



Immigration Practice 2011-2012 Edition

by Robert C. Divine and Blake Chisam

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Book Outline

Immigration Practice guides you through the aspects of immigration law practice in one volume. It includes 3,000+ footnotes citing statutes, regulations, court and administrative cases, policy memos, operational instructions, agency interpretive letters, websites, and more.

This reference book merges the practical with helpful commentary and analysis. Explanations are written in clear and easy to understand language. Substantive issues and actual procedures are described in the book, complete with checklists, required supporting evidence, and other essential information needed for completing a proper application and/or petition.

Highlights

- Liberally cross references to other related sections of the book.
- Line-by-line instructions on how to complete the commonly used forms.
- Checklists provided: forms and fees, detailed support letters, and other supporting evidence.
- Explanations of potentially applicable visa options organized by foreign national and/or employer attributes, instead of the typical alphabetical order.
- Citations throughout the book, and a CD-ROM Appendix.

What's New

- Constantly increased and updated links to government web sites containing current contact information, forms, primary law sources of all types, case status information, and processing and substantive guides—all referenced by pinpoint citations in the text. See Chapter 5 explaining sources of law, Appendix C and D-1 showing web links, and the CD-ROM in the back cover providing one-click access! Readers are strongly encouraged to review and use the CD-ROM and to consider drawing Appendix C, D-1, and E-1 into internet browser "favorites" or "bookmarks" for ready reference all the time.
- Revised appendix concerning special immigration conditions for every country on earth, contained in CD-ROM at Appendix § C-6.
- **Supreme Court decisions:** preserving judicial review of decisions made discretionary by regulation (§ 2-2(a)(1)(I)), remanding to BIA whether coercion or duress are excepted from the persecutor bar (§ 16-4(c)), preserving traditional factors in stays of removal (§ 11-6(b)), requiring knowledge of the use of an actual person's identity to constitute aggravated identity theft (§ 19-7(e)), requiring accurate advice on immigration consequences as part of constitutionally required effective assistance of criminal law counsel (§ 10-6(b)(2)(vi)), allowing proof of conditions outside of the "categorical" criminal record when the condition triggering immigration consequences is not normally an element of the crime (§ 10-6(b)(2)(2)(ii)); and considering whether an alien's state conviction for illegal possession of a controlled substance qualifies as an "aggravated felony" (§ 10-6(b)(1)(vi)).
- **Lower federal court decisions** concerning such issues as: what constitutes an "admission" (§§ 7-4(c)(1) and 8-8(e)(4)(iii)); improper USCIS rejection of filing with unsigned check (§ 1-6(b)), appealability of immigration agency decisions to federal courts (§ 2-2(a)(1)(I)), successful challenge to consular nonreviewability in first amendment case (§§ 7 3(e)(6)(vi) and 10 6(c)), single successful use of a 245(i) grandfathering petition (§ 8-7(b)(5)(ii)), innumerable issues concerning grounds and procedures for removal (chapters 10 and 11), § 336(b) lawsuits vesting exclusive jurisdiction in federal court (§ 12 3(c)(1)(ii)), the interplay of naturalization application and removal proceedings (§§ 12 3(c)(1)(iv) and 12 5(c)(3)(ii)), membership in a "particular social group" for asylum (§ 16 4(a)(3)), the possibility of overcoming a negative credibility finding in an asylum case (§ 16 4(a)(4)), extraordinary circumstances justifying exemption from the one-year rule for asylum claims (§ 16 4(c)), tension between removability and adjustment of status (based on marriage to USC) of Visa Waiver Program entrants (§ 18 3(b)(2)(iv)), NLRA duty to bargain with unions about no match policies (§ 19 4(e)), Puerto Rico's invalidation of its birth certificates before 7/1/2010 (§ 19 4(e)),
- **BIA decisions** on such issues as: IJ findings of frivolous asylum applications (§ 16-4(c)); aggravated felony including conspiracy without an overt act in furtherance of it (§ 10-6(b)(2)(vi)); unauthorized employment not a



