

# LEGAL ALERT

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## Damon Key Immigration Practice

### IMMIGRATION LAW 101: HOW DO PEOPLE GET GREEN CARDS?

We often get calls from people who want to “sponsor” someone for a green card<sup>1</sup> or an immigrant visa. People cannot “sponsor” someone, but they may be able to “petition” for someone to become a Lawful Permanent Resident (LPR). Immigrants come either as “immediate relatives” of U.S. citizens or through the family and employment preference systems. The 2016 limit for family preference immigrants is 226,000, and 140,338 for employment-based. A per-country limit is set at 7% of the total annual preference limits, and this creates long waiting lists for certain countries.<sup>2</sup>



By David P. McCauley

#### GOOD NEWS FOR IMMEDIATE RELATIVES #1: NO WAITING LISTS

Immediate relatives of U.S. citizens are outside the “preference” system: no per-country limits and no waiting lists. Immediate relatives are spouses (including spouses of the same sex) and minor children (under 21). For adult U.S. citizens, it includes their parents. (We sometimes get this question: “I just gave birth here, so my child is a U.S. citizen. Can I stay?” Answer: “When the child is 21.” So much for “anchor babies” . . .) Processing time ranges from four months to a year. Unfortunately, LPRs cannot claim family members as “immediate relatives.” And only U.S. citizens can petition for their fiancé(e)s. Other relatives of US citizens, and all relatives of LPRs come under the Preference Categories discussed below.

#### GOOD NEWS FOR IMMEDIATE RELATIVES #2: YOU CAN GET A GREEN CARD EVEN IF YOU’RE NO LONGER IN LEGAL STATUS IN THE U.S.

An immediate relative who entered the U.S. legally, and has not left the U.S., can be granted a green card,

even if “out of status” because the authorized stay in the U.S. has ended, or for some other reason.

#### FAMILY-BASED PREFERENCE CATEGORIES

By law, the annual number of family-based visas cannot be lower than 226,000. Add in “immediate relatives,” and the total can reach half a million. Although there is no annual limit on immediate relatives, that is not so under the preference categories.

An immigrant’s place on the waiting list is determined by the “priority date,” the date the visa petition (Form I-130) is received by U.S. Citizenship and Immigration Services (USCIS). Upon approval (unless the person will process for a green card here in the U.S.), USCIS transfers the file to the National Visa Center, U.S. Department of State (DOS). Each month the DOS publishes a Visa Bulletin (available online) giving cut-off dates for each preference category. When the priority date becomes earlier than the cut-off, an immigrant visa or green card is available.

<sup>1</sup> The title on the so-called “green card” is “Permanent Resident Card.” Yes, they are now green.

<sup>2</sup> The 2014 U.S. immigrant population was more than 42.4 million, 13.3 percent of our total population. Immigrants and their U.S.-born children now number approximately 81 million people, 26 percent of our population. “Frequently Requested Statistics on Immigrants and Immigration in the United States,” Migration Policy Institute, April 14, 2016.

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**The family-based preference categories are:****First:** (F1) Unmarried Sons and Daughters of Citizens.**Second:** Spouses and Children, Unmarried Sons and Daughters of LPRs.

A. (F2A) Spouses and Children of LPRs.

B. (F2B) Unmarried Sons and Daughters (21 years of age or older) of LPRs.

**Third:** (F3) Married Sons and Daughters of Citizens.**Fourth:** (F4) Brothers and Sisters of Adult Citizens.

Here are the family-based cut-off dates for September 2016.

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	15 SEP 09	15 SEP 09	15 SEP 09	22 MAR 95	01 JUL 05
F2A	15 NOV 14	15 NOV 14	15 NOV 14	01 SEP 14	15 NOV 14
F2B	01 FEB 10	01 FEB 10	01 FEB 10	15 SEP 95	01 DEC 05
F3	01 DEC 04	01 DEC 04	01 DEC 04	15 NOV 94	15 JUN 94
F4	08 OCT 03	01 JAN 03	01 JAN 01	22 APR 97	01 MAR 93

As of September 1, 2016 immigrant visa or green cards for unmarried sons and daughters of U.S. citizens from most countries were available if petitions were filed before September 25, 2009; for spouses and minor children of LPRs, November 15, 2014; and for the Filipino siblings of U.S. citizens, March 1, 1993 – a wait of more than 23 years!

