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Immigration Issues

ATTORNEY GENERAL ISSUES FINAL RULE TO REFORM BIA – The attorney general has issued a final rule that will fundamentally change the size, composition, and functioning of the Board of Immigration Appeals, the principal purpose being to expedite the processing of appeals. The final rule retains most of the features of the proposed rule that was announced in Feb. 2002 (see "Attorney General Proposes Major Changes at BIA," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2002, p. 1).

Under the rule, after a six-month transitional period, the BIA will be reduced from 23 to 11 members. The final rule also significantly changes the procedure for filing and pursuing appeals, eliminates the BIA's jurisdiction to review factual findings *de novo*, expands on existing "streamlining" regulations allowing for summary dismissal of appeals and summary affirmation of immigration judge decisions, and makes most appeals subject to review by only a single BIA member. In rejecting the criticisms of many commentators, the rule's supplementary information sets out at length the view of the Dept. of Justice that the rule comports with due process. The final rule takes effect on Sept. 25, 2002.

The rule establishes a transition period of 180 days, starting from the rule's effective date, in which the BIA is expected to significantly reduce its current backlog of cases. The supplementary information notes that, in anticipation of the rule and by making use of existing "streamlining" procedures, the BIA already has increased its production of decisions, from an average of 2,600 dispositions per month during 2001, to 3,300 in Feb. 2002, and to over 5,200 dispositions per month in recent months. After this transition period, the BIA will be reduced to 11 members, with the attorney general to decide which members will remain. The supplementary information explains that the reduction is intended to enhance the ability of the BIA "to reach consensus on legal issues." It is expected that the BIA will function with two

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three-member panels and five BIA members deciding cases individually.

The rule authorizes the BIA chair to set up a case management system in which each appeal will be screened by a single member, who will either decide the case or determine that it should be heard by a three-member panel. Three-member panels may be assigned only if necessary for the following:

• to settle inconsistencies between rulings by different immigration judges;

• to establish precedent construing the meaning of laws, regulations, or procedures;

• to correct the decision of an IJ that plainly fails to conform with the law;

• to resolve a case or controversy of major national import;

• to review a clearly erroneous factual determination by an IJ; or

• to reverse a decision of an IJ or the Immigration and Naturalization Service.

The supplementary information published with the rule explains that single member review will become the norm, with three-member panels reserved for cases that present novel or complex issues.

An appellant who seeks to have his or her case reviewed by a three-member panel must identify the specific factual or legal basis for that contention in his or her notice of appeal. This showing must be made in the notice of appeal, and the Notice of Appeal form (EOIR-26) is being revised for this purpose. In pending cases, where the notice of appeal was filed on or before Aug. 26, 2002, the rule gives the respondent until either Sept. 25, 2002, or the due date for respondent's brief, whichever is later, to make this showing.

The final rule also sets forth new standards for summary dismissals. Under the rule, in addition to using any of the grounds currently specified in the regulations for summary dismissal, a single BIA member could summarily dismiss an appeal if, after review of the record, the member determines that the appeal was filed for an improper purpose or to cause unnecessary delay or that the appeal lacked an arguable basis in fact or law. Filing an appeal that is summarily dismissed may also constitute frivolous behavior that can be cause for discipline.

The rule requires the BIA to accept an IJ's factual findings unless they are found to be "clearly erroneous." Except when taking administrative notice, the BIA would not consider new evidence. Accordingly, the rule states that the proper method of developing factual issues is to remand the case to the IJ or the INS. Because of logistical difficulties, the "clearly erroneous" standard for factual findings will only apply to appeals filed on or after the rule's Sept. 25, 2002, effective date.

The rule retains the 30-day deadline for filing a notice of an appeal from the decision of an IJ. However, the appeal will then be referred to a screening panel, where it is to be reviewed by a single BIA member. The reviewing member is to promptly dismiss any appeal subject to summary dismissal under the regulations. In cases that are not summarily dismissed, the screening panel will arrange for completion of the record of proceedings and transcript.

Once a case is transcribed, the BIA is to set a briefing schedule. In cases in which a party is in detention, both parties will be given 21 days in which to file simultaneous briefs. Reply briefs may be filed only by leave of the BIA. In cases not involving detention, the appellant first will be given 21 days to file a brief, and the appellee then will have 21 days to file an opposing brief. For good cause shown, the BIA may extend the time for filing a brief for up to 90 days.

The BIA member who initially reviewed the case, or another member assigned under the case management system, is then to decide the appeal. He or she may affirm the IJ's decision without opinion if the IJ's decision is correct, the errors allegedly committed by the IJ are harmless or nonmaterial, and if

• the issues on appeal are squarely controlled by BIA or federal court precedent and are not being applied to novel factual situations, or

• the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

If the BIA member considers that a written opinion is needed, he or she should issue "a brief order affirming, reversing, modifying, or remanding the decision," unless the BIA member designates the case for review by a three-member panel under the criteria described above.

Except in exigent circumstances, the BIA must dispose of all appeals assigned to single BIA members within 90 days of completion of the record and transcript or within 180 days after the appeal is assigned to a three-member panel. In exigent circumstances, the BIA chair is accorded discretion to grant an extension of up to 60 days. 67 Fed. Reg. 54,878–905 (Aug. 26, 2002).

AG ISSUES PROPOSED RULE ON REQUIREMENTS THAT IMMIGRANTS REPORT CHANGES OF ADDRESS – The attorney general has issued a proposed rule that would require non–U.S. citizens who apply for work authorization or any immigration benefit to acknowledge that they have received notice that they are required to inform the Immigration and Naturalization Service of any change of their address. The rule, which was issued July 26, 2002, states that the INS will use the address provided by the immigrant for all purposes, including (should it be necessary) the mailing of a Notice to Appear (NTA), the document that notifies a person that he or she is required to appear in immigration court.

By issuing this rule, the attorney general is responding to a ruling of the Board of Immigration Appeals that bars immigration judges from entering *in absentia* orders where the evidence shows that the NTA was served by mail but not received by the respondent and the respondent had not been advised of the obligation to keep the immigration court informed of his or her address. The new rule will require the INS to update over three dozen immigration forms that will now be required to contain an acknowledgment.

Section 265 of the Immigration and Nationality Act currently requires all noncitizens over 14 years of age who remain in the U.S. for 30 days or longer to report a change of address to the INS within ten days of any move. Under INA section 266(b), persons with an obligation to report address changes who fail to do so are guilty of a misdemeanor, punishable by a fine of no more than $200 and imprisonment of no more than 30 days. Up until now, the INS has not systematically notified noncitizens of these re-

quirements, nor has it systematically enforced them.

Publicity regarding the proposed rule has alarmed immigrant communities, provoking fears on the part of long-term residents that they may be prosecuted for past failures to report address changes. In fact, the proposed rule does nothing to further criminal enforcement of this requirement, since the rule is limited to prospectively requiring noncitizens applying for immigration benefits to acknowledge that they have been notified of the obligation to inform the INS of changes of address for purposes of ensuring their being subject to possible service of an NTA. However, the U.S. Justice Dept. has not sought to dispel concerns in immigrant communities by, for example, publicizing assurances that past failure to comply with the change-of-address notification requirement will not be prosecuted criminally.

Not surprisingly, the announcement of the rule greatly increased the number of change-of-address forms sent to the INS. According to a Sept. 6, 2002, *New York Times* article, change-of-address notices received by the INS went from 2,800 per month prior to Sept. 11, 2001, to 19,800 per month subsequently, to 30,000 per day following the July 26, 2002, announcement of the proposed rule. According to the article, an INS spokesperson stated that the agency has received 870,000 reports since July 26 and has been able to process only 100,000 of them. The reports are not processed into a database but instead are sent to be included in the individual's file.

