



# INFORMATION SESSION THE TRAVEL BAN DECISION AND FAMILY SEPARATION: WHAT YOU NEED TO KNOW

**Thursday, July 5 | 12:00 p.m.**

Penn State Law Clinics | 329 Innovation Boulevard  
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## Travel Ban 3.0 at the Supreme Court

*Last Updated July 2, 2018*

### **THE SUPREME COURT DECISION**

On June 26, 2018, the Supreme Court of the United States issued an opinion in the case of *Trump v. Hawaii*. (Travel Ban 3.0). Writing for the five-justice majority, Chief Justice Roberts held [that President Trump's travel ban does not violate the constitution or the Immigration and Nationality Act (INA)]. The Proclamation will continue to be fully in force indefinitely. The Supreme Court of the United States heard oral arguments in the case of *Trump v. Hawaii* on April 25, 2018 (Travel Ban 3.0). The Supreme Court had asked both parties to answer the four following questions:

- 1) Can the Court review the respondent's challenge to Travel Ban 3.0?
- 2) Is Travel Ban 3.0 a lawful exercise of the President's authority?
- 3) Is a nationwide injunction impermissibly overbroad?
- 4) Does Travel Ban 3.0 violate the Establishment Clause of the First Amendment?

**The Majority Opinion by Chief Justice Roberts:** Addressing first the plaintiff's statutory claims, the Chief Justice said, "The Proclamation is squarely within the scope of Presidential authority under the INA." He described 8 U.S.C. §1182(f) as a "comprehensive delegation" which "exudes deference to the President in every clause." Within the statute he found authority for the President to determine whether, when, who, and on what conditions to exclude foreign nationals. The Chief Justice dismissed arguments made by plaintiffs and the dissent that Proclamation is inconsistent with the INA. He found, for example, that § 1152(a)(1)(A), which prohibits discrimination on the basis of race, sex, or nationality in the issuance of immigrant visas, did not conflict with the Proclamation because the INA clearly distinguishes "admissibility determinations and visa issuance."

The Chief Justice next addressed the plaintiffs' claims that the Proclamation violates the Establishment Clause of the Constitution because it is "motivated not by concerns pertaining to national security but by animus towards Islam." He held that it is not the role of the Court to "probe and test the justifications' of immigration policies." He explained that the Court "may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can be reasonably understood to result from a justification independent of unconstitutional grounds." Because he found the Proclamation to be "neutral on its face," he held that the plaintiffs failed to demonstrate a "likelihood of success on the merits of their constitutional claim." Accordingly, the preliminary injunction granted by the District Court was reversed, and the case was remanded. The Chief Justice was careful to add that the Court did not express any opinion on the soundness of the policy.

**Concurring Opinion by Justice Kennedy:** Justice Kennedy joined fully in the majority opinion. In his concurrence he said, "There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. . . . Indeed, the very fact that an official

This document was prepared by Penn State Law's Center for Immigrants' Rights on July 2, 2018. This document is selective and not a substitute for legal advice.

Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country." This argument was supported with numerous examples of anti-Muslim statements by the President and his staff both before and after his inauguration.

## WHAT YOU NEED TO KNOW

Below is some information about what you need to know. Please consult with an immigration attorney if you are in need of legal advice. [Here is a list of attorneys](#) who have graciously agreed to assist members in our community impacted by the ban.

### When did the travel ban go into effect?

A: Travel Ban 3.0 has been in effect since December 4, 2017 because of orders by the Supreme Court prior to the decision. However, the ruling means that the ban will continue in its entirety until or unless the administration amends, replaces or repeals it. Procedurally, the Supreme Court remanded the case back to the lower courts for further proceedings.

### Who is covered by Ban?

- **Chad, Libya and Yemen:** all immigrants and those entering as tourists or business travelers
- **Iran:** all immigrants and nonimmigrants, EXCEPT F, J and M visa holders (extra scrutiny)
- **North Korea and Syria:** all immigrants and nonimmigrants
- **Somalia:** immigrants (and nonimmigrants subject to extra scrutiny)
- **Venezuela:** certain nonimmigrants government officials and their family members

### What is the scope of the ban? The ban applies to those who:

- are outside the United States on the applicable effective date
- do not have a valid visa on the effective date
- do not qualify for a visa or other travel document by the terms of the Proclamation

### Who is exempt from Ban 3.0?

- Lawful permanent residents (green card holders)
- Foreign nationals admitted or paroled to the United States on or after the effective date
- Foreign nationals with travel documents that are not visas that are valid before or issued after the effective date
- Dual nationals traveling on a passport that is not one of the affected countries
- Those traveling on a diplomatic or related visa
- Foreign nationals who have already been granted asylum, refugees who have already been granted admittance, and those who have been granted withholding of removal, advanced parole, or protections under the Convention Against Torture