**EMPLOYMENT-BASED PREFERENCE CATEGORIES** <sup>3 4</sup>

The employment-based categories are: **First (also called EB-1):** Priority Workers: EB-1A: individuals of extraordinary ability in their fields (“one of that small percentage who have risen to the very top of the field of endeavor”) (It helps to have the Nobel prize.); EB-1B: outstanding professors and researchers; and EB-1C: multinational executives/managers. **Second (EB-2):** Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability. **Third (EB-3):** Skilled Workers, Professionals, Other Workers. **Fourth (EB-4):** Special Immigrants (Religious Ministers or Religious Workers). **Fifth (EB-5):** Employment Creation Investors, often called “Million Dollar Investors”<sup>5</sup>

Here are the employment-based cut-off dates for September 2016. (“C” means visas and green cards are currently available. At present, there is also a waiting list for El Salvador, Guatemala and Honduras):

Employment based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	01 JAN 10	01 JAN 10	C	C
2nd	01 FEB 14	01 JAN 10	22 FEB 05	01 FEB 14	01 FEB 14
3rd	01 MAY 16	01 JAN 10	15 FEB 05	01 MAY 16	01 JUL 10
4th	C	C	01 JAN 10	01 JAN 10	C
5th	C	15 FEB 14	C	C	C

Monthly preference category movement in cut-off dates ranges from none-at-all to dramatic, including backwards! The F-2A category recently stood still for months. From May to June 2016, EB-2 for China retrogressed more than four years. Dramatic movement can occur in October because October 1, 2016 is the start of FY 2017, and a new annual supply of visas is available.

**OTHER GREEN CARD OPTIONS**

Other options for LPR status are through asylum (for persons with a well-founded fear of persecution in their home countries) and the annual State Department Diversity Visa Lottery, which randomly grants 55,000 visas a year to immigrants from countries with low rates of U.S. immigration. Registration runs for 30 days in October/November.

Our immigration law is complex, and dealing with the various agencies can be frustrating. Damon Key has one of Hawaii’s oldest and largest immigration practice groups. We welcome your questions. Other sources include web-sites of the American Immigration Lawyers Association (AILA), the American Immigration Council, USCIS, and the Department of State. All our immigration attorneys are AILA members.

<sup>3</sup> Spouses and minor children come in as derivatives if accompanying or following to join the principal immigrant.

<sup>4</sup> There are numerous nonimmigrant classifications that allow people to work in the U.S. on a temporary basis.

<sup>5</sup> In most cases, investors are in projects in Targeted Employment Areas, where unemployment is 150% of the national average and the required investment is \$500,000. Ten full-time jobs for American workers must be created for each investor.

## Did You Know?

Every day, we are expected to abide by all laws that are in place in our jurisdiction. In Hawaii, you must obey city laws, state laws, and federal laws. And while that may seem easy to some, the fact of the matter is that the law is changing daily and it's hard to keep up. Regardless, we are expected not to break the law. Well, it's hard to refrain from doing something you didn't know was illegal!

I've witnessed this firsthand on many occasions while walking downtown for lunch. You see the "walk" signal as you approach the crosswalk, but before you get there, it starts blinking with 15 seconds left. You know you can make it in 15 seconds, so you walk. Next thing you know, a police officer is writing you a ticket. For many, they wouldn't have walked if they knew it was against the law, but they just didn't know. Unfortunately, ignorance is no excuse. Thus, I'm hoping this article will provide you with some insight as to some of the laws in Hawaii that you may not know about.



*By Sommeret K.M. Wong*

### **When am I allowed to walk in a crosswalk?**

You may only enter a crosswalk when the WALK signal appears. HRS § 291C-33(1). If the red hand light is flashing or if the red hand appears with numbers, you may finish crossing, but you are not allowed to enter the crosswalk. HRS § 291C-33(2). Finally, you are not allowed to walk in the crosswalk when there is a steady red hand. HRS § 291C-33(2). Failure to obey the "don't walk" or flashing signal is punishable by a \$130.00 fine.

### **As a driver at a crosswalk, how long do I have to wait if there is a pedestrian crossing?**

If there is a pedestrian crossing upon the same half of the roadway that you are on, you must stop until the pedestrian has passed you and you can safely proceed. HRS § 291C-72(a)(1). If a pedestrian is approaching from the other side of the road, you should stop until the pedestrian has passed you and can safely proceed. HRS § 291C-72(a)(2). If you are behind the car that is waiting for a pedestrian to cross, you cannot overtake the vehicle. HRS § 291C-72(d).

### **Can my dog sit on my lap while I am driving?**

No. The law prohibits a driver from holding an animal on his/her lap or from having an animal within the driver's immediate area. HRS § 291C-124.