According to the supplementary information published with the proposed rule, the reason for the rule is the decision of the BIA in *Matter of G-Y-R*, 23 I. & N. Dec. 181 (BIA Oct. 19, 2001). When an individual, despite proper notice, fails to appear for a removal hearing, the immigration judge may order him or her removed *in absentia* (i.e., despite the fact that the person is not present to defend him/herself). In *G-Y-R-*, the BIA held that an IJ could not enter an *in absentia* order where the evidence indicated that the NTA, although mailed, was returned by the post office as undeliverable. The INS contended that it should have been sufficient that the NTA was served on the respondent's last known address (obtained as a result of her having applied for asylum), and that the respondent had an obligation to report any change of address under INA section 265. However, the BIA found that, because the respondent never received notice that the consequences of not reporting a current address could include entry of an *in absentia* order, such an order could not be based on her failure to report an address change. (For more regarding *G-Y-R-, see* "BIA: In Absentia Removal Order May Not Be Entered Where the Record Reflects That Respondent Did Not Receive Mailed NTA," IMMIGRANTS' RIGHTS UPDATE, Nov. 16, 2001, p. 7.) The new rule is intended to provide such notice, in order to allow service of an NTA on the last address provided by a noncitizen to be sufficient to support entry of an *in absentia* order if the individual fails to appear for the removal hearing.

67 Fed. Reg. 48,818 (July 26, 2002).

DOJ ISSUES FINAL RULE ON REGISTRATION OF NONIMMIGRANTS – The U.S. Dept. of Justice has issued a final rule requiring nonimmigrants from certain countries and other nonimmigrants designated by consular and immigration officials, to be registered, photographed, fingerprinted and subject to further monitoring upon entry into and departure from the United States. With a few exceptions, the final rule implements the provisions of the proposed rule that was announced on June 13, 2002 (see "DOJ Proposes Rules to Monitor Certain Nonimmigrants," IMMIGRANTS' RIGHTS UPDATE, July 29, 2002, p. 2). After a brief comment period, the Justice Dept. issued a final rule that will be effective Sept. 11, 2002, except for the provision of the rule requiring registration of departure, which does not take effect until Oct. 1, 2002.

With a few exceptions, the final rule is substantially the same as the proposed rule. The final rule incorporates two significant changes:

• ***The rule will not apply to nonimmigrants who are already in the U.S.*** The proposed rule had stated that the attorney general may require nonimmigrants from certain countries to register with the Immigration and Naturalization Service even if they are already in the U.S., but the final rule does not apply registration requirements to nonimmigrants who are already here. Accordingly, as noted in the supplementary material adopted as part of the final rule, if the attorney general requires such persons to register, he will post a notice of the requirement in the Federal Register.

• ***Nonimmigrants required to report will not be required to depart via the same port they entered.*** The proposed rule stated that anyone who was required to report under this new system would need to depart from certain designated airports. This restriction was dropped from the final rule.

As noted in the July 29, 2002, IRU article about the proposed regulation, the new rule will be imposed on nonimmigrants from certain countries. The rule will also be applied to nonimmigrants from other countries who meet particular criteria. Citing security concerns, the final rule is silent about what those criteria are, exactly.

In like manner, the rule does not address the entry of names into the National Crime Information Center database. The supplement to the proposed rule informed the public that the names of individuals who failed to register or who overstayed their visas would be entered into the database. Although the DOJ disclosed that it received comments on this announcement, it stated that inclusion of data in the NCIC database is not covered by the final rule. It therefore refused to address the public's concerns regarding the database.

The rule has been greeted by a chorus of criticism from around the world, especially from Muslim countries, where it is assumed that the majority of those who will be affected will be Muslims. The *Los Angeles Times*, in an article titled "Anti-Terror Screening Draws Fire" (Sept. 5, 2002), reports that there is concern in the U.S. State Dept. that the rule will drive another wedge between the U.S. and the countries from which the Bush administration is seeking cooperation in its antiterrorism efforts. The rule may also have ramifications for the already reeling U.S. economy. According to the article, "There . . . are growing concerns that tougher scrutiny of thousands of foreign visitors, if not performed quickly and discreetly, could depress tourism, trade and business."

67 Fed. Reg. 52,584 (Aug. 12, 2002).

INS AND FLORIDA ENTER MOU TO ALLOW STATE OFFICERS TO ENFORCE IMMIGRATION LAW – The Immigration and Naturalization Service and the state of Florida have reached an agreement under which

35 Florida state and local law enforcement officers may enforce immigration law under INS supervision.

The memorandum of understanding (MOU) laying out the agreement, which was finalized June 13, 2002, specifies that operations conducted jointly by the INS and the state will be limited to missions involving Florida's Regional Domestic Security Task Force. The agreement, however, fails to clearly delineate what such operations might entail. The MOU does set forth the scope of the parties' respective rights and liabilities, including responsibility for supervision and costs. It also identifies the types of functions the officers may undertake, and it creates a procedure whereby people who are affected by the officers' activities can file complaints, as well as a process for evaluating the pilot program the MOU creates. The MOU is effective until Sept. 2003.

Though Congress first authorized such joint agreements in 1996 via a provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), this agreement between the INS and Florida is the first of its kind in the nation. The IIRIRA provision, codified as section 287(g) of the Immigration and Nationality Act, allows the U.S. attorney general to enter into written agreements with any state or political subdivision to permit the state or locality's officers to perform immigration functions. A few other states, including South Carolina, have indicated they are also interested in entering such agreements.

Under the INS-Florida MOU, certain specially trained state and local officers may interrogate persons regarding their rights to be and remain in the United States. If such an officer has reason to believe that a person is in the U.S. in violation of the law and is likely to escape before a warrant can be obtained, the officer has the same authority that the INA grants INS officers to arrest such a person without a warrant. Other activities permitted to Florida officers under the agreement include administering oaths, transporting noncitizens, and assisting in pre-and post-arrest processing. However, Florida officers may engage in such activities only when they are taking part in a security or counter-terrorism operation supervised by INS officers.

The agreement also details criteria for selecting the officers to be specially trained and the components of their required training. In order to participate in the pilot program, officers must be U.S. citizens, have three years of law enforcement experience, and have obtained an associate degree. The training curriculum will include a review of the MOU and instruction in what immigration-related law enforcement functions the officers are authorized to engage in, as well as in cross-cultural awareness, the use of force, civil rights laws, and the Vienna Convention on Consular Relations. Officers who successfully complete the training course and pass a competency exam will receive an INS certification allowing them to participate in the pilot program for a year from the date of the certification. Costs for the pilot program, including all salaries, overtime pay, and training costs, are borne by the state.

The agreement also provides for a complaint procedure. Aggrieved individuals may lodge complaints by calling an office of the state of Florida at 954-535-2859, or a hotline number, 1-800-869-4499, or the INS at 202-514-5765, or by sending the INS a fax at 202-514-7244. The MOU states that complaints will be processed by both INS and state officials and that it is expected that complaints will be resolved within 90 days.

Finally, the MOU requires periodic assessments of the pilot program as well as a full evaluation to be concluded within 9 months of the time officers are certified. All complaints, reports, press coverage, and community interaction must be included in the evaluation.

MOU signed by Atty. Gen. John Ashcroft, INS Comm. James Ziglar, June 11, 2002; and Florida Gov. Jeb Bush and Dept. of Law Enforcement Comm. James T. Moore, June 13, 2002.

