities of the American worker, but rather offer the potential to create job opportunities for American labor.<sup>10</sup>

With this in mind, the documentation should demonstrate that the individual's actions were based on a real threat to his or her business interest. Examples would include letters from clients who were victims of the business partner's fraud, or copies of any written complaints submitted to the employer or a regulating agency or court. The L-1 manager would also emphasize that he had otherwise made efforts to maintain status. For example, the L-1 manager could show that he created and worked for a new corporation during the period in which his partner engaged in the fraudulent activities, but then merged the new company with the original L-1 sponsoring employer once the partner had been booted out.

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<sup>10</sup> *Lauvik v. INS*, 910 F.2d 658 (9th Cir. 1990); *Bhakta v. INS*, 667 F.2d 771 (9th Cir. 1982).

## ***Student and Exchange-Visitor Stumbles***

When F-1 foreign students and J-1 exchange visitors find themselves in violation of status, they may be permitted to correct their situation by obtaining a benefit known as reinstatement. Status violations for students and exchange visitors often involve the failure to maintain a full course of study or the non-participation in the exchange program.

Thankfully, immigration regulations provide forgiveness to certain F-1 students in situations where extraordinary events were the cause of the status violation.<sup>11</sup> An F-1 student may file a request for reinstatement if the individual has not been out of status for more than five months and meets other enumerated conditions. The student must show that s/he has no record of repeated or willful immigration law violations, is currently pursuing, or in the immediate future will pursue, a full course of study, has not engaged in unauthorized employment and is not otherwise deportable.

The student must also provide documentation showing that the status violation resulted from circumstances beyond his/her control, such as a serious injury, a natural disaster or a designated school official's "inadvertence, oversight, or neglect."<sup>12</sup> Alternatively, the student may show that the status violation relates to the reduction in his or her course load that the DSO could have lawfully authorized and that the denial of reinstatement would result in the extreme hardship to the student.<sup>13</sup>

Students out of status for more than five months are not necessarily without hope. In these situations, the student may submit the request for reinstatement asserting that "exceptional circumstances" prevented the student from filing the request within five months and that, in light of these circumstances, the request has been submitted as quickly as possible.

J-1 exchange visitors may be involved in activities beyond academic studies, including a service as au pairs, camp counselors, physicians or research scholars. U.S. State Department regulations implementing the Exchange Visitor Program provide that the failure to maintain valid program status encompasses not only terminating participation in the designated program but also remaining in the United States beyond the end date of the exchange visitor's J-1 sponsorship certificate, the Form DS-2019.<sup>14</sup> If the exchange visitor failed to maintain status for not more than 120 but less than 270 days, the J-1 nonimmigrant may formally request reinstatement.

When making this request, the exchange visitor must be able to show that he or she is pursuing, or was intending to pursue, the activities for which his/her J-1 status was approved. The exchange visitor must also show that the failure to maintain valid status was due to circumstances beyond the control of the exchange visitor, or from administrative delay or oversight, or the exchange visitor's excusable neglect. As an alternative to this requirement, the exchange visitor may show that the denial of reinstatement would create an unusual hardship. Unfortunately, reinstatement is not permitted in certain situations.

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<sup>11</sup> 8 CFR §214.2(f)(16)

<sup>12</sup> 8 CFR §214.2(f)(16)(i)(F)(1)

<sup>13</sup> 8 CFR §214.2(f)(16)(i)(F)(2)

<sup>14</sup> 22 CFR §62.45(a)



These include cases in which the exchange visitor failed to maintain status for more than 270 calendar days, engaged in unauthorized employment or has been suspended or terminated from the most recent exchange visitor program.

### ***Pratfalls en Route to Permanent Residence***

Quite often, the ultimate goal of a nonimmigrant is to become a lawful permanent resident. Of course, to be eligible for adjustment of status (“AOS”), the nonimmigrant must not have engaged in unauthorized employment or have been in unlawful immigration status on the date of filing the AOS application. Fortunately, for those who find themselves in the lamentable situation of having fallen out of lawful immigration status, INA § 245(c) provides some relief.<sup>15</sup> Under this provision, an individual who violated status may still be eligible for AOS if s/he failed to maintain continuously lawful status since entry to the U.S. “through no fault of his/[her] own” or “for technical reasons.”