### **Can I hold my phone while driving?**

No. It is illegal to hold a mobile electronic device while operating a motor vehicle. HRS § 291C-137. Even if you are not calling, texting, searching, or playing Pokémon Go, it is still illegal to have your phone in your hand. HRS § 291C-137(e). Further, even though you are at a red light, stop sign, or in traffic, it is still illegal. HRS § 291C-137(e). The fine associated with a violation of this law is \$250.00. HRS § 291C-137(f).

Knowing the law is the first step to abiding by it. So the next time you see someone enter the crosswalk when the red hand is flashing, you can be fairly certain that the police officer walking toward him/her is not just going to say hello.



# Hawaii Supreme Court Upends Indemnity Provisions in Construction Contracts

Indemnity provisions are commonly found in construction and service-related contracts. Typically, a subcontractor must agree in a contract to indemnify and be responsible for the negligence of the general contract or owner if either is sued by a third party.

We reported on a decision from the Hawaii Intermediate Court of Appeals in the Spring/Summer 2015 issue, in which the ICA upheld indemnity provisions. On appeal, however, the Hawaii Supreme Court found that a subcontractor did not have a duty to defend the developer upon tender under an indemnify provision in the parties' contract. *Arthur v. State of Hawaii*, 138 Haw. 85 (2016).

The case involved the wrongful death of Mona Arthur. Mona typically gardened on the hillside behind her home. She would cross a concrete drainage ditch and climb over a two-foot-high chain length fence.

Mona was found in a concrete ditch with severe head injuries, which ultimately led to her death. Suit was filed against many defendants for negligence in failing to build a fence higher than two feet. Defendants included Kamehameha Investment Corporation ("KIC"), the developer, and Sato and Associates, the civil engineer. KIC was sued for punitive damages.

Sato had previously agreed to indemnify, defend and hold harmless KIC from all claims, demands, or lawsuits arising out of the work undertaken by Sato outside of the scope of the agreement "and/or out of the negligence or any willful act or omission" of Sato. KIC tendered its defense to Sato pursuant to this provision. Based on this clause, the trial court apportioned a share of KIC's defense costs to Sato.

On appeal to the ICA, Sato argued it was not responsible for KIC's defense costs until a finding of liability against Sato was made.

Sato also argued that Haw. Rev. Stat. §431:10-222 voided, as against public policy, construction contracts that purported to indemnify another for the other's own negligence.

The statute stated that an agreement to indemnify another for its sole negligence was against public policy and unenforceable.

Nevertheless, the ICA found Sato had a duty to defend. Relying on *Pancakes of Hawaii, Inc. v. Pomare Prop. Corp.* (Haw. Ct. App. 1997), the ICA concluded that under the parties' agreement, Sato had a duty to defend KIC upon KIC's tender of the defense to Sato.

The Hawaii Supreme Court noted that when enacting the statute, the legislature was concerned with the prohibitive costs of insurance policies to contractors - particularly, small contractors and subcontractors - due to the inclusion of "hold harmless" clauses in their contracts with owners. The Court therefore determined that under Haw. Rev. Stat. §431:222, a subcontractor was not liable for the negligence of another, or for the defense thereof. KIC's defense costs associated with defending against the Arthurs' punitive damages claim had to be borne solely by KIC.

Finally, the Supreme Court held that *Pancakes* did not apply to construction contracts. Haw. Rev. Stat. §431:10-222 meant that each party is responsible for its negligence. In a construction contract, the scope of a promisor's duty to defend was to be determined at the end of the litigation.

Therefore, any indemnity provision needs to be carefully examined. If the indemnifying party is responsible for another's potential negligence, the provision is likely invalid under the Arthur case.



By Tred R. Eyerly



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# Conveyance Tax Planning

In recent years the Conveyance Tax, a state tax imposed each time property changes title or ownership, has become increasingly significant in real property transactions as the tax rate continues to rise and its application is further expanded by the legislature. Generally, the higher the sales price of the property being transferred, the higher the tax rate. More than ever, the Conveyance Tax can have a significant effect on businesses and individuals when large real property transactions are involved.



By Ikaika Jobe

## What is considered a transfer of ownership or interest in real property?

What the law recognizes as a transfer of ownership or interest of real property has become more extensive and encompassing in an attempt to close up so-called loopholes which were being used to evade the application of the Conveyance Tax. Previously, if property was owned by an entity such as an LLC or corporation, the sale would be of interests in the entity rather than interests in the property, therefore, the property was not treated as having been conveyed for Conveyance Tax purposes. No longer is this creative avoidance of the tax acceptable. A transfer of ownership or interest in real property now includes, but is not limited to: (a) a sale of real property interest, (b) a contribution of a real property interest by a shareholder, member, partner, or grantor to a corporation, limited liability company/limited liability partnership, partnership, or trust, (c) a distribution of a real property interest from a corporation, limited liability company/limited liability partnership, partnership, or trust to its shareholder, member, partner, or beneficiary/trustee/grantor, (d) a gift of real property interest, (e) a payment for goods and/or services or payment of debt in the form of a real property interest, and (f) a lease, sublease, or timeshare interest whose full unexpired term is for a period of five or more years.