STATE DEPT. PUBLISHES RULES FOR 2004 DIVERSITY VISA LOTTERY – The U.S. State Dept. has published a notice detailing application procedures for the 55,000 immigrant visas to be available in fiscal year 2004 under the diversity visa lottery program ("DV-2004"). The application process once again will be a one-month, mail-in procedure; and this time it will run from noon (Eastern Time) of Oct. 7, 2002, to noon of Nov. 6, 2002. The notice warns that entries received either before or after these dates will be disqualified, regardless of the postmark they bear.

The visa lottery was introduced in 1986 as a temporary procedure to increase immigration from countries that, especially since the 1960s, have sent relatively few immigrants to the U.S. In 1988 the program was extended for two years. The Immigration Act of 1990 then created a transitional program for three more years, followed in fiscal year 1995 by a permanent lottery program.

Under the permanent diversity visa program, 55,000 immigrant visas are allocated to the different regions of the world under a formula intended to allocate more visas to areas that have sent relatively few immigrants in the previous five years than to those that have contributed large numbers of immigrants. Natives of countries that have sent more than 50,000 immigrants to the U.S. in the past five years are not eligible, and no one country can receive more than seven percent of the diversity visas issued in a single year. (However, the State Dept. notes that the Nicaraguan and Central American Relief Act (NACARA) allocates 5,000 of the DV visas for use in the NACARA program. The reduction, which first took effect with DV-1999, will continue for as long as it is deemed necessary, including for DV-2004.)

Eligibility for Lottery. To be eligible for the visa lottery, the applicant must meet two basic requirements: (1) The applicant must be a native of one of the limited number of countries whose natives qualify for the lottery (*Note:* Persons from these countries who are already in the U.S. are eligible to apply); and (2) the person must meet either the education or training requirement of the DV program. In addition, the individual must submit a properly completed application within the application period.

Natives of the following regions and countries are eligible to apply for the visas:

• AFRICA. All countries qualify.

• ASIA. All countries (including Israel and the Middle East, Indonesia, Hong Kong S.A.R., which is counted separately from China, and Taiwan) qualify-except China (mainland-born only), India, Pakistan, Philippines, South Korea, and Vietnam.

• EUROPE. All countries (extending from Greenland to Russia and including all countries of the former U.S.S.R., and also including components and dependent areas overseas of Denmark, France, and the Netherlands) qualify, except the following: Great Britain (United Kingdom) and its territories (including Anguilla,

Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena, and Turks and Caicos Islands; however, Northern Ireland does qualify).

• NORTH AMERICA (which is not considered to include America south of the U.S.). Only the Bahamas qualifies (i.e., Canada does not qualify).

• OCEANIA. All countries qualify (includes Australia, New Zealand, Papua New Guinea, and all countries and islands of the South Pacific).

• AMERICA SOUTH OF THE U.S. BORDER, AND THE CARIBBEAN. All countries qualify except the following: Colombia, Dominican Republic, El Salvador, Haiti, Jamaica, and Mexico.

A *native* of a country is someone who was born in the country or someone who is chargeable to it under Immigration and Nationality Act section 202(b). The rules of chargeability allow the following categories of people to apply for lottery visas as natives of a qualifying country: (1) the spouse of someone born in one of the qualifying countries; (2) the minor dependent child of a parent who was born in a qualifying country; and (3) a person, regardless of age, (a) who was born in a country of which neither parent was a native or resident at the time of the person's birth, and (b) one of whose parents is a native of a qualifying country.

The alternative education and training requirements for the diversity visa program are that applicants either (1) must have a high school education (twelve-year course of elementary and secondary education) or its equivalent or (2) for two of the past five years they must have worked in a job that requires at least two years of training and experience. The work experience of applicants will be evaluated using the Dept. of Labor's O*Net OnLine database.

Though the lottery program imposes no age limits on who can apply, usually persons under 18 will be unable to satisfy the education/work requirement. Persons who are selected for visas can adjust status in the U.S. if they are otherwise qualified for adjustment of status. Finally, persons who are in the process of applying for a visa under a different visa category also can apply for the diversity visa lottery.

A husband and wife can each submit an entry; if either is selected, the other will qualify for a derivative visa. However, no person can submit more than one entry, and the applicant must personally sign the entry. If more than one entry is submitted for any person, that person will be disqualified from the program.

Application Process. As noted above, a basic requirement to participate in the visa lottery is that the native of a qualifying country must submit one entry form within the application period. An entry consists of a plain piece of paper with the following information typed or printed in English (entries will be disqualified if they do not provide all of this information):

1. APPLICANT'S FULL NAME. Last name, first name and middle name, with the last (sur-/family) name underlined (e.g., Smith, Sara Jane).

2. APPLICANT'S DATE AND PLACE OF BIRTH, *in the following order.* Date of birth: day, month, year (e.g., "15 November 1961"). Place of birth: city/town, district/county/province, country (e.g., "Munich, Bavaria, Germany") (use current name of country if different than at time of birth—e.g., Slovenia, rather than Yugoslavia; Kazakstan, rather than Soviet Union, etc.).

3. APPLICANT'S NATIVE COUNTRY, IF DIFFERENT FROM COUNTRY OF BIRTH. If the applicant is claiming nativity based on being a national of a country other than his or her country of birth, this must be clearly indicated on the entry itself and at the upper left corner of the entry envelope. If an applicant is claiming nativity through a spouse or parent, this should be indicated on the entry.

4. NAME, DATE AND PLACE OF BIRTH OF APPLICANT'S SPOUSE AND CHILDREN, *if any.* Applicants must include all of their children, natural as well as all legally adopted and stepchildren, who are under 21 and unmarried. Applicants' spouse and children must be listed even if they no longer reside with the applicant, and regardless of whether they will immigrate with the applicant. The instructions caution that failure to provide all this information will disqualify the applicant.

5. APPLICANT'S FULL MAILING ADDRESS. Make sure the address is complete and clearly written to ensure that the registration notice can be delivered; phone number is optional, but useful.

6. PHOTOS. A recent (less than 6 months old) photograph of the applicant that is between 1½ x 1½ inches (37 mm square) and 2 x 2 inches (50 mm square), with the applicant's name and date of birth printed across the back of the photo. Photos may be in either black and white or color. The entry must also include recent photographs of the applicant's spouse and children (natural as well as legally-adopted children and stepchildren). The subject of the photo must directly face the camera, with the head not tilted (i.e. tilted neither down, up, nor to the side). About 50 percent of the photo's area should be taken up by the head. The photo should be shot against a neutral, light-colored background, and the face should be in focus. The person photographed may not wear hats, dark glasses, or other paraphernalia that might obscure the face. Photos with the subject wearing head coverings or hats are acceptable only when worn for religious reasons, and even in these cases the headwear must not obscure any part of the face. Photos depicting applicants wearing tribal, military, airline, or other headwear not specifically religious in nature will be rejected.

Photographs must be submitted even if the spouse or child no longer resides with the applicant and regardless of whether they will accompany or follow to join the applicant in the U.S. Each family member must be represented in separate photographs, as group photographs will not be accepted. Each photograph must be attached to the entry by clear tape. Applicants should NOT use staples or paperclips or submit photocopies of photographs. The back of the entry may be used if there is not enough room on the front to accommodate the photographs.

