AILA

Law Journal

A Publication of the American Immigration Lawyers Association

Cyrus D. Mehta
Editor-in-Chief

Volume 6, Number 2, October 2024

fastcase FULL COURT PRESS

AILA Law Journal

Volume 6, Number 2, October 2024

EDITOR-IN-CHIEF

Cyrus D. Mehta
Founder & Managing Partner, Cyrus D. Mehta & Partners PLLC

MANAGING EDITOR

Danielle M. Polen
Editorial Director, AILA

EDITOR

Richard Link
Legal Editor, AILA

BOARD OF EDITORS

Dan H. Berger
Partner, Curran Berger & Kludt, and Immigration Fellow, Cornell Law School

Kaitlyn A. Box
Senior Associate, Cyrus D. Mehta & Partners PLLC

Dagmar Butte
Shareholder, Parker Butte & Lane, Portland, Oregon

Mahsa Khanbabai
Owner, Khanbabai Immigration Law

Olivia Serene Lee
Partner, Minami Tamaki LLP

Angelo A. Paparelli
Partner, Seyfarth Shaw LLP

Thomas K. Ragland
Member, Clark Hill PLC

Diane Rish
Senior Manager, Immigration, Salesforce Inc.

Craig R. Shagin
Member, The Shagin Law Group LLC,
Adjunct Professor of Law, Widener Commonwealth Law School

Rebecca Sharpless
Professor, University of Miami School of Law

William A. Stock
Founding Member & Partner, Klasko Immigration Law Partners LLP,
AILA Past President

Margaret Kuehne Taylor
Adjunct Professor of Law, University of Maryland Carey School of Law,
Ret. Senior Litigation Counsel, Office of Immigration Litigation,
U.S. Department of Justice

AILA LAW JOURNAL (ISSN 2642-8598 (print)/ISSN 2642-8601 (online)) is published two times per year by Full Court Press, a Fastcase, Inc., imprint. Individual issues may be purchased for $60.00, or subscriptions for $99.00 a year. Discounts are available for AILA members and Fastcase legal research users. Copyright 2024 American Immigration Lawyers Association. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner: American Immigration Lawyers Association, Suite 300, 1331 G Street, NW, Washington, DC 20005-3142, Phone: 202-507-7600, Fax: 202-783-7853.

Publishing Staff
Publisher: Leanne Battle
Production Editor: Sharon D. Ray
Cover Design: Morgan Morrissette Wright and Sharon D. Ray

The cover of this journal features a painting known as *The Sea* by French artist Jean Désiré Gustave Courbet. A leader of the Realist movement, Courbet is also remembered for his political content and activism. The image is provided courtesy of the Metropolitan Museum of Art under a CC0 1.0 Universal (CC0 1.0) Public Domain Dedication.

Cite this publication as:

AILA Law Journal (Full Court Press, Fastcase, Inc.)

Copyright © 2024 American Immigration Lawyers Association

All Rights Reserved

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

729 15th Street, NW, Suite 500, Washington, DC 20005
https://www.fastcase.com

POSTMASTER: Send address changes to AILA LAW JOURNAL, 729 15th Street, NW, Suite 500, Washington, DC 20005

Disclaimer

The articles featured in the AILA Law Journal do not necessarily represent the views of AILA or the publisher, nor should they be regarded as legal advice from the association or authors. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional.

Likewise, the articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors, or their firms or organizations.

Submissions

Direct editorial inquires and send material for publication to:

ailalawjournal@aila.org

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys, law firms, and organizations working in immigration law.

Questions About This Publication?

For questions about the Editorial Content appearing in these volumes or reprint, please contact:

Leanne Battle, Publisher, Full Court Press, at leanne.battle@vlex.com or at 866.773.2782

For questions about Sales, or to reach Customer Service:

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

ISSN 2642-8598 (print)
ISSN 2642-8601 (online)

This Makes No Sense

Craig Shagin and Maria Vejarano*

Abstract: There are numerous provisions in the immigration laws that make no sense. They add unnecessary delay, expense and backlogs in a terribly over burdened system. Here are three proposals that are intended to remove some of the cholesterol from the veins of the immigration system. Hopefully, this will inspire others to make suggestions of a similar improvements. Complicated systems can benefit by small continuous improvements. This requires constant input.