## Who is Subject to the Conveyance Tax?

The person subject to the Conveyance Tax is generally the grantor, lessor, sublessor, assignor, transferor, seller, conveyor, or any other person conveying the real property interest.

## How is the Conveyance Tax Determined?

The Conveyance Tax is based on the sales price (actual and full consideration actually paid or ultimately required to be paid) of the property as well as whether or not the buyer intends to use the property as their primary residence (occupant vs. investor). There are two graduated scales used to determine the Conveyance Tax rate which are dependent on the type of property being transferred and whether the purchaser is eligible for a county homeowner's exemption on property tax. Unlike a capital gains tax, it is immaterial for purposes of the Conveyance Tax that the transfer or conveyance resulted in a gain or loss.

## Is there an Exemption to the Conveyance Tax?

Depending on the type of transaction, certain exemptions are allowed, such as a conveyance from the grantor to the grantor's revocable trust.

As you can see, the Conveyance Tax can encompass a whole variety of real property transactions, including leases for a period of five years or more. Depending on the value of the property and its intended use, the Conveyance Tax can be very substantial, especially when factoring in additional fees or taxes to the transaction. Therefore, it is important to have a proper understanding of the applicability of the Conveyance Tax, so one can better strategize for business and/or estate planning purposes.



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## 2016 IUCN World Conservation Congress

**O**n September 1st, at the Hawai'i Supreme Court, law students from around the world presented oral arguments before a panel of mock judges from the International Court of Justice ("ICJ"), titled the Tony Oposa Intergenerational Moot Court ("Moot Court"). The question before the mock ICJ was whether states have a responsibility under international law to address the global climate crisis for the benefit of present and future generations. Six teams from France, Brazil, South Korea, U.S. (New York and Hawaii), and the Philippines submitted written memorials to the mock ICJ and presented oral arguments.



*By Loren A. Seahase*

The oral arguments were recorded and were subsequently presented to the International Union for the Conservation of Nature ("IUCN") for IUCN approval to ultimately submit the same legal question to the real ICJ through a request for an advisory opinion. Due to the vast size of the IUCN all new matters must be voted on by the World Conservation Congress ("WCC") through submission of motions. The purpose behind the Moot Court presentation was to elaborate on one particular motion pending for vote. This particular motion, which was eventually passed, calls on the IUCN to make a request to the United Nations General Assembly for it to submit a request for an advisory opinion from the ICJ on same legal question presented to the Moot Court. The IUCN, as a well-respected non-governmental organization, is frequently called upon by international tribunals to submit position statements on the legal framework and analysis applicable to a specific legal question. The legal framework and analysis in the memorials and oral arguments of the Moot Court will be used by the IUCN in the event it is asked to submit a position statement to the real ICJ on this legal question.

Over the last three months I coached a team of law students from the University of Hawai'i, William S. Richardson School of Law in drafting their memorial and preparing for oral arguments. Although I gave them a crash course on international law, framed the arguments, mined sources, provided substantive revisions of the memorial, provided guidance for international oral arguments, and held oral argument practice sessions, it was the team that did the real heavy lifting. They eagerly learned a new subject matter; spent countless hours researching, writing, and analyzing; and in the end bravely gave a professional confident oral argument before seasoned international law professors and the Chief Justice of the Hawai'i Supreme Court.

As international law is a passion of mine, it was a labor of love. Regardless of the number of hours I spent working on this after work, on the weekends, and well after my own family went to sleep I thoroughly enjoyed every minute. It was an honor to coach a team of such hard-working law students, represent my alma mater, participate in the Tony Oposa Intergenerational Moot Court for the 2016 IUCN World Conservation Congress, and I hope to be involved with the actual submissions to the real ICJ when the time comes.

The William S. Richardson School of Law, University of Hawai'i team was: Alyssa-Marie Y.H. Kau, Kaily Wakefield, Arillele Kramer, Sean Aronson, Claire Colegrove, Lisa Engebretsen, Rio Kwon and Team Advisor, Loren Seahase.



*Team Advisor Loren Seahase and some of her team members Arielle Kramer, Alyssa-Marie Y. H. Kau and Kaily Wakefield.*

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# 2016 Legislative Update

The Hawaii State Legislature concluded its 2016 Regular Session with 263 bills becoming law. Here are a few of the noteworthy new laws.

