CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE- DECEMBER 6, 2019

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Immigration Update- December 6, 2019

Headlines

Could Immigration Lawyers become Criminals? – The U.S. Supreme Court has agreed to consider the case of U.S. v. Sineneng-Smith involving an immigration consultant - Evelyn Sineneng-Smith - who told her undocumented clients they could stay in the United States under a program she knew had ended. Though she received a conviction for fraud, the deeper issue is whether she is guilty of unlawful encouragement of a person to violate U.S. immigration laws when she knew the person has no status.

DHS Adopts Interim Final Rule on Bilateral and Multilateral Asylum Cooperative Agreement – On November 19, 2019 USCIS published an interim final rule (effective immediately) in the Federal Register that purports to want to ensure. As the rule summary notes: "The Department of Justice and the Department of Homeland Security are adopting an interim final rule to modify existing regulations to provide for the implementation of Asylum Cooperative Agreements that the United States enters into pursuant to section 208(a)(2)(A) of the Immigration and Nationality Act.

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Could Immigration Lawyers become Criminals?

The U.S. Supreme Court has agreed to consider the case of U.S. v. Sineneng-Smith involving an immigration consultant - Evelyn Sineneng-Smith - who told her undocumented clients they could stay in the United States under a program she knew had ended. She was convicted on a charge of fraud; however, the more worrisome issue is whether she also is guilty of unlawful

encouragement of a person to violate U.S. immigration laws when she knew the person has no status. The U.S. Circuit Court for the 9th Circuit vacated this portion of the conviction on the ground that the underlying law violates the freedom of speech guaranteed under the First Amendment of the Constitution. The Court noted the chilling effect it could have not only on social media users merely commenting on whether persons should stay until the law changes but also on lawyers giving advice to their clients. As this case winds its way through the Supreme Court docket it bears watching but it is also a powerful reminder – irrespective of whether the government's position is correct on this set of facts - that lawyers must consider whether their conduct in advising clients complies with existing ethical and legal constraints. This case implicates the clients of business immigration lawyers no less than those who only practice asylum or removal defense. There are a number of scenarios where a beneficiary may fall out of status or otherwise lose entitlement to remain in the U.S. where the logical answer on what to do may not be the legal answer, especially if the Supreme Court reverses the 9th Circuit.

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DHS Adopts Interim Final Rule on Bilateral and Multilateral Asylum Cooperative Agreement

On November 19, 2019 USCIS published an interim final rule (effective immediately) in the Federal Register that purports to want to ensure. As the rule summary notes: "The Department of Justice (``DOJ'') and the Department of Homeland Security (``DHS'') (collectively, ``the Departments'') are adopting an interim final rule (``IFR'' or ``rule'') to modify existing regulations to provide for the implementation of Asylum Cooperative Agreements (``ACAs'') that the United States enters into pursuant to section 208(a)(2)(A) of the Immigration and Nationality Act (``INA'' or ``Act''). Because the underlying purpose of section 208(a)(2)(A) is to provide asylum seekers with access to only one of the ACA signatory countries' protection systems, this rule adopts a modified approach to the expedited removal (``ER'') and section 240 processes in the form of a threshold screening as to which country will consider the alien's claim. This rule will apply to all ACAs in force between the United States and countries other than Canada, including bilateral ACAs recently entered into with El Salvador, Guatemala, and Honduras in an effort to share the distribution of hundreds of thousands of asylum claims. The rule will apply only prospectively to aliens who arrive at a U.S. port of entry, or enter or attempt to enter the

United States between ports of entry, on or after the effective date of the rule. The rule gives substantial discretion to DHGS officials in Expedited Removal Proceedings to make a threshold finding whether the individual seeking asylum is ineligible to apply for asylum in the U.S. under any of the applicable agreements. The same is true in regular removal hearings before an Immigration Judge. The rule also changes existing regulations t 8 CFR 208.30 for how asylum officers are to conduct credible fear screenings and says in pertinent part: "New paragraph (e)(7) requires an asylum officer, in an appropriate case, to make several threshold screening determinations before assessing the merits of an alien's claims for asylum, withholding of removal, or CAT protection. First, the asylum officer must determine whether the alien is subject to one or more ACAs.

Second, if so, the officer must determine whether the alien meets any exception to the applicable agreement(s)--including the public-interest exception, which, under section 208(a)(2)(A), all ACAs must contain. If the alien is not subject to any ACA, or the alien meets an exception to each applicable agreement, the asylum officer will assess the merits of the alien's claims for relief as usual--that is, assess whether the alien has a credible fear of persecution or torture under existing paragraphs (e)(2) and (3). But if the alien is subject to an ACA, and does not meet any exception, the asylum officer will inform the alien that he or she is potentially subject to removal to the third country signatory to the relevant ACA, and that the third country, rather than the United States, will provide access to a full and fair procedure for the applicant's claim. After identifying the third country or countries to which the alien may be removed, if the alien does not affirmatively state a fear of persecution or torture in, or removal to, the country or countries, the asylum officer will refer the determination--i.e., that the alien is barred from applying for asylum, withholding of removal, and CAT protection in the United States, and subject to removal to the third country or countries--to a supervisory officer for review. If the supervisory asylum officer disagrees, that officer will remand the case to the asylum officer for a credible fear interview. If, on the other hand, the alien affirmatively states a fear of persecution or torture in, or removal to, the third country or countries, the asylum officer will then determine whether the alien can establish, by a preponderance of the evidence, that, if the alien were removed to the third country or countries, it is more likely than not that he or she would be persecuted on account of a

protected ground or tortured." Assuming the officer determines the alien has met that burden, given that the alien has already been placed into ER proceedings, the officer will assess the credible fear claim.

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Firm in the News:

Cyrus Mehta spoke on a panel entitled *"How to Challenge the Government in Court"* at the 52nd Annual PLI Immigration & Naturalization Institute Conference in New York on December 5, 2019.