7. THE APPLICANT'S SIGNATURE. Applicants who do not personally sign their applications will be disqualified. The signature must be made in the applicant's "usual and customary" manner, in his or her native alphabet. Neither an initialed signature nor block printing of the applicant's name will be accepted. Should applicants sign their name in the Roman alphabet and their native language employs a different alphabet, they must also sign in the native alphabet.

The entry must be mailed (regular mail or air mail only; no faxes, registered mail, hand delivery, express mail, etc.) in a regular or business-size envelope. The envelope must be between 6 and 10 inches long (15-25 cm) and between 3½ and 4½ inches

wide (9-11 cm). No postcards will be accepted, nor will envelopes placed inside express or oversized mail packages be accepted. The qualifying country or area of which the applicant is a native, followed by the applicant's full name and address as indicated on the application, must be printed or typed in English on the front of the envelope in the top left-hand corner. Both the country of nativity and the country of the address must be shown, even if they are the same. The address to which the application should be mailed is the same for all applicants, except that the zip code differs depending upon the geographic area of the applicant's native country. Address the envelope as follows:

If the qualifying country is in ASIA:

DV Program
Kentucky Consular Center
2002 Vista Crest
Migrate, KY 41902-2000
U.S.A.

If the qualifying country is in SOUTH AMERICA, CENTRAL AMERICA, or the CARIBBEAN: Use the same address as for Asia, except use 4004 Vista Crest as the street number and 41904-4000 as the zip code.

If the qualifying country is in EUROPE: same address, except use 3003 Vista Crest as the street number and 41903-3000 as the zip code.

If the qualifying country is in AFRICA: same address, except use 1001 Vista Crest as the street number and 41901-1000 as the zip code.

If the qualifying country is in OCEANIA: same address, except use 5005 Vista Crest as the street number and 41905-5000 as the zip code.

If the qualifying country is the BAHAMAS: same address, except use 6006 Vista Crest as the street number and 41906-6000 as the zip code.

No fee is charged for submitting a visa lottery entry. The entries will each be numbered and selected at random for "registration." No advantage can be gained by submitting an application early in the application period, since all applications actually received during the application period will have an equal chance of being randomly selected within their regions. Persons whose applications are selected for registration will be notified by mail about the next steps to take to apply for visas between April and July 2003. Because the State Dept. selects more entries than there are visas available, registrants who are notified that their entries have been selected must act promptly to apply for an immigrant visa.

The State Dept. notice also reminds that in order to receive a visa, randomly selected applicants must meet all eligibility requirements under U.S. law. Such requirements include those relating to special processing established in response to the events of Sept. 11, 2001. The notice warns that these requirements may significantly increase the level of scrutiny and time necessary to process applications for natives of some countries listed as eligible for DV-2004, "particularly those where a higher level of activity related to post-September 11 concerns has been indicated." These countries include, but are not limited to, nations identified as state sponsors of terrorism.

DV-2004 will end either when all visas available under the program have been issued or on Sept. 30, 2004, whichever is sooner.
67 Fed. Reg. 54,251–56 (Aug. 21, 2002).

PRESIDENT SIGNS BILL PROTECTING VISA APPLICANTS FROM AGING OUT – President Bush has signed the Child Status Protection Act, which prevents certain non–U.S. citizen children from "aging out" of eligibility to immigrate as children when they turn 21 years of age. The act was signed into law on Aug. 6, 2002. Its major provisions are summarized below.

Children of U.S. citizens. Under the new law, the following three categories of children are classified as immediate relatives, even though they have reached the age of 21 before the final adjudication of their applications for permanent residence:

• children of U.S. citizens who are under the age of 21 on the date their parents file an I-130 petition for them;

• children whose permanent resident parents naturalize after filing I-130s for them, as long as they were under the age of 21 on the date their parents naturalized; and

• married sons and daughters who divorce after their U.S. citizen parents file I-130s for them, as long as they were under the age of 21 on the date of their divorce.

Children of permanent residents. The new law creates a formula for calculating age that protects some children from "aging out" of the family preference, employment-based, and diversity categories. The age of child applicants—both as principals and derivatives—is determined by taking the age of the child when the immigrant visa becomes available and subtracting the number of months during which the visa petition was pending.

In the family preference categories, this means that children of permanent residents who are over 21 when their priority dates become current may still immigrate as children if, by subtracting the number of months that their I–130 was pending, their age falls below 21.

This formula can only be used by applicants who remain unmarried and who apply for permanent residence within one year of the date that an immigrant visa becomes available to them. Applicants whose age is determined to be over 21 under this formula are automatically reclassified to the appropriate category (e.g., unmarried sons and daughters of permanent residents) and their original priority date is retained.

Unmarried children of asylees and refugees. As long as they are under the age of 21 on the date their parents apply for asylum or refugee status, children of asylees and refugees who seek derivative status continue to be classified as children if they turn 21 while their parents' asylum and refugee applications are pending. The same rule is used when derivative children apply for permanent residence as asylees.

Unmarried sons and daughters of naturalized citizens. Because the first preference category (unmarried sons and daughters of U.S. citizens) for the Philippines has become far more backlogged than the 2B category (unmarried sons and daughters of permanent residents), Filipinos who naturalized unwittingly lengthened the time it would take for their sons and daughters to immigrate. The new law now allows unmarried adult sons and daughters whose permanent resident parents naturalize after filing I-130s for them to choose to proceed with their cases as if their parents

had never naturalized. Sons and daughters who want to take advantage of this provision must file a written statement with the attorney general that they do not want their petitions to be converted to the first preference category or that they want to revoke a petition that has already converted.

Battered children. The Child Status Protection Act specifies that none of its provisions can be construed to limit or deny the rights or benefits provided to "aged out" battered immigrant children under section 204 of the Immigration and Nationality Act.

Effective date. The law took effect on the date of enactment and applies to cases pending with the Immigration and Naturalization Service or the U.S. State Dept. on or after that date. This means that unmarried children who "aged out" before the law passed may be able to retain immediate relative status as long as a final determination had not been made on their applications for adjustment of status or an immigrant visa.

AG ISSUES PROPOSED RULE GOVERNING 212(c) RELIEF FOR LPRs WITH CERTAIN CONVICTIONS PRIOR TO APR. 1, 1997 – The attorney general has issued a proposed rule that would establish procedures governing applications for relief under section 212(c) of the Immigration and Nationality Act.

The proposed rule, which comes as a result of the Supreme Court's ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001), would implement a narrow interpretation of the decision. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) barred 212(c) relief for individuals who are deportable because of specified criminal offenses, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) repealed section 212(c). However, in *St. Cyr*, the Court ruled that the AEDPA restrictions on eligibility for 212(c) relief do not apply to individuals who pled guilty to the disqualifying conviction prior to the enactment of the AEDPA and that this relief remains available for such individuals even if they are in removal proceedings under the IIRIRA.

The proposed rule allows individuals in the same situation as the petitioners in *St. Cyr* to move to reopen their cases to apply for 212(c) relief. However, under the rule relief would not be available to individuals whose convictions were the result of a trial rather than a guilty plea. Nor would it be available to individuals who were already deported as a result of the attorney general's retroactive interpretation of the AEDPA, even though the interpretation was invalidated by *St. Cyr.*

In order to qualify for 212(c) relief under the proposed rule, an individual must meet the following criteria: he or she must (1) be a lawful permanent resident, or have been an LPR prior to receiving a final order of deportation or removal; (2) have a lawful unrelinquished domicile in the United States for at least seven years (or have had a lawful unrelinquished domicile for at least seven years prior to receiving a final order of deportation or removal); (3) be admissible (the only grounds of inadmissibility that would apply under the rule are INA sections 212(a)(3) (for security and terrorism grounds) and 212(a)(10)(C) (for international child abductors; as explained below, the proposed rule mistakenly cites section 212(a)(9)(C) instead of 212(a)(10)(C), but presumably this will be corrected); (4) be deportable or removable on a ground that is comparable to a ground of exclusion or inadmissibility; and (5) not be barred from applying for 212(c) relief under the law as it existed at the time that the individual pled guilty or *nolo contendere*.