Introduction

There are numerous provisions in the immigration laws that make no sense. They create unnecessary delay and expense to resolve an issue and either serve no meaningful purpose or serve a purpose that could be addressed in a more economical manner. These issues typically are mere oversights either in the administration of the immigration laws or due to their convoluted bureaucratic administration.[1] They are not exciting topics. They are not at the forefront of some policy argument nor are they a matter of great scholarly interest. Nevertheless, taken collectively, these issues contribute to delays in processing cases, unnecessarily adding to the backlog of both removal cases and petitions before U.S. Citizenship and Immigration Services (USCIS), and the costs of administering the immigration laws. Believing that there is merit in seeking to make continuous improvements—even if small—to any complicated operation, we believe examining such flaws and offering realistic improvements will provide, over time, an improved immigration system.

Here, we note three such problems and propose easy fixes that should be both noncontroversial and improve the efficiency of administering the immigration laws. These are:

1. Requiring that immigration detention facility medical staff be USCIS-designated civil surgeons so that detained aliens do not have to leave a detention facility to get a Form I-693 Report of Immigration Medical Examination completed;
2. Mandate that the Attorney General designate a Department of Homeland Security office to review INA § 237(a)(1)(H) waiver requests when Form N-400 applications for naturalization are denied because USCIS determines that the alien was not admissible at the time of entry and does not elect to put them into removal proceedings; and

AILA Law Journal / October 2024, Vol. 6, No. 2, pp. 293–300.
© 2024 American Immigration Lawyers Association. All rights reserved.
ISSN 2642-8598 (print) /ISSN 2642-8601 (online)

3. Permit U.S. Immigration and Customs Enforcement (ICE) legal advisors to grant parole in place to individuals who presumptively qualify for cancellation of removal but for the absence of available visas and have a path to receive an immigrant visa but for their means of entry.

Requiring All Immigration Detention Facility Medical Staff to Be USCIS-Designated Civil Surgeons

The problem: Many detained aliens seek relief through adjustment of status, which requires, among other things, a Form I-693 completed by a USCIS-designated civil surgeon.[2] These are typically private medical offices under contract with USCIS scattered about a state.[3] There do not appear to be any in a detention facility. In order to have this Form I-693 approved, arrangements must be made with the detention facility to have the alien transported to the approved civil surgeon's offices, with a security detail to prevent any escape during transportation.[4]

These procedures are not available on Pennsylvania's alien detention facilities' websites.[5] Scheduling an appointment requires communicating with someone at the detention center. All of this is done at great cost to the alien and his or her family and is an inconvenience to the immigration court, as an adjustment of status application may not be adjudicated without a completed Form I-693.[6] This delay is profitable to the private prisons now detaining aliens, as each day an alien is detained is another day of revenue.[7] Hence, the detention facilities have no incentive, outside of being directed by USCIS, to make the system more efficient.

The medical examination and vaccination requirements apply to all aliens seeking admission to the United States,[8] including those who are about to arrive in the United States for the first time, as well as those who have been here for 50 years.[9] The logic of worrying about contagion from a person who has lived in the United States for decades may escape the non-USCIS indoctrinated. However, this absurdity pales in comparison to having to remove someone from a detention center, where they have already been examined for contagion, so that a USCIS-designated civil surgeon can examine and then return them to the detention center. Because they are returning from outside the prison, they may again, depending on the prison's policies, be placed in isolation to ensure—what else—that they do not now have a contagion. This makes no sense.

Prisons, jails, or the more popularly termed detention facilities are required to safeguard their populations from contagion.[10] Providing medical care in immigration detention facilities is crucial for safeguarding the health and welfare of detainees. Whereas the standards and procedures for delivering such care can differ based on factors such as the particular facility and the supervising agencies, each detention facility with an ICE contract must comply with

one of several national detention standards: National Detention Standards (NDS),[11] Performance-Based National Detention Standards (PBNDS),[12] NDS 2019,[13] or Family Residential Standards 2020.[14]

The 2000 National Detention Standards establish guidelines and protocols for delivering medical care within immigration detention facilities. They mandate that facilities maintain accreditation from the National Commission on Correctional Health Care and strive to attain accreditation from the Joint Commission on the Accreditation of Health Care Organizations, to ensure adherence to recognized standards of care.