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bar to 245(i) adjustment (§ 8-7(b)(5)(ii)); what constitutes "admission," and the effect of "rollback" provisions for Cuban adjustment and IRCA grantees, for purposes of adjustment rescission, aggravated felony and moral turpitude deportability, bars on waivers, and eligibility for suspension/cancellation (§§ 7-4(c)(1) and 8-8(e)(4)(iii) and other sections referenced there); asylum evidence and review standards and country reports evidence (§ 16-4(a)(4)); inclusion of a modified sentence from probation violation into the term of imprisonment for aggravated felony analysis (§ 10-6(b)(2)(i)); filing for asylum "within a reasonable period" given "changed circumstances" (§ 16-4(c)); 245(i) does not trump 212(a)(9)(C) (§ 8-7(b)(5)(ii)); use of step-relationships to establish hardship for relief from removal (§ 14-7(b)(3)); an alien's ability to file an I-751 without need of a waiver when the spouse has died during conditional residence (§ 14-7(a)(5)(i)); IJs' ability to adjudicate "ported" employment in adjustment applications (§ 8-7(d)(1)(ii)); the consequences of failure of the IJ to give advisals on grant of voluntary departure (§ 11-5(i)); EOIR's imposition of "reciprocal discipline" to state suspension or disbarment (§ 3-6); aiding and abetting evasion of inspection constitutes deportable smuggling (§ 10-6(i)); bond determinations concerning danger to the community (§ 11-3(f)); comprehensive approaches to continuance of proceedings in family and employment adjustment cases (§ 11-5(c)); drug paraphernalia encompassed in the controlled substance inadmissibility ground but not ineligible for waiver (§ 10-6(b)(1)(iv)); the availability of § 212(c) relief from deportability for a pre-IRRIRA plea that led to conviction in 2005 (§ 11-5(f)); an arriving alien's ability to apply for adjustment even with an outstanding unexecuted removal order (§ 11-5(d)); EOIR's jurisdiction to ameliorate the conditions of release such as electronic monitoring (§ 11-3(f)); use of the battered spouse cancellation of removal provisions by permanent residents (§ 11-5(f)); EOIR jurisdiction to entertain motions to reopen in absentia orders of departed aliens (§ 11-3(e)); lack of BIA jurisdiction to hear appeals from IJ findings that an alien in expedited removal is a citizen (§ 17-4(c)(1)); EOIR jurisdiction to hear TPS applications regardless of exhaustion with USCIS (§ 16-7(a)(6)); no EOIR jurisdiction to review custody conditions of VWP entrant (§ 18-3(b)(2)(iv)); deportability grounds based on false claim to passport (§ 10-6(g)); BIA misreading of CSPA provision INA § 203(h) allowing preservation of priority date for any child who aged out of any category (§ 8-4(d)); A.G. vacating of Compean, reinstating Lozada for ineffective assistance of counsel motions to reopen (§ 11-7); and pending late-reinstated appeal of conviction does not undermine finality for immigration consequences (§ 10-6(b)(2)(iv)).

- **New statutes and implementing agency guidance** concerning the following: imposing fees for use of ESTA in Visa Waiver Program travel (§ 18-3(b)(2)(iii)); extending provisions for E-Verify (§ 19-4(l)(1)), non-minister immigrant religious workers (§ 17-5(b)), certain J-1 waivers for physicians (§ 17-5(c)(1)(ii)), and EB-5 regional centers (§ 15-2(f)(5)); providing protection from the death of a sponsor or principal beneficiary (§ 14-7(a)(6), 14-7(d), 16-3(f)); and advisals and protections from abuse for certain temporary worker visa recipients (§§ 7-3(e), 17-5(h)(1)(ii), 18-3(a)(2)(ii), 18-5(b))
- **Regulations and government policy memorandums and other decisions** concerning such matters as special arrangements for CNMI (§ 7-3(a)), employment relationship in H-1B and L-1 petitions (§§ 17-3(b)(5)(ii) and § 17-4(b)(4)(i)), infectious disease listings and vaccination requirements for medical examination of immigrants (§ 10-6(a)), EB-5 job creation issues and regional center project approvals (§ 15-2(f)), options for I-751 removal of conditions to permanent residence when divorce is pending but not completed (§ 14-7(a)(5)(i)), successorship of employers in employment based immigrant petitions (§ 15-1(i)), unlawful presence and its consequences (§ 10-6(f)), concurrent filing of I-360 for religious workers and I-485 (§ 8-7(b)(3) and 17-5(b)(2)(i)); Updated visa classifications from 8 CFR 41.12 (§ 7-3(c)(1)); Updated "6 Month Club" of countries whose passports are deemed valid for 6 months longer, allowing I-94 to passport expiration rather than 6 months before (§ 7-4(b)); allowing essentially unlimited stays for athletes and performers who step outside the U.S. for one day occasionally (§ 17-5(a)(2)(5)); new J-1 visa skills list and how prior skills lists still apply (§ 18-5(b)(2)(ix)); implementation of new DS-160 nonimmigrant visa application (§§ 1-6(a)(3) and 7-3(d) and (3)); name-based screening systems interplay (§ 1-7), Form G-1145 (§ 2-2(a)(1)(B)), DOL centralization of the prevailing wage determination process (§§ 2-4(a), 15-3(d)(1), and 17-4(b)(5)(i)), new Wage and Hour Division publications about employer responsibilities in H visas and PERMs (§§ 2-4(b) and § 17-4(b)(5)), revisions to Form G-28 (§ 3-5), premium processing again available for R-1 petitions for religious workers and steps to notify USCIS of early religious employment termination (§§ 7-2(c) and 17-5(b)(2)(ii)), revised rules on nonimmigrant