Among the acceptable reasons for clemency specifically listed in the regulations are: (1) inaction of “another individual or organization designated by regulation to act on behalf of an individual and over whose action the individual has no control, if the inaction is acknowledged by that individual or organization” and (2) technical violation resulting from inaction of the USCIS.<sup>16</sup> Although probably designed to be limiting, these excuses could conceivably be interpreted broadly.

### ***“Authorized Agent”***

Inaction of “another individual or organization designated by regulation to act on behalf of an individual and over whose action the individual has no control” can include a wide range of alter egos. An authorized agent could include employers, attorneys, educational institutions, local, state and federal government agencies, or private and non-profit organizations. Aside from the obvious agents, such as an attorney or a non-lawyer who meets the test for a USCIS “accredited representative,”<sup>17</sup> stand-ins could also include petitioning employers,<sup>18</sup> and designated school officials who are specifically required to complete the SEVIS Form I-20 for F-1 or M-1 students.<sup>19</sup>

Similarly, a nonimmigrant exchange visitor in J-1 status must present a SEVIS Form DS-2019 issued by a program sponsor approved by the Department of State (“DOS”) for participation by J-1 exchange visitors.<sup>20</sup> The DOS is authorized to designate public and private entities to act as sponsors of the

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<sup>15</sup> Besides the forgiveness provisions in § 245(c) discussed in the text, there are two other provisions allowing adjustment of status despite prior violations of immigration status, Immigration and Nationality Act §§ 245(i) and 245(k). One of these, § 245(i), expired long ago, and is of little use except for the rare individual who falls within its terms. For information on the other, see Angelo A. Paparelli and John Valdez, “Never Say ‘I’ (Unless You Must): Employment-Based Options for Adjustment of Status that Avoid INA § 245(i),” accessible at: [http://entertheusa.com/publications/never\\_say\\_i.pdf](http://entertheusa.com/publications/never_say_i.pdf).

<sup>16</sup> 8 CFR §245.1(d)(2)

<sup>17</sup> 8 C.F.R. §103.2(a)(3)

<sup>18</sup> INA §214(c)(1)

<sup>19</sup> 8 CFR §214.3(l)(1)

<sup>20</sup> 8 CFR §214.2(j)(1)(i)

Exchange Visitor Program.<sup>21</sup> Moreover, entities that may apply for designation as a sponsor include U.S. local, state and federal government agencies, international agencies or organizations of which the United States is a member and which have an office in the United States or reputable organizations which are “citizens of the United States.”<sup>22</sup>

The significance of including such a wide range of individuals and entities as authorized agents is that this forgiveness provision could potentially benefit a multitude of AOS applicants. As a result, if an AOS applicant’s failure to maintain nonimmigrant status did not involve a legal representative, the AOS applicant may look to another possible “authorized agent” such as a DSO who may have made unwitting errors with respect to the issuance of a SEVIS I-20, or a distracted or forgetful employer’s error in failing to submit a timely change of status request.

In addition to identifying the authorized agent, the regulations require that the agent acknowledge the inaction that led to the AOS applicant’s failure to maintain lawful status. Consequently, the AOS applicant may wish to seek an affidavit from the agent, explaining that he or she was designated to act on the AOS applicant’s behalf and how the agent’s inaction led to the AOS applicant’s failure to maintain status. Notably, since the regulations require an acknowledgement from the acting agent, if the agent is not an attorney, the AOS applicant is not required to submit a bar complaint to argue that the agent’s inaction led to his or her failure to maintain status.

An explanation should also be provided of how the AOS applicant lacked any meaningful control over the agent’s actions. For example, an AOS applicant may not have any practical control over his or her attorney’s actions or inaction. Although an attorney may need his or her client approval for actions, the client does not necessarily have control over the attorney’s actions, given that the client does not control the manner in which her attorney researched and devised strategies for her clients to maintain lawful immigration status and comply with relevant immigration law requirements.