Detention facilities covered by this policy include Service Processing Centers, Contract Detention Facilities, and state or local government facilities used by ICE through Intergovernmental Service Agreements for detaining detainees for over 72 hours.[15]

Current policy mandates an initial medical screening, primary medical care, and emergency care for all detainees.[16] The policy requires medical facilities to have sufficient space and equipment, to keep medical records separate from detainee records, and to ensure the secure storage and administration of medication.[17] Medical screening must be conducted for all new arrivals, including mental health screening, tuberculosis screening, and evaluation for substance use or dependence.[18]

These same physicians are undoubtedly technically qualified to make the determinations required to complete Form I-693. The primary responsibility of a civil surgeon is to conduct immigration medical examinations to assess whether aliens exhibit any of the following medical conditions that could lead to their inadmissibility:

1. Communicable disease of public health significance,
2. Failure to provide evidence of required vaccinations (applicable to immigrant visa applicants and adjustment of status applicants only),
3. Physical or mental disorder with associated harmful behavior, and
4. Drug abuse or addiction.[19]

All of this is already being carried out by the detention centers under existing policies. Thus, all that is required to eliminate the need for detainees to leave the institution to complete a Form I-693 exam is to require all detention facilities to have their medical staff certified to be designated civil surgeons. The facilities already appear to meet the requirements. Existing policy requires that healthcare staff possess valid professional licensure or certification, so civil surgeons must also.[20]

This simple fix would deduct months from an adjustment of status case, eliminate the cost of having to transport an alien under guard outside the prison, reduce the detained case backlog, and reduce the government expense and the alien's loss of freedom by unnecessarily detaining an adjusting alien for longer than necessary.

The solution, moreover, is easy. It requires no new legislation or regulations. USCIS designates eligible physicians as civil surgeons to perform medical examinations for these immigration benefit applicants in the United States.[21] USCIS could designate the detention facility physicians, even keeping their archaic "civil surgeon" nomenclature, to perform this task. The applicable ICE contracts could require detention facilities to seek and obtain certification for their medical staff.

There is administrative precedent as well. A Policy Memorandum already exists: "To ease difficulties encountered by physicians and applicants in the military, USCIS [issued] a blanket civil surgeon designation to qualifying military physicians to permit them to perform the immigration medical examination and Vaccination Record, Form I-693, for eligible members and veterans of the Armed Forces and their dependents."[22] Similar action could be taken with respect to physicians serving in alien detention facilities.

Enable USCIS to Issue a 237(a)(1)(H) Waiver

Currently, there is no means for an alien to correct a technical defect in an initial entry except in removal proceedings. Although the Immigration and Nationality Act permits the Attorney General to waive the removal of an alien for fraud or misrepresentation—whether willful or innocent—there is no procedure for USCIS to grant such a waiver outside of removal proceedings.[23] This makes no sense.

The problem arises in multiple forms, typically when an alien applies for naturalization years after having entered the United States and residing here, reasonably believing they are in lawful permanent resident status. Thus, by way of illustration, a citizen of the United Kingdom receives an EB-1 visa. She, her husband, and their children have their passports stamped and receive their entry packets simultaneously on May 1. The dependent husband and children travel to the United States on May 4 to establish a residence and enroll the children in school. They are admitted and receive green cards. The wife, who is the principal applicant, arrives in the United States on August 4. She, too, is admitted and issued a green card. Subsequently, the family has traveled to and from the United States a dozen times together.

Five years later, the husband and wife apply for naturalization. USCIS denies the husband's application because a spouse or child, as defined under the Act,[24] shall "be entitled to the same status … if accompanying or following to join, the spouse or parent."[25] The Philadelphia USCIS Field Office, at least, reads this provision literally, so that if the dependents precede the principal applicant to the United States, they are not accompanying or following to join. Philadelphia USCIS may be an outlier of literal interpretation, but there are a multitude of other technical flaws that might result in a subsequent finding that an alien was not lawfully admitted for permanent residence. For example, the principal applicant may later be found to have committed fraud on entry;

there might have been a technical defect in the divorce of a prior marriage; or the lead applicant may have inadvertently or deliberately failed to disclose information that, were the true facts known, might not themselves have been grounds for inadmissibility but could have led to further inquiry and, for that reason alone, would render the individual inadmissible.