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visa interview waivers (§ 7-3(e)), CBP correction of erroneous I-94s (§ 7 4(b)), evolution of USCIS thinking about when a new LCA and/or petition is required when an H-1B worker's location changes (§§ 7 5(b)(1)(i) and 15-3(c)(2)), elimination, in effect, of K-3 petitions, and of ability to challenge K-1 consular returns (§ 14 7(a)(4)), numerous BALCA decisions supporting PERM denials on highly technical grounds (§ 15-3), ICE policy to expand release of aliens found to have credible fear (§ 16 3(a)(1)(iv)), DOL denial of LCAs based on FEIN data inconsistencies (§ 17 4(b)(5)(i)), offer of return transportation cost as sufficient to cut off wage obligations (§ 17 4(b)(5)(ii)), impact of H-1B dependent employer's failure to inquire of end user about displacement issues (§ 17 4(b)(5)(iii)), expanded list of countries eligible to use H-2A and H-2B programs (§ 17 4(d)(2)(i)), revised H-2B process (§ 17 4(d)(2)(ii)), credentials required for immigrant physicians (§ 17 5(c)(1)(iii)), new rules for H-2A workers (§ 17 5(e)(1)), new ICE SEVP policies on F-1 to H-1B "cap gap" optional practical training (§ 18 4(d)(9)(iii)), ICE revised policy on I-9 fines calculations (§ 19 4(j)), more RICO lawsuits against employers based on hiring unauthorized workers (§ 19 4(k)), and E-Verify developments and USCIS guidance including concerning federal contractors (§ 19-4(l)(1)).

- **New instructions about completing Forms I-129 and ETA-9089** (App. §§ D-3 and D-15).
- New § 3-9 concerning the **unauthorized practice of law**.
- **Improved discussion** about effect of travel while petitions and applications are pending (§ 7-5(d)), adjustment applicants caught years waiting for retrogressed visa numbers (§ 8 3(e)), how to alert USCIS or NVC to special circumstances such as alternate chargeability, retention of past petition priority date, etc. (§ 8 7(c) and § 8 8(b)(1)), immigration courts' authority to adjudicate permanent portability in employment based cases (§ 8 7(d)(1)(ii)), categorical, modified categorical, and other approaches to determining criminal basis for immigration consequences (§ 10 6(b)(2)(i)), "normal" job requirements for PERM (§ 15 3(c)(8)), PERM reconsideration and appeals (§15 3(f)), suggestions for dealing with various government errors (see §§ 1-6(c)(2), § 2-2(a)(1)(B); 11-6(a), 15-3(e), 17 4(b)(5)(i)), and credentials evaluations in relation to ACCRAO's EDGE database (§ 1-8).

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TESTIMONIALS

Some of the most experienced and acclaimed immigration lawyers in the nation have said:

"Having Immigration Practice is like having an AILA mentor sitting beside you at work. Your real-world examples, suggestions and strategies make the morass of laws and regulations comprehensible."

- **R. Mike Borland**, Borland & Borland, Attorneys at Law, P.C., Midland, Texas

"Immigration Practice is excellent and very practical. I use it for my Immigration Law classes. My students appreciate the focus on the real-life practice of Immigration Law, as opposed to the theory and policy of immigration. The charts regarding eligibility for various visas and forms of relief are indispensable for students and practitioners alike."

- **David C. Koelsch**, Assistant Professor and Director, Immigration Law Clinic, University of Detroit Mercy School of Law, named by AILA as Outstanding Immigration Law Professor for 2009.

"Immigration Practice is a handy reference work for both the novice and the experienced practitioner with a novel organizational approach that focuses on real life situations rather than the statutory category."

- **Daryl Buffenstein** is a leader of the national immigration firm of Barry, Appleman, & Leiden. He is Former President and General Counsel of the American Immigration Lawyers Association (AILA).

"Immigration Practice is filled with practical, down to earth information in a format that is easy to use. I bought one for each member of my staff."

- **Peter Williamson**, Houston, TX. Mr. Williamson is Former President of AILA (1994-1995) and served as Chair of the Texas Chapter, on the National Board of Governors (1982-present), and on the National Executive Committee.