### **Plain Meaning**

If an individual’s failure to maintain lawful status does not necessarily fall within the enumerated circumstances provided in the regulations, the AOS applicant can still challenge the USCIS’s narrow approach in interpreting the statutory term “technical reasons” that led to the status violation. In ***Mart v. Beebe***, the U.S. District Court for the District of Oregon found that 8 C.F.R. §245.1(d)(2) “impermissibly limits the applicability of the words ‘or for technical reasons’.”<sup>23</sup> According to the court, the rule “subverts that [statutory] subsection’s plain meaning: that any alien who falls into unlawful status ‘through no fault of his own or for technical reasons’ is not precluded from adjusting status.”<sup>24</sup> The court held that Congress’s intent was not to preclude individuals from adjusting their status when they have “diligently endeavored to

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<sup>21</sup> 22 CFR 62.1(b)

<sup>22</sup> 22 CFR 62.3

<sup>23</sup> ***Mart v. Beebe***, 2001 U.S. Dist. LEXIS 182

<sup>24</sup> *Id.*

obey the law and have contributed substantially to the United States through their work and community involvement.”

In reliance on *Mart v. Beebe*, an attorney could emphasize the equities in a particular case while also pointing to the many complexities of immigration law. As in the nonimmigrant context, the AOS applicant should show diligent efforts to comply with the immigration laws. Moreover, if the AOS applicant is employed in an industry that serves the public interest, such as the healthcare industry, this would be a very important factor to highlight. One need not be a world-renowned scientist, however, to fall within this category; rather, the focus is on serving a public need. Thus, if an AOS applicant is a nurse, it would surely be worth noting that our country suffers from a severe shortage of nurses.

### ***Equitable Tolling***

Another basis for seeking relief, involving the failure to file for an immigration benefit on time, is equitable tolling. Equitable tolling, when allowed, operates to extend the deadline to file for an immigration benefit or other form of relief. As the Ninth Circuit Court of Appeals has held, equitable tolling is available, e.g., “[w]here the ineffective performance was that of an actual attorney.”<sup>25</sup> The foundation for this longstanding principle in immigration cases is the often-cited case, *Matter of Lozada*, where the Board of Immigration Appeals (“BIA”) found that a motion to reopen based on ineffective assistance of prior counsel “should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts.”<sup>26</sup> Recognizing that there must be a balance between providing relief to an injured client and protecting an attorney’s integrity from baseless claims of ineffective assistance of counsel, the BIA ruled that a complaint should be filed with the appropriate disciplinary authority if “prior counsel’s handling of the case involved a violation of ethical or legal responsibilities.” If a complaint is not filed, an explanation must be provided.

The failure to file such a complaint does not necessarily preclude one from seeking a remedy based on a prior attorney’s error. The federal appellate courts have taken a range of approaches from strict interpretation to the much more liberal. Representing the latter, the Ninth Circuit Court of Appeals has taken the position that although the BIA’s requirements are reasonable, the application of these requirements should not be so rigid as to deny an individual from obtaining relief for failing to meet the BIA’s technical requirements.

Numerous cases in the Ninth Circuit have relaxed the *Lozada* requirements based on facts that were discernible from reliable sources, such as transcript records. In *Escobar Grijalva v. Immigration and Naturalization Service*, an Immigration Judge (“IJ”) proceeded with an asylum applicant’s administrative hearing despite strong indications not only that her attorney was unprepared but that she was unsure whether she should proceed with the attorney. The Ninth Circuit ruled that the record of the administrative hearing, which includes transcripts of what occurred during the last hearing, clearly

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<sup>25</sup> See *Iturribarria v. INS*, 321 F.3d 889, 898 (9th Cir. 2003); and *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224-25 (9th Cir. 2002)

<sup>26</sup> *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988)

demonstrated that the asylum applicant was not adequately represented.<sup>27</sup> Another situation in which the Ninth Circuit eased up on the **Lozada** requirements is when a respondent's attorney despite diligent efforts was unable to obtain evidence documenting a previous lawyer's incompetence. In this case, the Ninth Circuit recognized that the respondent was unable to identify the specifics of his prior counsel's "deficient performance without reference to an accurate and substantially complete record of the filings and proceedings before the [Immigration Judge]."<sup>28</sup>

Other circuit courts of appeals have taken an approach similar to that of the Ninth Circuit. The Third Circuit Court, for example, cautioned against rigidly applying the requirement of filing a complaint with the appropriate state bar, emphasizing the "inherent dangers . . . in applying a formulaic interpretation of **Lozada**."<sup>29</sup> Expressing concern that courts "could apply **Lozada's** third prong [i.e., requiring the filing of a bar complaint] so strictly that it would effectively require all petitioners claiming ineffective assistance to file a bar complaint,"<sup>30</sup> the Third Circuit ruled that there is no "absolute requirement" to file such a complaint in order to successfully claim ineffective assistance of counsel.