The requirement described in (3) above is intended to reflect the two grounds of exclusion that could not be waived by section 212(c). However, the rule's citation to INA section 212(a)(9)(C) is mistaken, since this ground was renumbered by the IIRIRA. The ground of inadmissibility referenced as 212(a)(9)(c) in section 212(c) prior to the enactment of IIRIRA is now section 212(a)(10)(C), which refers to individuals who are inadmissible for participating in international child abduction.

The requirement described in (4) above is based on the history of section 212(c), which was originally enacted as a waiver of grounds of exclusion. But it was subsequently applied by the Board of Immigration Appeals to waive grounds of deportability, where the ground was analogous to a ground of exclusion that can be waived by section 212(c). Thus, the BIA held that 212(c) relief was not available for an individual deportable for entry without inspection, because there was no ground of exclusion corresponding to this ground of deportability. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 280 (Att'y. Gen. 1991).

Because section 212(c) was amended by the AEDPA, the requirement described in (5) above applies differently to individuals who were convicted prior to the enactment of the AEDPA and those convicted subsequently. For individuals who pled to a crime prior to the Apr. 24, 1996, enactment of the AEDPA, it means that if the individual was convicted of an aggravated felony, he or she must not have actually been incarcerated for five years or more, since this would disqualify the individual from 212(c) relief under pre-AEDPA law. For individuals who pled to a conviction between Apr. 24, 1996, and the Apr. 1, 1997, effective date of the IIRIRA, the individual must be eligible for relief under section 212(c) as it was modified by the AEDPA. In other words, the individual is not eligible for relief if he or she received a conviction for an aggravated felony, a controlled substance offense, a firearms offense, or two or more crimes involving moral turpitude for which the individual received a sentence of at least one year.

Individuals who did not plead guilty or *nolo*, but instead were convicted after trial, may not benefit from the proposed rule. The rule also bars individuals from obtaining relief if they have been deported and are outside of the United States, or if they entered the U.S. unlawfully after having been deported.

Individuals who have final orders of deportation, exclusion, or removal but who are eligible for relief under the rule would be able to file a motion to reopen their cases under the proposed rule. The motion, and the envelope containing it, would need to identify it as a "special motion to seek 212(c) relief." The normal time and number limitations on motions to reopen would not apply to this special motion, but eligible individuals may file only one such special motion. The special motion would have to be filed no later than 180 days after the effective date of a final rule implementing these proposals. The filing of a special motion does not stay the execution of a final order, and applicants who need a stay would also have to file an application for a stay.

Individuals who previously filed a motion to reopen under the "*Soriano* regulations" that were issued on Jan. 22, 2001, would not need to file a special motion under the proposed rule (the *Soriano* regulations, issued prior to the decision in *St. Cyr,* retreated from the attorney general's ruling in *Matter of Soriano,*

21 I. & N. Dec. 516 (Att'y. Gen. 1997) and allowed LPRs who were placed in deportation proceedings prior to the enactment of the AEDPA to apply for 212(c) relief. For more information on these regulations, see "EOIR Issues Final Rule to Allow Some LPRs with Pre-AEDPA Convictions to Apply for 212(c) Waivers," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 4).

Comments to the proposed rule must be submitted on or before Oct. 15, 2002, in order to be taken into account when the final rule is developed. 67 Fed. Reg. 52,627–33 (Aug. 13, 2002).

TPS EXTENDED FOR MONTSERRAT AND SOMALIA – In two separate notices, Attorney General John Ashcroft has extended temporary protected status (TPS) for an additional year to nationals of Montserrat and Somalia. The designation for Somalis is effective from Sept. 17, 2002, until Sept. 17, 2003, and the effective period for nationals of Montserrat is from Aug. 27, 2002, until Aug. 27, 2003. To maintain TPS and work authorization, nationals of either country must reregister during a designated 60-day period. For nationals of Montserrat, that period began on July 17, 2002, and ends on Sept. 16, 2002. For Somalis, the period runs from July 26, 2002, until Sept. 24, 2002.

The Immigration and Nationality Act authorizes the attorney general to grant TPS to individuals in the United States who are nationals of countries that are experiencing armed conflict, environmental disaster, or other extraordinary and temporary adverse conditions. TPS may also be granted to individuals of no nationality who last habitually resided in a country whose nationals are eligible for TPS. The attorney general has determined that because civil conflict continues in Somalia and hazardous volcanic activity persists in Montserrat, extensions of TPS are warranted for eligible people from both countries. The attorney general estimates that there are 327 nationals of Montserrat and 250 nationals of Somalia who are eligible for reregistration.

To reregister for the extension, applicants must submit the following:

- Form I-821 (without the $50 filing fee);
- Form I-765 (Application for Employment Authorization); and
- two identification photographs (1½ x 1½ inches).

All applicants must file both forms with the local Immigration and Naturalization Service district office that has jurisdiction over the their place of residence. If the applicant wishes only to reregister and does not want work authorization, a filing fee is not required. However, all applicants seeking an extension of work authorization must submit the $120 filing fee, or a fee waiver request and affidavit, with the work authorization application (for waiver requirements, *see* 8 C.F.R. section 244.20). Information concerning the extensions may be obtained through the INS National Customer Service Center at 800-375-5283, or from the INS web site, www.ins.usdoj.gov.

Applicants for an extension of TPS do not need to submit new fingerprints or the accompanying $50 fee. Children who are TPS beneficiaries and who have reached the age of 14 but were not previously fingerprinted must pay the $50 fingerprint fee with their application for extension.

TPS registrants who need to travel outside the U.S. during the coming year must receive "advance parole" from their local INS office prior to departing the country. Failure to do so may jeopardize their ability to return to the U.S. Advance parole allows individuals to travel abroad and return to the U.S. and is issued on a case-by-case basis. Individuals who are granted TPS may apply for advance parole by filing Form I-131 at their local INS district office. However, individuals who have accrued more than 180 days of unlawful presence in the U.S. should not travel abroad, because even with advance parole they will be subject to the 3- or 10-year "unlawful presence" bars to admission when they seek to return to the U.S.

Some nationals of Montserrat or Somalia may qualify for late initial registration for TPS under 8 C.F.R. section 244.2(f)(2). To apply for late initial registration, applicants must

- be a national of the designated country;
- have been "continuously physically present" in the U.S. since the original designation (Aug. 28, 1997, for Montserrat; Sept. 4, 2001, for Somalia);
- have continuously resided in the U.S. since Aug. 22, 1997 (for Montserrat), or Sept. 4, 2001 (for Somalia);
- be admissible as an immigrant except as provided under INA section 244(c)(2)(A); and
- not be ineligible under INA section 244(c)(2)(B) (i.e., they must not have committed a felony and two misdemeanors in the U.S. nor be ineligible for admission under INA section 208(b)(2), which bars persecutors of others, persons who have committed certain crimes, and persons deemed security risks).

An applicant for late initial registration must also show that during the initial registration period (Aug. 28, 1997, through Aug, 27, 1998, for Montserrat; Sept. 4, 2001, through Sept. 17, 2002, for Somalia), he or she

- was a nonimmigrant or had been granted voluntary departure status or any relief from removal;
- had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal or change of status pending or subject to further review or appeal;
- was a parolee or had a pending request for an extension; or
- was the spouse or child of an individual who is currently eligible to be a TPS registrant.