"Immigration Practice fills a niche that needed filling: A single volume with all the basics explained in plain English for newcomers, and plenty of sophisticated discussion with lots of footnotes for old hands. The appendix alone is worth the



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price of the book! It has all the addresses, phone numbers, and lists that are needed constantly in immigration practice, plus tips on how to fill out the most common forms. I keep this volume on my desk as a convenient and thorough reference. You can tell that it was prepared an experienced practitioner who understands the practical side of an immigration practice and who is result oriented."

- **Dale M. Schwartz**, Schwartz & Kuck, Atlanta, GA is Former President of AILA (1986-87), and has testified as an expert witness before committees of the U.S. House of Representatives and the United States Senate on immigration legislation. Mr. Schwartz was Co-Chairman of the Immigration Law Committee of the Section of Litigation of the American Bar Association.

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- **David Ware**, Metairie, LA is very active in AILA including: Vice-Chair, Committee on International Students (1995 to Present); Treasurer, Louisiana Chapter, 1984 to 1988; INS Liaison Chair, 1988 to 1989; NAFSA Region III Liaison, 1992 to 1995.

"I ordered a copy of Immigration Practice. We love it, and are using it frequently."

- **Elizabeth Stern**, Shaw Pittman, Washington, DC heads the firm's Business Immigration practice group.

"I have just received your excellent treatise Immigration Practice. I would recommend it highly as a valuable guide not only for a beginning immigration lawyer, but for the seasoned practitioner as well."

- **Ben Gim**, Gim & Wong, New York, NY

"I am really impressed by Immigration Practice. I picked a few arcane questions to look up and found the subjects right away in the index. The text was clear and practical. We find it very useful."

- **Joseph K. Venishnick**, Labor and Employment Counsel, ASEA Brown Boveri, Inc. Windsor, CT

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"I truly use Immigration Practice as a bible for immigration practice. I generally read the appropriate area of interest to which I need an answer, then refer to the statute and the regs. It works quite well for me."

- **Petro Morgos**, Cherry Hill, NJ

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- **Jonathan David Guze**, Durham, NC

"Immigration Practice has quickly become my immigration "bible" as a first look source, despite having a number of other fine works in my collection."

- **Byron Toben**, Montreal, Quebec (Ill. & NY bar)

"I'm a new disciple of your Immigration Practice book."

- **Andre Michael Wang**, Portland, OR



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"I have enjoyed and profited a great deal from Immigration Practice."

- **Philip Berns**, Stamford, CT

"Immigration Practice is one of the most invaluable tools in my library. Although I did not anticipate a career in immigration law, most of my clients are Korean and many are in need of immigration assistance. Needless to say, your book is the next best thing to the Bible. For someone who is just hanging out their shingle and is interested in establishing an immigration practice your book is invaluable."

- **Seung-Ho Choe**, Rockville, MD

AUTHOR

Robert C. Divine is the Chairman of the Immigration Group of Baker Donelson, a law firm of 540 lawyers and public policy advisors with offices in 14 cities from Washington, D.C. to New Orleans. Mr. Divine served in Washington, D.C. from July 2004 until November 2006 as the first Chief Counsel of United States Citizenship and Immigration Services (USCIS), the world's largest immigration services agency within the Department of Homeland Security (DHS). From July 2005 until July 2006, he served as Acting Director and then Acting Deputy Director of USCIS. In early 2004 he served as an expert for the U.S. Commission on International Religious Freedom evaluating the impact on asylum claims from DHS' implementation of expedited removal procedures. He has practiced immigration law since 1986 and is the current Chair of the American Immigration Lawyers Association's liaison committee to the U.S. Department of State. He has served as an expert witness in U.S. and foreign courts. His practice includes all aspects of U.S. immigration law, representing large and small international and domestic employers, family sponsors, and individual foreign nationals. He has also litigated significant business matters, including class action employment discrimination, contract, commercial, product liability, antitrust, ERISA benefits, business torts (including RICO, misrepresentation, Consumer Protection Act), and immigration-related criminal matters.

CONTRIBUTORS

R. Blake Chisam updating author for the 2005 and 2006 editions and contributing editor, is currently Staff Director and Chief Counsel of the House Ethics Committee. He was Senior Counsel to the Immigration Subcommittee of the Judiciary Committee of the U.S. House of Representatives. Before accepting the invitation of the House leadership to undertake government service, Mr. Chisam practiced exclusively in the area of Immigration and Nationality Law as a partner several well know firms including his own. He advised organizations with respect to immigration-related policy, employment, civil rights, and health care law matters, including related white-collar criminal and regulatory compliance issues. Mr. Chisam served on Business Litigation committee. In October 2000, Mr. Chisam and his wife Jasmine A. Majid were awarded the Meritorious Public Service Award by then Attorney General Janet Reno, in recognition of their "tireless and distinguished pro bono efforts on behalf of unrepresented aliens detained by the...Immigration and Naturalization Service."

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