As these cases demonstrate, an argument can be made for equitable tolling based on the ineffective assistance of counsel without strictly following the **Lozada** requirements. In presenting a case for ineffective assistance of counsel by the client's previous lawyer, the attorney should clearly identify the mistakes that were made, and how those mistakes harmed the client. There may be ways to document the mistakes without necessarily filing a bar complaint, as the above cases show. In addition to evidence such as administrative hearing transcripts, or the fact of an attorney's failure to file an appeal, the client may also try to approach his or her previous attorney and obtain an affidavit explaining the mistakes that were made and how those mistakes caused the client to lose lawful status.

Because equitable tolling requires that the alien acted reasonably in relying on an individual's special skills, the attorney must ensure that the alien's actions are properly documented and explained. The alien's documentation should show that his or her expectation that prior counsel would take action was reasonable. If appropriate, the documentation could include the retainer agreement, which could show that the alien had taken timely steps to find competent assistance in attempting to comply with immigration laws.

### **Complexity or Competence**

Although the individual may not always be required to submit a bar complaint in claiming that he or she was harmed through the ineffective assistance of counsel, the decision on whether to file a complaint should be assessed carefully. For example, the State Bar of California imposes a wide range of discipline for a variety of transgressions. Generally, if Bar prosecutors determine that an attorney's conduct only bordered on a violation or was a minor breach, they may choose an alternative to discipline, including a

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<sup>27</sup> **Escobar Grijalva v. INS**, 206 F.3d 1331 (9<sup>th</sup> Cir. 2000)

<sup>28</sup> **Ontiveros-Lopez v.INS**, 213 F.3d 1121 (9<sup>th</sup> Cir. 2000)

<sup>29</sup> **Lu v. Ashcroft**, 259 F.3d 127 (3d Cir. 2001)

<sup>30</sup> **Lu v. Ashcroft**, 259 F.3d 127 (3d Cir. 2001)

warning letter, an admonition or settle on an agreement in lieu of discipline that would require the attorney to fulfill specially tailored remedial conditions.

The complexity of immigration law makes it especially important to protect individuals from incompetent, or worse yet, predatory lawyers and notarios.<sup>31</sup> Immigration law is widely recognized as an area of great intricacy. As the Congressional Research Service stated in a July 28, 2005 report to the House Committee on the Judiciary: “The statutory scheme defining and delimiting the rights of aliens is exceedingly complex. Courts and commentators have stated that the Immigration and Nationality Act resembles ‘King Mino’s labyrinth in ancient Crete,’ and is ‘second only to the Internal Revenue Code in complexity.’ *Chan v. Reno*, 1997 U.S. Dist. LEXIS 30 16, \*5 (S.D.N.Y. 1997) (citations omitted).”<sup>32</sup>

Immigration law has been characterized as confusing and inscrutable by several knowledgeable authorities. The Ninth Circuit recognizes that “Immigration law is very complex.”<sup>33</sup> In describing the procedural history of a tortuous case, the Second Circuit Court of Appeals characterizes the complexity of immigration law quite colorfully and accurately: “This case vividly illustrates the labyrinthine character of modern immigration law – a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike. The inscrutability of the current immigration law system, and the interplay of the numerous amendments and alterations to that system by Congress . . . have spawned years of litigation, generated two separate opinions by the District Court, and consumed significant resources of this Court.”<sup>34</sup>

If a lawyer makes a mistake in this complex area of law, could the client refrain from submitting a claim and instead obtain the attorney’s cooperation in seeking relief? As discussed above, there are specific forms of relief available to individuals who are able to provide affidavits from their previous attorney stating that his or her mistakes resulted in harm to the individual. In addition, could the alien also have the former attorney contribute to the legal fees and costs of seeking extraordinary relief? From the attorney’s perspective, if the alien files a complaint, the attorney’s malpractice insurance will likely increase, and the amount of money that it would take to remedy the mistake could be substantially less than the cost of defense and the foreseeable increase in malpractice insurance premiums.

However appealing it may be make a fiscal appeal to an attorney, an attorney in California may be subject to suspension, disbarment, or other discipline if he or she, as a party or as an attorney for a party to agree or seek agreement that “professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.”<sup>35</sup> Under the Rules of Professional Conduct, members are also prohibited from threatening “to present criminal, administrative,

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<sup>31</sup> In *Escobar Grijalva v. INS*, the Ninth Circuit concludes: “The administrative record in this case points to serious problems in the immigration bar. . . . There is a need to clean house, to get rid of those who prey on the ignorant. The starting point is not to make the helpless the victim.”