An applicant for late initial registration must enroll no later than 60 days from the expiration or termination of the conditions listed above.

67 Fed. Reg. 47,002–04 (Jul. 17, 2002) (Montserrat);
67 Fed. Reg. 48,950–51 (Aug. 5, 2002) (Somalia).

INS PROPOSES CREATION OF ONLINE CASE STATUS SERVICE – The Immigration and Naturalization Service has proposed to launch a service that would provide case status information to individual applicants and their representatives via the internet. To look up their case's status online, applicants would have to type their case receipt number into a web-based application. Once applicants made an inquiry through the web-based service, they would be able to request e-mail notification of further status changes. The INS also proposes to provide a toll-free telephone number that would allow applicants to check on the status of their cases through an interactive voice response telephone system.

The online case status service was proposed in a Federal Register notice published Aug. 13, 2002. Comments on the proposal are due on or before Oct. 15, 2002.

Litigation

SETTLEMENT IN FAMILY UNITY CLASS ACTION PRELIMINARILY APPROVED – The plaintiffs and the Immigration and Naturalization Service have settled a class action lawsuit that challenged the agency's failure to timely adjudicate applications for Family Unity status and related requests for employment authorization. The settlement applies only to cases filed with or transferred to the INS California Service Center. Under its terms, the INS will dedicate at least a set amount of resources to processing initial Family Unity applications as long as a backlog exists, and will issue employment authorization to applicants for renewal of Family Unity status within 90 days of the date on which they apply for renewal. The federal district court in Santa Ana, California, preliminarily approved the settlement on Aug. 26, 2002, and set a fairness hearing to take place on Oct. 28, 2002.

Enacted as part of the Immigration Act of 1990, the Family Unity program allows the spouses and children of permanent residents who legalized their immigration status through the 1986 amnesty program to remain and work in the U.S. This relief is mandatory under the statute; the INS may not deport persons who are eligible for Family Unity and must grant them employment authorization. The INS decided to implement the statute by granting voluntary departure and work authorization to eligible individuals in two-year increments.

The suit charged that the INS was refusing to process Family Unity and employment authorization applications. At the time the suit was filed, in August 2002, many applicants at the INS California Service Center had been waiting more than two years for the INS to issue what should be routine approvals. During the course of settlement discussions in the case, the INS significantly reduced this backlog.

The plaintiffs are represented by the American Immigration Law Foundation, the Immigrant Legal Resource Center, and NILC. Interested parties may obtain copies of the settlement agreement by contacting NILC or logging on to NILC's website (www.nilc.org). A copy of the Notice to Class, which contains a summary of the agreement and explains the procedures that class members may use should they object to the settlement, is also available on the NILC website. Any objections must be postmarked by Oct. 7, 2002.

Escutia, et al. v. Reno, No. SA CV 00-841 AHS (C.D.Cal., filed Aug. 25, 2000).

9TH CIRCUIT RULES HABEAS JURISDICTION NOT AVAILABLE TO REVIEW CHALLENGES TO BIA EXERCISE OF DISCRETION – A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit has ruled that federal habeas jurisdiction to review decisions made by the Board of Immigration Appeals in deportation cases does not extend to challenges to the BIA's exercise of discretion. The majority of the panel concluded that habeas jurisdiction in immigration cases under 28 U.S.C. section 2241 encompasses claims of constitutional or statutory error but not challenges to the exercise of discretion. Judge Margaret McKeown filed a concurring opinion, agreeing with the result in this particular case but disagreeing with the majority "to the extent that its opinion can be read to bar habeas review . . . in all cases that implicate abuse of discretion."

The petitioner in this case, a Mr. Gutierrez-Chavez, is a Colombian national who was admitted to the United States as a lawful permanent resident in 1979, when he was 13 years old. In 1990 he suffered an injury at work that disabled him, and when his disability payments stopped in the following year, he became desperate for money. Having little other recourse, he sold drugs over a period of approximately six months in 1991. That same year he was arrested and charged with possession of cocaine with intent to sell. After pleading guilty, he was sentenced to three years' incarceration but released on parole after serving approximately two years.

In 1992 the Immigration and Naturalization Service commenced deportation proceedings against Gutierrez based on his conviction for an aggravated felony. At his deportation hearing in 1994, Gutierrez applied for a waiver under section 212(c) of the Immigration and Nationality Act. His wife and parents also testified in support of the application. However, the immigration judge denied the waiver, finding that Gutierrez "failed to demonstrate sufficient favorable equities which offset the negative factors in his case, in particular his 1991 conviction for an aggravated felony." The IJ also found that Gutierrez's deportation to Colombia would not cause great hardship because all of his family members were from Colombia and were still primarily Spanish speakers. Gutierrez appealed the ruling to the BIA.

On appeal, Gutierrez raised three claims. He claimed that (1) the IJ incorrectly weighed the equities in his case in denying a 212(c) waiver; (2) the language interpretation provided at the hearing was inadequate, thereby denying him due process; and (3) the IJ was biased against him because Gutierrez was from Cali, Colombia. The BIA affirmed the IJ in a per curium opinion, rejecting all three claims.

In August 1996, Gutierrez filed a petition for review of the BIA's ruling. The Ninth Circuit dismissed the petition for lack of jurisdiction, citing section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (which eliminated jurisdiction over petitions for review filed by individuals who were deportable based on specified criminal convictions, including aggravated felonies). Gutierrez then filed a habeas petition in federal district court, raising the three claims that he had made with the BIA.

The district court concluded that claims of abuse of discretion may be raised in a habeas petition under 28 U.S.C. section 2241. However, the court concluded that in this case the BIA did not abuse its discretion, noting that to mitigate his serious criminal offense Gutierrez would have to show unusual or outstanding equities. The district court also rejected Gutierrez's due process claims, finding that he did not show that better interpretation service at his hearing would have made any difference to his case, nor that the IJ was biased against him. Gutierrez appealed this decision to the Ninth Circuit.

As noted above, a majority of the three-judge panel found that jurisdiction under section 2241 is limited to claims of constitutional or statutory error and does not extend to review of "purely discretionary decisions." The majority did note that "[h]abeas is available to claim that the INS [sic] somehow failed to exercise discretion in accordance with federal law or did so in an unconstitutional manner." However, "Habeas is not available to claim that the INS [sic] simply came to an unwise, yet lawful, conclusion

when it did exercise its discretion." The court therefore found that it lacks jurisdiction to review Gutierrez's claim that the BIA did not properly weigh the equities in denying him 212(c) relief. The court found that habeas jurisdiction does properly encompass the due process claims raised by Gutierrez, but agreed with the district court that Gutierrez failed to establish these claims.

In Judge McKeown's concurring opinion, she disagreed with the majority to the extent that its opinion might be read to bar habeas review of any claim of abuse of discretion. She noted that the Supreme Court, in its recent decision in *INS v. St. Cyr*, 533 U.S. 289, 303–04 (2001), specifically discussed "the historical use of habeas corpus to remedy unlawful executive action," including "the improper exercise of official discretion." She distinguished between "manifest abuse of discretion," which is a violation of law reviewable by habeas, and claims such as Gutierrez's that seek to challenge the BIA's reasoned exercise of discretion. "I have no quibble with the long-standing proposition that we will not disturb the BIA's discretion under section 212(c), as long as it considered relevant factors, explained its outcome, and is consistent with its own precedent," Judge McKeown wrote. But, she noted, the standard and scope of review that is available should not be confused with a lack of jurisdiction to review. She concluded that, to the extent that the majority's opinion could be read to limit jurisdiction over discretionary decisions only to those cases where the BIA completely fails to exercise discretion, it is unduly narrow.