There is a cure for this problem if the alien is in removal proceedings. A waiver before an immigration judge is available for individuals who have been deemed inadmissible to the United States due to misrepresentations made during their admission process.[26] This provision applies both to those whose entry into the United States was procured through fraudulent means or willful misrepresentation of material facts as well as innocent misrepresentations that render them inadmissible.[27]

The BIA has held that the contradictory reference in INA § 237(a)(1)(H) to "aliens described in [INA §212(a)(6)(C)(i)], whether willful or innocent," should be read to include persons charged as inadmissible at the time of entry or adjustment for fraud or willful misrepresentation under INA § 212(a)(6)(C)(i), and also for lack of a valid immigrant visa under INA § 212(a)(7)(A)(i)(I) where there was a misrepresentation made at the time of admission, whether innocent or not.[28] In *Matter of Fu*, Mr. Fu was found to have implicitly misrepresented his eligibility for an immigrant visa as the son of his lawful permanent resident father, even though his father had passed away prior to the issuance of the visa.[29] Despite the potential innocence of this implicit misrepresentation and the lack of a charge relating to INA § 212(a)(6)(C)(i), he was deemed eligible for a waiver under INA § 237(a)(1)(H).[30]

The waiver involves determinations well within the capability of the USCIS to determine. To qualify for a waiver of removability, the person must be: (1) the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; (2) be in possession of an immigrant visa or equivalent document; and (3) otherwise have been admissible at the time of admission to the United States.[31] These findings are even less than those that USCIS is called on to make for a waiver of misrepresentation prior to admission.[32]

Permitting USCIS to make this determination would preclude the necessity of placing an alien in proceedings to obtain a 237(a)(1)(H) waiver, thus reducing the burden on the immigration courts. It would also prevent an otherwise worthy alien from being barred from naturalizing and becoming a citizen of the United States.

Parole in Place for Aliens Presumptively Granted Non-LPR Cancellation of Removal

Cancellation of removal and adjustment to lawful permanent residence is a relief available to aliens who: (1) have been physically present in the United

States for 10 years or more, (2) demonstrate good moral character, (3) have not been convicted of certain crimes, and (4) demonstrate that their removal would result in exceptional and extremely unusual hardship to a United States citizen or lawful permanent resident spouse, child, or parent.[33] However, only 4,000 people are permitted to be granted non-LPR cancellation of removal per year.[34] There is currently about a four-year wait for this relief to be available *after* a merits hearing has been concluded. This means that those cases remain on the immigration court's docket for several years thereafter. Although a case may be denied on the day of the individual merits hearing, it may only be granted when the allocated relief is available. Because many cases take years before they can be presented to an immigration judge, and then must wait years before relief can be granted, an applicant's U.S. citizen children may become adults in the interim.

These cases often involve U.S. citizen spouses, children, or parents who could petition for the alien but for the absence of a lawful entry. The immigration court backlog could be reduced if those aliens who have presumptively qualified for cancellation relief were given parole in place by the Department of Homeland Security to permit them to seek adjustment of status. This would follow the model proposed by President Biden for spouses of U.S. citizens. However, it would also require the presumptive approval of cancellation relief. Hence, these would necessarily be persons of good moral character, who have been in the United States for 10 or more years, who have not been convicted of disqualifying crimes, and whose departure would result in exceptional and extremely unusual hardship to their qualifying relatives.

Conclusion

There seems to be an endless number of requirements or procedures that either serve no valid substantive purpose or serve a purpose poorly. Correcting these is, in the scheme of things, not the most pressing issue either of the policy or practice of immigration lawyers. Nevertheless, their accumulation, like ohms in the flow of electricity, slows our work and burdens the system. The three mentioned here are just examples. We hope our readers will suggest more. Because seeing the absurdity of the statutes without commenting on them really just makes no sense.

Notes

* Craig Shagin (cshagin@shaginlaw.com) is the founding member of The Shagin Law Group LLC and an Adjunct Professor of Law at Widener University Commonwealth Law School. Maria F. Vejarano (mvejarano@shaginlaw.com) is an immigration attorney at The Shagin Law Group LLC. The Shagin Law Group is a full-service immigration law firm in Harrisburg, Pennsylvania.

1. Given that the laws are administered by five Departments—Homeland Security, Justice, State, Labor, and Health—the greater wonder is not the number of meaningless obstacles but their paucity. Nevertheless, there is much to be said for continuous improvement of small details in any complicated system. The purpose of this article is to highlight three. However, there is likely an unlimited supply of such topics.