<sup>32</sup> “Enforcing Immigration Law: Issues of Complexity,” by its Legislative Attorney, Stephen R. Viña, (CRS Doc. No. M-72805 at p. CRS-3)

<sup>33</sup> *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988)

<sup>34</sup> *Drax v. Reno*, 338 F.3d 98, 99-100 (2d Cir. 2003)

<sup>35</sup> State Bar Act §6090.5 Attorney/Client Agreement Not to File Complaint - Cause for Discipline.

or disciplinary charges to obtain an advantage in a civil dispute.”<sup>36</sup> This provision is interpreted to include “the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license.”<sup>37</sup>

The American Bar Association (“ABA”) also takes the position that a lawyer “shall inform the appropriate professional authority” if he or she knows that another lawyer’s violation of the Rules of Professional Conduct “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>38</sup> According to the ABA, the standard for “substantial” involves the “seriousness of the possible offense and the quantum of evidence of which the lawyer is aware.”<sup>39</sup> In this same vein, the ABA posits that professional misconduct includes violations or attempted violations of the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.<sup>40</sup>

In seeking cooperation from the client’s previous counsel, the attorney must tread a careful path to avoid a breach of ethics or a violation of law. The attorney should perhaps focus on the ways in which previous counsel could bolster the client’s chances of obtaining relief (and thereby have the problem go away) rather than present such a path as an alternative to the filing of a bar complaint. In the interest of avoiding accusations of extortion or dereliction of the duty to report misconduct, the current immigration attorney may take the position, where appropriate, that previous counsel may have made an error that does not necessarily rise to the level of misconduct or a violation of an ethical duty. Prior counsel may be more likely to cooperate if it is communicated that the main interest of the client is to rectify the harm, i.e., obtain the immigration benefit the client is seeking.

## ***Happy Ever After***

In situations involving extraordinary circumstances, the client is often in dire straits and seemingly without remedy. It is in these cases that the attorney must be at his or her most creative. Cases of this type are often driven by an unusual and distressing series of events; thus, the attorney must carefully develop all of the facts, formulate intelligent, creative arguments and meticulously compile the necessary supporting documents to present a case that is balanced between the objective analysis of the law and facts and the emotional appeal that may well be required to move the adjudicator to exercise discretion favorably.

When presented with these woeful cases, the best approach is to embrace the possibility of redressing mistakes made by innocent individuals rather than treating them as lost causes. After all, the existence of relief based on extraordinary circumstances is really an acknowledgement that mercy must sometime be shown to ensure that the basic principles of immigration law (i.e., family unity, the betterment of society through diversity) are protected. For literary or historic inspiration, the adept immigration lawyer may look

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<sup>36</sup> Rules of Professional Conduct Rule 5-100(A).

<sup>37</sup> Rules of Professional Conduct Rule 5-100(B).

<sup>38</sup> Model Rules of Professional Conduct Rule 8.3(a) Reporting Professional Misconduct

<sup>39</sup> Model Rules of Professional Conduct Rule 8.3 Reporting Professional Misconduct – Comment [3]

<sup>40</sup> Model Rules of Professional Conduct Rule 8.4 Misconduct (a)(c)

either to Shakespeare's character Portia in *The Merchant of Venice* ("The quality of mercy is not strain'd")<sup>41</sup> or to one founding father's belief that "[t]he care of human life and happiness and not their destruction is the first and only legitimate object of good government."<sup>42</sup>

So maybe the wife of the heart transplant patient was wrong; maybe the hearts of immigration officers have only been lightly used. Let us hope, in the interest of hapless and hopeless foreign citizens, that immigration officers, justified by well-documented and deserving requests prepared by a zealous advocate, can be persuaded to engage in ever more compassionate cardiac workouts.

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<sup>41</sup> Shakespeare, William. *The Merchant of Venice*, IV, i, 180-187, "Portia: The quality of mercy is not strain'd/ It droppeth as the gentle rain from heaven/ Upon the place beneath. It is twice blest/ It blesseth him that gives and him that takes."

<sup>42</sup> Thomas Jefferson to Maryland Republicans, 1809. ME 16:359