Gutierrez-Chavez v. INS, No. 00-56149 (9th Cir. July 31, 2002).

9TH CIRCUIT RULES INDEFINITE DETENTION OF INADMISSIBLE NONCITIZEN UNLAWFUL – A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit has ruled, in a case titled *Xi v. INS*, that the Immigration and Nationality Act does not authorize the indefinite detention of inadmissible noncitizens who are subject to a final order of removal.

The decision follows the Supreme Court's ruling in *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, a case concerning noncitizens who had held lawful permanent resident status, the Court held that section 241(a)(6) of the INA does not permit the detention of noncitizens subject to final orders once execution of the removal order is no longer reasonably foreseeable (for more regarding *Zadvydas*, see "Supreme Court Holds That INA Does Not Authorize Indefinite Detention," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2001, p. 10).

Writing for the majority, Judge Margaret McKeown found that *Xi v. INS* is controlled by *Zadvydas*, since the issue in question concerns the interpretation of the same statutory language. Judge Pamela Ann Rymer filed a dissent. In her view, because inadmissible noncitizens do not have the same constitutional rights as LPRs, in cases involving inadmissible noncitizens there is no need to narrowly construe the statute to avoid constitutional concerns. *Xi v. INS*, No. 01-35867 (9th Cir. Aug. 1, 2002).

9TH CIRCUIT REMANDS CASE DUE TO IJ'S BOILERPLATE CREDIBILITY FINDINGS – Stating that "Cookie cutter findings are the antithesis of individual determinations required in asylum cases," the Ninth Circuit Court of Appeals has remanded an asylum case in which the immigration judge used boilerplate demeanor findings to issue a denial.

The case was that of a Ms. Paramasamy, a Tamil woman from Sri Lanka whom the Sri Lankan army suspected of being a guerrilla. Paramasamy lived in Jaffna, an area under control of a guerrilla group, the Liberation Tigers of Tamil Elam. In 1995, when the national army began occupying Jaffna, Paramasamy, along with other Tamils, including guerrillas, tried to flee the area but was caught by the army and confined for about a month. She testified that while she was being held, soldiers threatened and sexually assaulted her. She also alleged that government officials continued to harass her after the army released her. She finally came to the United States, where she applied for asylum.

The immigration judge denied the application, concluding that Paramasamy was not credible. The IJ's decision set forth detailed findings about Paramasamy's credibility and demeanor, and also speculated on her motives for leaving Sri Lanka, concluding that if she had in fact been sexually assaulted she would have disclosed this fact to the INS officers who questioned her at the port of entry. On appeal to the Board of Immigration Appeals, Paramasamy noted that, although the IJ's findings about her demeanor purported to be specific to her case, in fact the IJ made the same findings verbatim in two other cases. The BIA nevertheless upheld the IJ's decision, finding that the duplicate passages did not constitute a basis to disturb the IJ's findings regarding Paramasamy's demeanor.

The court of appeals began its analysis by noting that a judge's findings regarding demeanor are accorded substantial deference. Despite such deference, however, the court declined to accept the IJ's demeanor findings and held that the denial of asylum to Paramasamy could not be supported by substantial evidence. Citing *Platero-Cortez v. INS*, 804 F.2d 1127 (9th Cir. 1986), the court stated that deference to a judge's credibility findings presupposes that each case is evaluated on its own merits and that it "strained credulity" to accept that three different people would testify in exactly the same manner at the same point in their testimony.

Nor did the court of appeals accept the IJ's other findings. For example, it found fault with the way the IJ substituted her own conjecture for the evidence in the record. The court found no support for the IJ's findings that Paramasamy fled Sri Lanka out of a desire to find a spouse or obtain better job opportunities.

The IJ had also concluded that if Paramasamy had been sexually assaulted, she would have revealed this fact earlier than she did. The court of appeals, however, noted that when they interviewed her at the airport, INS officers had not asked Paramasamy any details about her detention by the Sri Lankan military. Therefore, her nondisclosure upon seeking to enter the U.S. could not be deemed inconsistent with her later testimony. More importantly, the court went on to take note of and discuss the fact that women who have suffered sexual abuse have difficulty reporting it. Accordingly, the court remanded the case so that an individualized determination can be made on the particular facts of

Paramasamy's case.

Paramasamy v. Ashcroft, 295 F.3d 1047 (9th Cir. 2002).

6TH CIRCUIT AFFIRMS INJUNCTION PROHIBITING BLANKET CLOSING OF IMMIGRATION HEARINGS – The U.S. Court of Appeals for the Sixth Circuit has affirmed an injunction that prohibits the government from closing immigration hearings to the public and the press without an individualized showing of justification.

The ruling affirms a preliminary injunction issued by a district court in Michigan, in a lawsuit brought by the press challenging the closing of removal hearings in the case of Rabih Haddad. Haddad's case had been closed pursuant to a memorandum issued by Chief Immigration Judge Michael Creppy (for background on this memo, see "Chief Immigration Judge Issues Guidelines for Secret Removal Hearings," IMMIGRANTS' RIGHTS UPDATE, Dec. 20, 2001, p. 3; for background on the district court injunction, see "Michigan District Court Preliminarily Enjoins Closed Removal Hearings," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 6).

The court concluded that the district court did not abuse its discretion in issuing the injunction. It also found that the plaintiffs are likely to prevail on their claim that the blanket closing of hearings without an individualized showing justifying the action violates the First Amendment.

Detroit Free Press v. Ashcroft, No. 02-1437 (6th Cir. Aug. 26, 2002).

Employment Issues

NLRB ISSUES GUIDANCE ON PROCEDURES IMPLEMENTING *HOFFMAN PLASTIC* DECISION – The National Labor Relations Board (NLRB) has issued guidance to its regional and field offices on how to handle cases involving workers who may be undocumented, in light of the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* (122 S. Ct. 1275 (2002). The guidance was issued in the form of a memorandum from the NLRB's general counsel, who prosecutes violations of the National Labor Relations Act (NLRA), to the agency's regional offices.

Issued on July 19, 2002, the memo reaffirms that all workers "enjoy protections from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status" and that investigations into alleged violations of the NLRA should begin with the "presum[ption] that employees are lawfully authorized to work." In the guidance, the general counsel states that questions concerning an employee's immigration status do not belong in the initial phase of the investigation, which concerns only liability on the part of the employer. Rather, immigration status questions should be left to the NLRB compliance phase. (Compliance is a separate proceeding that involves only the determination of remedies, and it takes place after the NLRB has established that the employer violated the worker's rights.) Accordingly, the regions have been instructed to "continue to object to [an employer's] attempt to elicit evidence concerning an employee's asserted undocumented status in order to escape unfair labor practice liability." The general counsel also made clear that immigration status is irrelevant to the determination of which employees are eligible to vote in a union election.

Furthermore, the guidance directs agents not to conduct investigations into employees' immigration status on their own initiative. Instead, agents are to consider questions concerning immigration status only when the "employer establishes that it knows or has reason to know that a discriminatee is undocumented." According to the general counsel, "a mere assertion is not a sufficient basis to trigger such an investigation." Once the employer makes that showing, the agent investigating the charge should ask the party that filed the complaint and/or the employee to respond to the employer's evidence.