### Q: Am I eligible for a waiver?

A: In order to obtain a waiver, an applicant must demonstrate: 1) undue hardship if entry were denied, 2) entry would not pose a threat to national security, and 3) entry is in the national interest. This is a very difficult standard to meet. Although more than 8,400 people have applied for a waiver, the Department of

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Despite the robust activity in the district and appellate courts the Supreme Court issued twin orders on December 4, 2017 to reinstate the full version Travel Ban 3.0. This meant that the Proclamation remained in effect while the Supreme Court decision was pending. On April 10, 2018, the White House announced that Chad will be removed from the travel ban after finding that the country met “baseline” security standards.

### **WHERE CAN I FIND MORE RESOURCES?**

For a list of comprehensive resources on the travel ban visit our website

For access to the briefing in *Trump v. Hawaii*, see the SCOTUSblog

For information about your rights see this factsheet from the American Civil Liberties Union (ACLU)

More information and resources are available through Muslim Advocates, the American-Arab Anti-Discrimination Committee (ADC), and the American Immigration Lawyers Association (AILA)

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## ***Executive Order on Family Detention: What You Need to Know***

*Updated June 20, 2018*

### **1. What does the Executive Order Say?**

Titled "Affording Congress the Opportunity Address Family Separation" President Trump signed a new executive order (EO) June 20, 2018. Section 1 of the EO continues to mandate prosecution against individuals who cross the border irregularly and to also to "maintain family unity, including by detaining families together." The EO also states that the administration's position separating families is due to "Congress's failure to act." Importantly, there is no congressional order requiring families to be detained at all- separately or together.

### **2. What is the Relationship Between this Executive Order and the Trump Administration's "Zero Tolerance" Policy?**

The EO maintains the administration's "zero tolerance" policy to the extent that parents who cross the border with children will continue to be prosecuted. By issuing the EO the administration seems to have retracted from its position that parents must be separated from children during their criminal proceedings. Importantly, the EO does not end the policy of family separation.

### **3. Is Family Detention or Family Separation Required by Law?**

No. The Department of Homeland Security has prosecutorial discretion to detain or release children, parents and families from immigration detention. Such discretion is necessary because the federal government has limited resources and many noncitizens have compelling circumstances that make detention unsuitable. There is no statute or regulation that requires the Department to detain families. Rather, detaining parents and children is a policy choice.

### **4. What is the difference between law and policy?**

Laws can be passed by Congress in the form of a statute or created by formal regulation by an administrative agency. The process for passing statutes is found in the Constitution, and the process for creating regulations is found in the Administrative Procedure Act (APA). In contrast, a policy is discretionary, and can in most cases be made or changed at any time.

### **5. Are Attorneys General required by law to prosecute every parent who crosses the border, including asylum seekers?**

No. In American criminal law, prosecutors have broad prosecutorial discretion, which means they can choose whether to bring charges against a person. The choice by the Trump administration to prosecute and charge anyone who crosses the border irregularly (including those who present themselves at the border seeking asylum) is a choice, not a mandate. Prosecutorial discretion in the context of criminal law has been recognized by the Supreme Court in U.S. v. Armstrong, 517 U.S. 456, 464 (1996). Importantly, Article 31 of the 1951 Refugee Convention also prohibits states from prosecuting asylum seekers for irregular entry.

*The goal of this document is to provide general information regarding family separation and is not meant to act as a substitute to legal advice from an attorney.*



## ***Family Separation Policy: What You Need to Know***

*Updated June 20, 2018*

### **1. What is the family separation policy?**

The Trump Administration has implemented a “zero tolerance” policy against those who irregularly cross the border which has the result of separating families at the border. On April 6, 2018 Attorney General Sessions issued a memorandum from Attorney General Jeff Sessions entitled Memorandum for Federal Prosecutors Along the Southwest Border calling for a “zero tolerance policy,” and instructing United States Attorney’s Offices along the border to criminally prosecute anyone who enters unlawfully. On May 7, Attorney General Sessions confirmed that the Department of Homeland Security is referring everyone who crosses the Southwest border unlawfully to the Department of Justice for prosecution.

### **2. Is the family separation policy new?**

Yes. Some have suggested that this policy is no different from policies previously implemented by the Obama and Bush administrations. However, this family separation policy is not a carryover from any prior administration. While family separations did occur under the Obama and Bush administrations, those separations were uncommon because the policies did not systematically target first time offenders for prosecution and made exceptions for adults migrating with children. When Congress became aware in 2005 that enforcement practices resulted in family separation, it instructed DHS to adopt policies to release families or use alternatives to detention wherever possible.

