

THE behind BOOK / By Stephanie L. Browning

with
Martin J. Lawler, author of
Professionals: A Matter of Degree



Martin J. Lawler

PROFESSIONALS: A MATTER OF DEGREE has long been a vital resource for immigration law attorneys practicing employment-based immigration. Now in its fourth edition, *Professionals* has received a very warm reception from AILA members and others who have been waiting for the latest edition. After a seven-year hiatus, the author, Martin J. Lawler, has presented the most comprehensive edition yet, offering readers even more information for successfully preparing business visas, proving degree equivalency, and establishing that a job is a specialty or professional occupation. New to this edition is a companion volume devoted solely to relevant source materials and practice aids, such as sample letters, agency memos and cables, and court and administrative decisions.

Recently, *ILT* spoke with Martin about the need for such a book and the reasons why it has been so successful.

Why did you write *Professionals: A Matter of Degree*?

With the changes in the economy following September 11, business visa practice is no longer focused on H-1Bs. The name of the game is to use the whole panoply of available business visas. I expanded the book to include visas for chefs, P visas for athletes and entertainers, O visas for extraordinary ability, TN visas for scientific technicians, and so forth. The book also extensively discusses the evidence needed to win extraordinary ability, outstanding researcher, and national interest cases in the current climate of heightened scrutiny.

I wrote the first edition of the book in 1990 after winning *Hong Kong TV v. Ilchert*, a landmark district court case that found that a corporate president could obtain an H-1 visa with no college education at all. I was getting calls from other lawyers litigating similar cases and decided that it would be helpful to put everything I had about degree equivalency cases and H-1s in one place. That is how it began. The book grew from there.

How did you get into immigration law?

I was born into it. My father worked for the

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Border Patrol in Vermont during prohibition and busted the mayor for bootlegging. He then went on to work for the INS at its Central Office, which, before the war (World War II), was located in Philadelphia. After serving in the Navy in the Pacific Theater, he worked for the INS briefly in San Francisco and then began his law practice. He was located in Chinatown, and his practice often involved proving family relationships for which documents did not exist, instead of relying on family photos or cemetery head stones that listed the descendant's children.

Why business visas?

I started out handling deportation and family cases. The practice evolved focusing more on business visas. I still enjoy a good complex family case. A few years ago, I tried a district court case involving the

denial of a third-preference family-based visa petition for a married daughter. It had languished for about five years and was approved two days after the petitioner died. The INS claimed that the humanitarian reinstatement rules did not apply because the petition was not approvable at the time it was decided. Also, the father's immigration file reflected he had claimed to have a son, not a daughter.

With my experience in handling Chinese petitions, I could see that while the names were spelled substantially differently, they had the same sound. With the help of a Chinese Linguistics professor at U.C. Berkeley, I presented evidence to the court that the individuals were actually one and the same. In the old style Cantonese fashion, children were often referred to as male and one would clarify the children's gender if questioned about it. →



Martin J. Lawler and Donald J. Wolfson don chef attire during a Q&A session at the AILA Annual Conference in New Orleans last June.

This was a very satisfying win made even more so when I collected \$36,000 in EAJA fees.

How is *Professionals* useful for the experienced practitioner?

The reason the book is so popular is that it is a quick reference, giving practical advice on how to solve recurring problems. Throughout the book, I tried to tackle difficult questions and provide practical solutions with sufficient detail to be useful. Ron Klasko contributed invaluable advice about moving between

positions and Roxanna Bacon explains the intricacies of what to do during downsizing.

I use the book to find AAO cases to support appeals involving H-1B positions held by multiple people with different types of degrees; to find an expert opinion to support the notion that a graphic artist position at a magazine is a specialty occupation; and to determine whether a preschool teacher is eligible for an H-1B visa. Unlike the prior editions, this one has an exceptional index that makes it very user friendly.

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What are you doing about the plethora of H-1B RFE denials?

I try to prepare cases more thoroughly than ever, supporting the applications with expert opinions, sample prior AAO decisions, and other evidence. At times, I am digging in my heels and fighting. For example, I am seeing many RFEs on nonimmigrant visa petitions questioning ability to pay. The AAO and USCIS personnel at the last AILA conference clearly stated that ability to pay is not an issue for an H-1B petition. Based on that, I will not provide the requested tax returns.

For ridiculous RFEs such as for a seventh-year H-1B extension questioning whether the software engineering position with a salary of \$125,000 is a specialty occupation, I am sending the matters to the CSC suggesting that this is a training issue and not a legal issue. I also have been copying AILA and requesting its intervention.

What is the most troubling business visa trend?

I believe it is the ever increasing discriminatory attitude against small companies. Often I see RFEs and denials involving small companies that would never be issued for a Fortune 500 firm. Small businesses in America create most of the employment and have done so for the last couple of decades. Smaller companies may not be as bureaucratic as larger ones, but there is no reason a graphic artist for a magazine with a circulation of 55,000 should receive an RFE, whereas *Time* magazine would not. I understand that →

USCIS officers see incredible cases such as a software engineer seeking employment with a gas station. But these cases are truly the exception. The court in *Young China Daily v. Ilchert* said that the size of a company has no relevance to whether an occupation is a professional one.

What is your view of the Yates memo requiring approval of the petition and pending of the adjustment for 180 days before a labor certification can be ported to a new company?

I think this memo is contrary to the meaning of the statute and congressional intent. The reason Congress created portability for immigrants is because of the outrageous governmental delays in deciding cases. Congress recognizes that it is absurd for the Labor Department to take two to four years to issue a labor certification, the USCIS a year or two on a visa petition, and so forth.

Congress recognizes that five years later in an employment-based situation, virtually no one is still in the previous position verified on the labor certification. Technically, if these people were to follow the law, they would have to file a second labor certification for the position in which they are promoted. If this were actually done in each case, labor certifications would take twice as long and the whole system would grind to a halt. Many think it already has ground to a halt.

What is the most vexing problem facing H-1Bs?

Proving that occupations are specialty when the employer has a number of people filling similar positions with different degrees. All of the service centers are focusing on this, particularly for smaller companies. I helped one lawyer with a denial from the Nebraska Service Center that said the occupation was not a specialty one

because it did not require “one degree.” There are many AAO and other cases that have approved H-1 and H-1B petitions for positions that are filled by people with various degrees. I think it is important in these cases to work out the theory of the case and to document it as carefully as possible before filing. In this area, trying to fix problems after filing may not be possible.

What do you do when you are not practicing law?

In addition to spending time with my wife, Hope, and my daughter, Cara, I am an amateur equestrian. I am still competing in the jumper division in horse shows throughout California. At Cara’s urging, this past year, I have learned to ski and scuba dive.

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