## **Affordable Rental Housing (Act 127).**

Act 127 establishes a goal for the state government, by itself or jointly with other parties, to develop at least 22,500 affordable rental housing units, ready for occupancy between January 1, 2017 and December 31, 2026. The Act also establishes a special action team on affordable rental housing, comprising certain state and county officials and community representatives, tasked with recommending actions to increase the supply of affordable rental housing, target rental housing development in transit-oriented development areas, preserve the existing rental housing stock, enhance the market for rental housing relative to fee simple housing, and mitigate community concerns over the development of nearby rental housing projects.



*By Christopher J.I. Leong*

## **Statewide Community Planning (Act 130).**

Act 130 creates a permanent interagency council for transit-oriented development, which will serve to coordinate and facilitate transit-oriented development planning at the state level. This council will include a number of state and county officials and community representatives. A major task for the council will be the creation of a strategic plan to address transit-oriented development projects, including mixed-use and affordable and rental housing projects, on state lands. Act 130 will also authorize the Department of Education to use school impact fees collected from transit-oriented development projects to be used specifically for schools within the transit-oriented development area to account for projected increases in school populations.

## **Roads Commission (Act 194).**

Recognizing that private roads and roads where ownership is disputed often do not receive proper repair and maintenance, Act 194 establishes a temporary roads commission within the Department of Transportation to review studies and provide opinions on disputes regarding private roads and then recommend action to the appropriate legislative body, including the initiation of condemnation proceedings if appropriate. The Act also expands the authority of the State and the counties to initiate condemnation proceedings for public roads and highways and allows owners of private roads to petition their respective mayor to initiate condemnation proceedings of those private roads when certain conditions are met.



## **Conservation District Use Permits (Act 216).**

Until now, an application for a conservation district use permit was deemed automatically granted after 180 days if the Department of Land and Natural Resources did not act on the application. When the permit application triggered other procedures, such as an environmental impact statement or a contested case hearing, the applicant could request an extension of 90 days for DLNR to make a decision. Recognizing that the preparation of environmental impact statements and contested case hearings often takes more than 90 days, the Legislature enacted Act 216 to automatically extend DLNR's deadline until 90 days after the completion of the environmental impact statement or contested case hearing.

## **Uniform Partition of Heirs Property Act (Act 260).**

Act 260 adopts the Uniform Partition of Heirs Property Act, which provides a process for partitioning property held by tenants in common where: there is no written agreement governing partition of the property; one or more of the cotenants acquired title from a relative, and twenty percent or more of the interests in the property are held by relatives. After an action to partition heirs property is filed and the property is appraised, any of the cotenants can give notice and elect to buy the interests of the cotenants that requested partition. If the interests are not bought out through this procedure, the court can either physically partition the property or, if physical partition is not feasible, order a partition by sale and distribute the proceeds according to each tenant's percentage interest.

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## Attorneys in the News

Damon Key Leong Kupchak Hastert  
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L-to-R: Clare Hanusz, David McCauley, Pamela Rotner Sakamoto and Mark Murakami

As part of our monthly program of outside speakers on topics of interest, in August the firm hosted author Pamela Rotner Sakamoto, who wrote the bestseller-New-York-Times-reviewed “*In Broad Daylight: A Japanese American Family Caught Between Two Worlds.*” As noted on Amazon.com, “meticulously researched and beautifully written, the true story of a Japanese American family that found itself on opposite sides during World War II—an epic tale of family, separation, divided loyalties, love, reconciliation, loss, and redemption—this is a riveting chronicle of U.S.–Japan relations and the Japanese experience in America.” A fantastic book and author, and we thank her for speaking.

**Clare M. Hanusz** had an op-ed published on September 11th, Sunday’s Star Advertiser “Abuse of undocumented workers is dark side of ‘buy local’ campaign (see link: <http://bit.ly/2cRHNAo>). Claire was also interviewed by Hawaii News Now on September 14th. She helped a foreign fisherman who sustained a serious eye injury. He claimed his captain refused to take him to the doctor. “Hawaii News Now Fishing industry pushes back following questions about labor practices” (see link: <http://goo.gl/j8M1F0>).



**E. Kumau Pineda-Akiona** was sworn in as a member of the U.S. Supreme Court Bar by Chief Justice Roberts on a recent visit to Washington, D.C.

**Robert H. Thomas** will be the keynote speaker at an Eminent Domain conference in Las Vegas later in September. Robert also will be presenting two programs at the 13th Annual Brigham-Kanner Property Right Conference at the International Court of Justice in The Netherlands in October.