### **3. Is family separation required by law?**

No. Speaking about family separation, President Trump said, “I hate the children being taken away. The Democrats have to change their law—that’s their law.” There is, however, no law by Congress or any other body which requires family separation. The systematic separation of children from their parents is a policy choice by the administration.

### **4. What is the difference between law and policy?**

Laws can be passed by Congress in the form of a statute or created by formal regulation by an administrative agency. The process for passing statutes is found in the Constitution, and the process for creating regulations is found in the Administrative Procedure Act (APA). In contrast, a policy is a statement of intent or method of action. Policies do not adhere to strict rulemaking requirements of the Constitution or the APA, and so they are not binding. Policies are discretionary, and can in most cases be made or changed at any time.

### **5. Are Attorneys General required by law to prosecute every person who crosses the border with children, including asylum seekers?**

No. In American criminal law, prosecutors have broad prosecutorial discretion, which means they can choose whether to bring charges against a person. The choice by the Trump administration to prosecute and charge anyone who crosses the border irregularly (including those who present themselves at the border seeking asylum) is a choice, not a mandate. Prosecutorial discretion in

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When a noncitizen arrives at, or is apprehended between, a port of arrival without documents, or with false documents, § INA 235(b) instructs the immigration officer to order the noncitizen removed *unless* they express a fear of returning to their home country or an intention to apply for asylum. If the noncitizen expresses fear or an intention to apply for asylum, they may be referred to an asylum officer and the application for asylum begins. Criminally prosecuting asylum seekers for unlawful entry before they have had an opportunity to apply for asylum dramatically slows down the process for seeking asylum and also raises a number of legal and policy concerns.

**11. Has the administration made any other changes to asylum?**

Yes. The Attorney General has the power to certify to himself pending immigration cases. In one case, *Matter of A-B-* Attorney General Sessions overruled *Matter of A-R-C-G-*, a landmark asylum case which recognized “married women in Guatemala who are unable to leave their relationship” as a particular social group for asylum purposes. *Matter of A-R-C-G-* was a step forward for asylum seekers hoping to build a claim on the basis of domestic abuse for which the state is unable or unwilling to intervene. Law professor and gender expert Karen Musalo remarked how *Matter of A-B-* “basically throws us back to the Dark Ages, when we didn’t recognize that women’s rights were human rights.”

**12. What are the alternatives to separating parents and children?**

On the criminal side, Attorneys General should be allowed to use their discretion in deciding whether an irregular border crosser should be charged criminally and detained pending trial. In the civil immigration side, the administration should consider alternatives to detention. The United States government spends over \$2 billion each year detaining immigrants. However, there are alternatives to detention and family separation that result in a net financial and humanitarian gain for the country implementing them. For example, the Community Assessment and Placement (CAP) model prioritizes presumption against detention, procedural minimum standards, identification and decision-making, and case management as tools to build a system that ensures that detention is only used as a last resort instead of a first option.

**13. What can I do to help families separated at the border?**

There are several organizations you can donate to that provide legal services to families impacted by family separation, or that advocate for changes to law and policy that will protect children at the border.

**14. Where can I find more resources?**

Penn State’s Center for Immigrants’ Rights Clinic

American Immigration Council

Women’s Refugee Commission (including: know your parental rights)

Human Rights First

Department of Homeland Security Fact Sheet: Zero Tolerance Policy (June 15, 2018)

Department of Homeland Security Myth v. Fact: Zero Tolerance Policy (June 18, 2018)

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## Unpacking President Trump's Latest Executive Order

June 22, 2018

by Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar and founding director of the Center for Immigrants' Rights Clinic at Penn State Law - University Park

On June 20, 2018, President Trump issued an Executive Order (EO) titled "**Affording Congress the Opportunity Address Family Separation**." While portions of the EO suggest a move by the administration away from family separation, the EO does not address the **2300 children** already separated from their parents since May. Reports show they are currently being held in the Office of Refugee Resettlement custody in locations across the country.



Further, the EO does not actually end family separation, but instead includes language to suggest a policy to "maintain family unity, including by detaining families together." The complication is that many legal and practical obstacles could stand in the way. In order to keep families in detention together, the administration must comply with a landmark settlement known as **Flores v. Sessions** which set national standards for the detention, release and treatment of all children in immigration detention. As **stated by** University of California-Davis Dean Kevin Johnson, "The Flores settlement [would] need to be revised to allow indefinite detention of children." Dean Johnson continued, "That seems unlikely. The court refused to allow the Obama administration to detain children for long periods in response to the influx of Central Americans in 2014."

