

PREFACE

Since the publication of the updated *AILA Litigation Toolbox* in 2001, we have witnessed an explosion of immigration litigation, one that has been a long time building. For this, we say thank you, and, it's about time! As immigration attorneys, we have historically been reluctant to litigate against the Department of Homeland Security (including USCIS, ICE, and CBP), the Department of Labor, and the Department of State, mostly because of the "I will need their help on this other case" syndrome.

Of course, there have always been those among our membership who have shrugged off this defeatist attitude and have charged ahead, in many ways leading us to a better place—a place where respect is earned because victories have been won. These victories have changed hundreds of thousands of lives and have sharpened the skills of those willing to fight for the rights our clients possess. You know the names of these men and women. You know their tenacity, their will, and their refusal to settle for less than the constitutionally protected rights of their clients. The motto of these attorneys is simple: "We would rather have the government fear us than like us."

We believe that if you are reading this, you are about to join those attorneys. Recent changes in immigration law have focused our concerns on the lack of due process, lack of equal protection, and the not-so-subtle and very clear intent of Congress to strip all remaining discretion from those charged with enforcing these laws. We also continuously run into those government employees who, rather than exercise the limited discretion granted to them to keep families together or allow our clients to grow their businesses, seek to use the immigration laws to further "punish" our clients by denying them access to counsel, timely access to the courts, and family unifying relief.

These words are not sour grapes; they are borne of experience and frustration at the increasing insensitivity to the U.S. Constitution. For these reasons, we have compiled and updated *AILA's Immigration Litigation Toolbox*. We seek to arm all attorneys with the sword of justice, and to allow immigration practitioners to make litigation a part of their everyday practices. We can no longer be afraid to bring to light the injustices against our clients simply because we need the help of DHS/DOL/DOS in cases for our other clients. We have no business representing anyone as attorneys if we are unwilling to use all of the tools at our disposal to seek justice for all of our clients. Much good can be accomplished by shining a light on the dark corners of injustice. *Be Not Afraid*.

The *Immigration Litigation Toolbox* is divided into separate sections; each section deals with a separate part of our judicial system. Each section contains sample motions, pleadings, and memoranda, along with a brief cover memo explaining when and how to use that particular sample. Of necessity, the *Immigration Litigation Toolbox* is more of a tome than a light piece of reading material. Motions, pleadings, and memoranda take up space. We have tried to consolidate these materials as much as possible, while at the same time making this volume easy to use. The *Immigration Litigation Toolbox* itself comes with a CD-ROM containing all of the samples, in Microsoft Word format (which can be read by other programs as well), to make it easy for attorneys to adapt and use the samples in their everyday practices.

The various sections of the *Immigration Litigation Toolbox* address, in order, the numerous administrative and judicial procedures with which we as immigration lawyers deal on a daily basis. This, of course, starts with DHS itself. The sub-agencies of DHS—USCIS, ICE, and CBP—all handle, in one respect or another, various provisions of Title 8 of the Code of Federal Regulations and the Immigration and Nationality Act (INA). Each of these agencies has set up various procedures for enforcing "its" part of the immigration laws. These procedures, if mastered by the attorney, can be used to effectively fight for our clients' rights. Along with the Administrative Appeals Office, USCIS's own internal review procedures require that certain types of pleadings and procedures be followed prior to granting certain benefits under the INA. Following along this natural progression, the *Immigration Litigation Toolbox* contains sections on the immigration court, the Board of Immigration Appeals, the federal district courts, and the circuit courts of appeal.

These sample motions, pleadings, and memoranda all come with two very simple caveats. First, the law changes constantly. Do not *ever* use one of these samples without first verifying that all cases, laws, and

regulations cited in the sample have not been overruled, set aside, or modified by a subsequent ruling. To ignore this very simple rule, learned by all first-year law students, would be foolish. Second, read the local rules of procedure pertaining to the court in which you are filing. These include the Immigration Court Operating Procedures, the new *BIA Practice Manual*, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure, and their local caveats. Local rules are dramatically different in every court included in this book. Ignore them at your client's risk!

Obviously, a volume of this size and detail does not come into existence on its own. Numerous individuals have contributed sample pleadings, and many of these individuals have served as senior and associate editors of this and the past volume of the publication. Continuing thanks and praise should be given to Cynthia A. Aziz, Robert H. Cohen, Alice S. Glover, Anwen Hughes, Jeff Joseph, Mary A. Kenney, Mary E. Kramer, Ira J. Kurzban, Peter N. Larrabee, Martin J. Lawler, Laura L. Lichter, Zachary Nightingale, Trina Realmuto, Leonard M. Roos, Linda Rose, Stacy Tolchin, Marc Van der Hout, Joseph A. Vail, and Nadine K. Wettstein.

The *Immigration Litigation Toolbox* is not the first effort by AILA to educate its members on the joys of litigating against DHS. The first such comprehensive effort was an excellent book edited by Lory D. Rosenberg, now the director of Immigration Defense & Expert Assistance (IDEA), and formerly a member of the Board of Immigration Appeals. She wrote her book, *Fair Hearings Pleadings Manual*, while serving as the first director of the AILF's Legal Action Center. It is her book that gave impetus to this larger volume, and some of those original pleadings are found in these pages. Previously, Stuart I. Folinsky and Bonnie Stern-Wasser developed the idea of what has become *AILA's Immigration Litigation Toolbox*. To them we owe a debt of gratitude. Without the base of wisdom and tenacity found in the work of the pioneers in immigration litigation, we would have had a much more difficult time preparing this book for you.

We must, of necessity and sincere gratitude, acknowledge the tremendous work of Stephanie L. Browning, Senior Legal Editor, in pushing this work to its completion. She is the driving force behind this volume and is a dedicated member of the AILA Publications team. It is quite clear to us that without her prodding, cajoling, long-suffering, and, lastly, sternness, this project would still be sitting on the floor next to our desks. If you in any way find use in the *Immigration Litigation Toolbox*, please send a note of gratitude to Stephanie. Additionally, sincere thanks and appreciation also go to Randy P. Auerbach, Director of Publications, Tatia L. Gordon-Troy, Associate Director of Publications, and Sharon Cook Poorak, Director of Education, for their own exertions and service in completing this work.

We hope you find the sample motions, pleadings, and memoranda in the *Toolbox* helpful in your practice. If you do, we ask you to do us one favor. Take a pro bono immigration case this year—please. Help out the private organizations whose workloads are staggering and whose funding is minimal. Ask them if there is one case you can take to lighten their load. We promise you that you will not regret the time you put into preparing, presenting, and hopefully winning a case on behalf of someone who cannot pay you. Those victories taste the sweetest.

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