With respect to back pay—the remedy at issue in the *Hoffman* case—the NLRB's guidance instructs agents not to seek it once evidence establishes that an employee was not authorized to work during the back pay period. However, following the lead of the U.S. Dept. of Labor, the general counsel concluded that *Hoffman* does not preclude the award of back pay "for work previously performed under unlawfully imposed terms and conditions, [such as] a unilateral change of pay or benefits." The general counsel has not yet decided whether back pay is available to a worker who was demoted to a lower-paying position in violation of the NLRA.

In cases where back pay is not available, the general counsel encouraged regional offices to consider pursuing other types of remedies, including nontraditional remedies, particularly tailored to the facts of each case. Importantly, "in most cases, Regions should seek to remedy unfair labor practices against undocumented workers by requiring the [NLRB] notice [determining that the employer violated the NLRA] to be read to employees." The NLRB's standard practice has been to require that the notice simply be posted on a bulletin board or another area accessible to employees.

Despite the Supreme Court's decision in *Hoffman,* the NLRB general counsel found that a conditional reinstatement order is still a viable remedy in cases where an employer knowingly hired an undocumented worker. The NLRB's order of conditional reinstatement was affirmed by the Second Circuit in *A.P.R.A. Fuel Oil Buyers Group, Inc. v. NLRB,* 134 F.3d 50 (2d Cir. 1997), a case involving an employer who knowingly hired undocumented workers. In *A.P.R.A.*, the NLRB ordered reinstatement conditioned on the workers' ability to establish their work authorization and to comply with the I-9 employment eligibility verification requirements at the time of returning to work. Under *A.P.R.A.*, workers must be given a reasonable period of time to adjust their status in order to comply with the I-9 process. In cases where the employer did not knowingly hire the undocumented worker and the employer can show that the worker would not have been hired had the employer known about her lack of work authorization, then the reinstatement remedy is not available. This holds true even if the worker is authorized to work at the time the NLRB issues the reinstatement order. While the general counsel found

that an order of conditional reinstatement is still appropriate in some cases, the memorandum also states unequivocally that back pay is no longer available even in an *A.P.R.A.*–type scenario, where the employer knowingly hired undocumented workers.

Finally, the general counsel left open the possibility that remedies traditionally considered "extraordinary," and normally sought only where an employer is found to have egregiously violated the NLRA, may be available to undocumented workers. For example, unions may be granted access to the worksite during organizing campaigns in cases involving unfair labor practices.

The general counsel's memorandum, "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after *Hoffman Plastic Compounds, Inc*.," can be found at www.nlrb.gov/gcmemo/gc02-06.html.

NLRB GC-02-06 (July 19, 2002).

Immigrants & Welfare Update

MASSACHUSETTS SUPREME COURT UPHOLDS 6-MONTH RESIDENCY REQUIREMENT FOR STATE TANF PROGRAM – The Supreme Judicial Court of Massachusetts has rejected a challenge to the six-month residency requirement in a state welfare program for immigrants. The state program provides assistance to immigrants who are ineligible for Temporary Assistance for Needy Families (TANF) due to the 1996 federal welfare law. While immigrants applying for the state-funded program must have lived in Massachusetts for six months, there is no such residency requirement for the immigrants (or U.S. citizens) who are eligible for federal TANF in Massachusetts.

Plaintiffs asserted that the state's imposition of a residency requirement on some lawfully present immigrants, but not others, violates the equal protection clauses of the U.S. Constitution and the Massachusetts Declaration of Rights. However, the court refused to compare the treatment of immigrants under the state program against their treatment under the federal program. Instead, it examined only the restrictions in the separate state program. Concluding that the discrimination in the state program is based on residency in Massachusetts, rather than immigration status, the court applied a "rational basis" standard of review. Had the court found that the state's discrimination was based on immigration status, it would have applied the more stringent "strict scrutiny" review.

The court found sufficient rational basis to support the six-month state residency requirement. In rejecting the plaintiffs' claims, the court deemed it significant that Massachusetts created a separate program intended only to help immigrants who were rendered ineligible for federal welfare. In this way, it distinguished New York's state-funded medical program, which had been available to both citizens and immigrants before the state restricted coverage for certain lawfully present immigrants. New York's highest court found that such discrimination against lawfully present immigrants was unconstitutional. (See *Aliessa vs. Novello,* 96 N.Y. 2d 418 (2001); "N.Y. Law Restricting Immigrants' Eligibility for State Medical Aid Found Unconstitutional," IMMIGRANTS' RIGHTS UPDATE, June 29, 2001, p. 15.) In ruling against the plaintiffs, the Massachusetts court also considered the consequences of requiring legislatures to enact programs that cover either "all or none" of the immigrants rendered ineligible due to the federal welfare law.

Doe v. Commissioner of Transitional Assistance, __Mass.__ , 2002 Mass. LEXIS 526 (Mass. Aug. 15, 2002).

Miscellaneous

TRAINING ON REMEDIES FOR IMMIGRANT CRIME VICTIMS TO BE HELD IN LOS ANGELES – In conjunction with NILC and a number of other agencies, the National Immigration Project of the National Lawyers Guild (NLG) will be conducting a training on remedies for immigrant victims of crime. "New Choices for Immigrant Victims of Crimes: An Interdisciplinary Training" will be held on Oct. 15, 2002, in Los Angeles, preceding the NLG's national conference.

The event will be a day-long conference for attorneys, service providers, and others who work with noncitizen victims of crimes. National and local experts will provide an overview of immigration options for victims of crimes, and the material will be presented in two tracks. Intended for persons with experience advising on Violence Against Women Act (VAWA) self-petitions, the immigration training track will cover: advanced self-petitioning strategies; overcoming Immigration and Naturalization Service district problems with VAWA adjustments and U visa interim relief; options and strategies in immigration proceedings; and non-VAWA options.

Registration is $35 in advance and $50 at the door. For more information, including a copy of the registration brochure, interested parties should visit the NLG's website at www.nationalimmigrationproject.org. Cosponsors include the Asian Pacific American Legal Center, the Immigrant Legal Resource Center, the Legal Aid Foundation of Los Angeles, the Los Angeles chapter of the NLG, Public Counsel Law Center, and NILC.

WORKERS' RIGHTS TRAININGS TO BE HELD IN TEXAS, NEBRASKA, AND NORTH CAROLINA – This fall NILC will be continuing its Office of Special Counsel (OSC)–funded series on the rights of immigrant workers, with the next set of trainings to take place *Sept. 13 (Austin, TX), Sept. 20 (Omaha, Nebraska),* and *Sept. 27 (Carrboro, NC).* Cosponsored by numerous local agencies, these events offer advocates and service providers the chance to learn about the latest developments on issues affecting immigrant workers and to share advocacy strategies. Topics to be addressed include: immigration-related employment discrimination; the I-9 employment eligibility verification process and reverification issues; Social Security Administration "no match" letters; and the Supreme Court's recent decision in the *Hoffman Plastics* case.

Registration costs and deadlines vary, depending on the location. For more information on these and other upcoming trainings, interested parties should contact Mike Muñoz, NILC Program Coordinator, at 213-639-3900, ext. 110, or at munoz@nilc.org.

The National Immigration Law Center . . .

. . . is a national public interest law firm whose mission is to protect and promote the rights of low-income immigrants. NILC staff specialize in the immigration, public benefits, and employment rights of immigrants. We serve an unusually diverse consitutency of legal aid programs, pro bono attorneys, immigrants' rights coalitions, community groups, and other nonprofit agencies throughout the United States.

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