The administration recognized some of these complications by stating in Section 3(e) of the EO: "The Attorney General shall promptly file a request with the U.S. District Court for the Central District of California to modify the Settlement Agreement in *Flores v. Sessions*, CV 85-4544 ("*Flores* settlement"), in a manner that would permit the Secretary, under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings." Not surprisingly, the administration **filed such a request** with a federal district court in California on June 21.

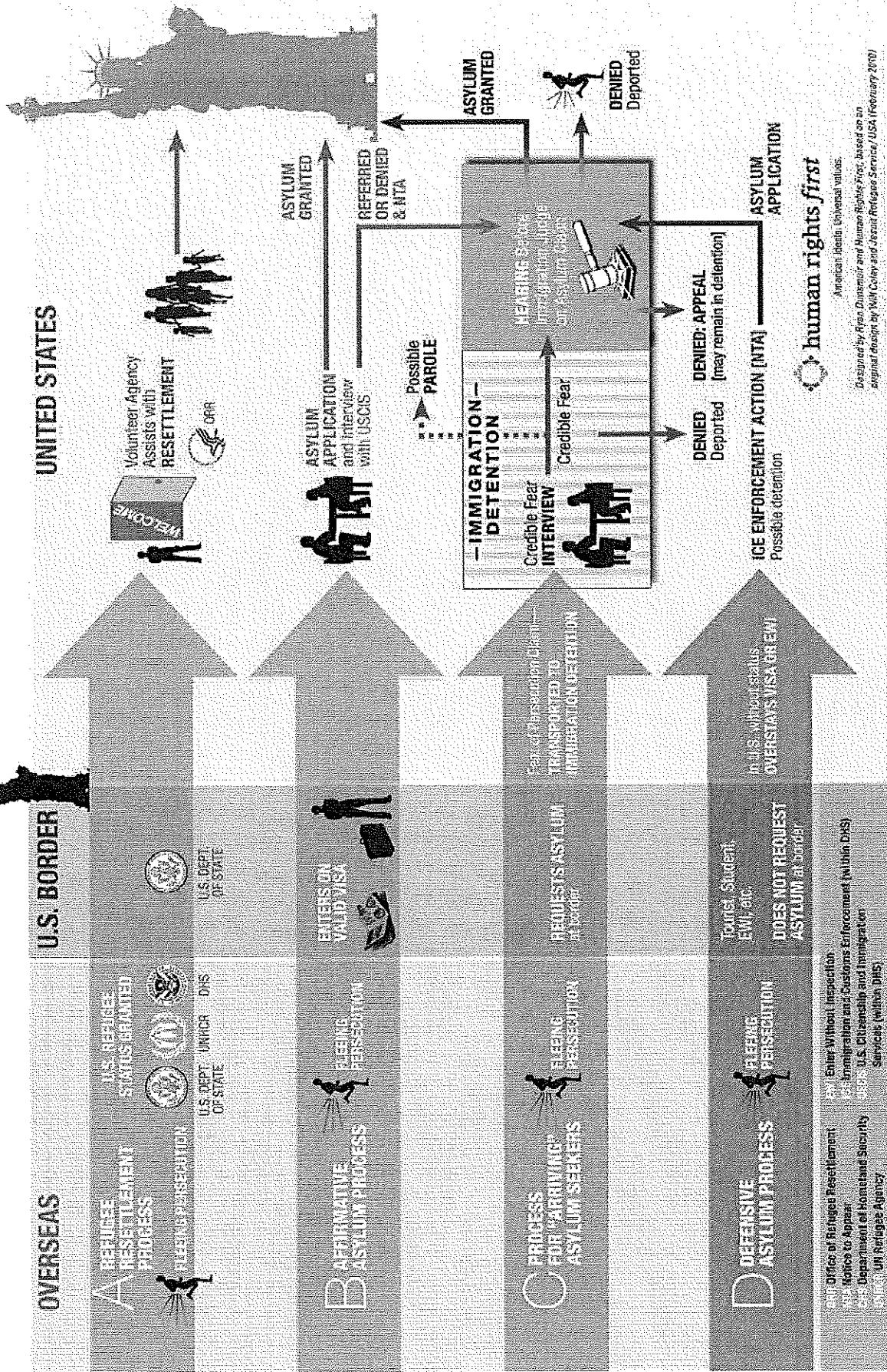
Adding chaos to confusion, a **spokesman for the Pentagon reported to the New York Times**, "The United States is preparing to shelter as many as 20,000 migrant children on four American military bases." It was unclear whether parents will be housed in the military housing.