2. The Immigration and Nationality Act (INA) renders any alien inadmissible to the United States if they have a communicable disease of public health significance. Regulations require that such individuals seeking to adjust status be examined by a USCIS-designated civil surgeon. 8 U.S.C. § 1182; INA § 212(a)(1). Additionally, any alien seeking admission as an immigrant or adjustment of status must present documentation of having received vaccinations for vaccine-preventable diseases.

3. USCIS does not publish the complete list on its website. Instead, it has a "find" tool. Pennsylvania has both Pike County Prison and the GEO Group's Moshannon Valley Detention Facility with no certified surgeons in the detention facilities. *See* https://www.uscis.gov/tools/find-a-civil-surgeon.

4. U.S. Immigration and Customs Enforcement, Detention Management, 2000 National Detention Standards for Non-Dedicated Facilities, https://www.ice.gov/doclib/dro/detention-standards/pdf/medical.pdf.

5. *See* BCRC, Berks County Residential Center, https://www.berkspa.gov/Dept/BCRC/Pages/default.aspx; U.S. Immigration and Customs Enforcement, Moshannon Valley Processing Center, https://www.ice.gov/detain/detention-facilities/moshannon-valley-processing-center; York County, Pennsylvania, Prison, https://yorkcountypa.gov/477/Prison.

6. 8 U.S.C. § 1182; INA § 212(a)(1).

7. The Department of Homeland Security (DHS) and the White House requested $1.84 billion for DHS Custody Operations. This funding level would amount to over $5 million per day spent on immigration detention. This funding level would put the current cost to detain an immigrant at approximately $159 per day at a capacity of 31,800. The U.S. House of Representatives would spend even more. Furthermore, many of these detention dollars flow to enormous private prison corporations that stand to reap significant profits when the number of detained immigrants increases.

8. 8 C.F.R. § 245.1; 8 C.F.R. § 245.5; INA § 212(a)(1)(A)(ii).

9. INA § 212(a)(1)(A)(i).

10. U.S. Const. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97 (1976). The Supreme Court held that deliberate indifference to the serious medical needs of prisoners constitutes cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. This decision establishes that prison officials have a constitutional obligation to provide adequate medical care to inmates, and failure to do so, when deliberate and leading to harm, violates the prohibition against cruel and unusual punishment; *Hutto v. Finney*, 437 U.S. 678, 686 (1978). The Supreme Court emphasized that prison conditions must meet basic human needs, including protection from serious health risks, under the Eighth Amendment's prohibition against cruel and unusual punishment.

11. U.S. Immigration and Customs Enforcement, 2000 National Detention Standards for Non-Dedicated Facilities, https://www.ice.gov/detain/detention-management/2000.

12. U.S. Immigration and Customs Enforcement, *2008 Operations Manual ICE Performance-Based National Detention Standards*, https://www.ice.gov/detain/detention-management/2008.

13. U.S. Immigration and Customs Enforcement, *2019 National Detention Standards for Non-Dedicated Facilities*, https://www.ice.gov/detain/detention-management/2008.

14. U.S. Immigration and Customs Enforcement, *Family Residential Standards*, https://www.ice.gov/detain/detention-management/family-residential.

15. Medical Care, https://www.ice.gov/doclib/dro/detention-standards/pdf/medical.pdf.

16. *Id.*

17. *Id.*

18. *Id.*

19. INA § 212(a)(1).

20. U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, at 59 (2011), https://www.ice.gov/detain/detention-management, and U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 4.3: Medical Care* 15 (2019), https://www.ice.gov/doclib/detention-standards/2019/4_3.pdf.

21. 42 C.F.R. § 34.2(o) and 22 C.F.R. § 42.66. See 9 FAM 302.2-3(E).

22. PM-602-0074 (Sept. 26, 2012).

23. INA § 237(a)(1)(H).

24. INA § 101(b)(1).

25. INA § 203(d).

26. *Id.*

27. INA § 212(a)(6)(C)(i).

28. *Matter of Fu*, 23 *I& N Dec*. 985 (BIA 2006).

29. *Id.*

30. *Id.*

31. INA §§ 237(a)(1)(H)(i)(I)-237(a)(1)(H)(i)(II).

32. INA § 212(i).

33. INA § 240A(b)(1).

34. 8 U.S.C. § 1229(e); INA § 240A(e)(1).