The administration's choice to maintain its "**zero tolerance**" policy to prosecute any person who crosses the border irregularly is confirmed by Section 3(a) of the EO: "The Secretary of Homeland Security (Secretary), shall, to the extent permitted by law and subject to the availability of appropriations, maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings involving their members." Importantly, prosecuting every border crosser is by no means required by law and in fact interferes with the concept of prosecutorial discretion. In the federal criminal context, U.S. Attorney Generals also have broad discretion to decide whether to charge, detain or try a person in the criminal justice system. This discretion has been recognized by the **Supreme Court** and is contained in the U.S. Attorneys Manual. The choice by AG Sessions to mandate all U.S. Attorneys to prosecute every irregular border crosser is unusual and has been rejected by at least **one U.S. Attorney** in Texas who on June 21, declared that he would dismiss all illegal entry immigration cases where children were separated from their families. The choice by any prosecutor to bring criminal charges, detain or take a case to trial all present examples of prosecutorial discretion.

While the EO and policies from Attorney General Sessions suggest that detaining families, whether together or separately, is necessary as a matter of law, the reality is that detention is a purely discretionary decision. The administration has ample **prosecutorial discretion** to detain or release children, parents and families from immigration detention. In the immigration context, **prosecutorial discretion** has long been exercised for both economic and humanitarian reasons. The government lacks the resources to deport over 11 million people living in the United States without authorization and importantly uses discretion to protect from deportation those who present compelling equities such serving a primary caregiver or contributing to the U.S. economy.



# How Refugees Get to the U.S.





***Referral List for Individuals and Families Impacted by the Travel Ban***

Updated June 29, 2018

\*The following individuals are members of AILA's Middle East Interest Group and have graciously agreed to serve as a referral for members in our community impacted by the Travel Ban. For more information about the travel ban, visit the [website](#) of Penn State Law Center for Immigrants' Rights Clinic. For questions, please contact MEIG member and director of the Center for Immigrants' Rights Clinic: Shoba Sivaprasad Wadhia at [ssw11@psu.edu](mailto:ssw11@psu.edu)

**Ammar Alo**

Location: Toledo, Ohio

Services: low-cost options

Law Firm: Alo Legal

Address: 4303 Talmadge Road, Suite 201, Toledo, Ohio 43623

Telephone: (419) 913-1580

Email: [ammar@alolegal.com](mailto:ammar@alolegal.com)

Website: [alolegal.com](http://alolegal.com)

**Ban Al-Wardi**

Location: Los Angeles, California

Services: low-cost options

Languages: Arabic

Law Firm: Law Offices of Ban Al-Wardi

Address: 4030 Palos Verdes Dr. N, Ste. 200, Rolling Hills Estates, CA 90274

Telephone: (310) 544-9827

Website: [alwardilaw.com](http://alwardilaw.com)

**Alex Baron**

Location: Tukwila, Washington

Languages: Arabic and Spanish

Law Firm: Law Office of Bart Parsley

Address: 130 Andover Park East, Suite 300, Tukwila, Washington 98188

Telephone: (206) 260-7050

Email: [info@parsleylaw.net](mailto:info@parsleylaw.net)

Website: [parsleylaw.net](http://parsleylaw.net)

**Jennifer Bogacki**

Location: Burlington, North Carolina

Services: low-cost and pro bono options

Law Firm: The Vernon Law Firm PA

Address: 522 South Lexington Avenue, Burlington North Carolina 27216

Telephone: (336) 227-8851

Address: 137 N. 5<sup>th</sup> Street, Allentown, Pennsylvania 18102  
Telephone: (610) 432-7200  
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**Richard Loiseau**

Location: Florida and Indiana.  
Services: low-cost and pro bono options  
Languages: French and English  
Law Firm: Immigration 360  
Telephone: (866) 668-7247  
Email: immigrationauthority@gmail.com  
Website: <https://b-m.facebook.com/pg/RichardLoiseau4Ever/about/>

**Haleh Mansouri**

Location: Los Angeles, California  
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Languages: Spanish and Farsi  
Law Firm: Law Offices of Haleh Mansouri  
Address: 624 South Grand Avenue, Suite 2200, Los Angeles, California 90017  
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**Fazila Vaid**

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Address: 200 North Martingale Road, Suite 800, Schaumburg, Illinois 60173  
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Website: masudafunai.com

**Tala Voosoghi**

Location: New York  
Services: pro bono and low-cost options  
Languages: Farsi, French, and English  
Law Firm: Sullivan, Stolier, Schulze, & Grubb