



## Immigration Issues

### DREAM ACT PASSES SENATE JUDICIARY COMMITTEE BY LARGE MAJORITY

The Senate Judiciary Committee has voted 16 to 3 to approve the Development, Relief and Education for Alien Minors (DREAM) Act of 2003 and report it to the Senate floor, but not before adopting some changes opposed by immigrant and education advocates. Seven out of the ten committee Republicans and all Democrats voted in favor of the bill. The strong vote increases the odds that the DREAM Act will be enacted during this session of Congress, perhaps in the spring.

The DREAM Act (S. 1545), which was reintroduced in late July of this year, addresses the plight of young immigrants who have spent their formative years in the U.S. but whose future hangs in the balance as a result of current immigration law. Presently, the immigration status of children is dependent on their manner of entry into the U.S. or their parents' immigration status, and generally they are unable to adjust to legal status unless their parents manage to do so. After they grow to young adulthood, immigrant students are treated the same as undocumented immigrants who arrived as adults, with no opportunity to gain

legal status absent exceptional circumstances. No consideration is given to the fact that they have grown up here, nor to any of their own actions. It does not matter whether they have remained in school or stayed out of trouble. The DREAM Act would offer these U.S.-raised youngsters a mechanism by which to obtain legal status.

The changes made by the Senate Judiciary Committee were introduced as an amendment during the committee markup by Sens. Charles Grassley (R-IA) and Dianne Feinstein (D-CA), two cosponsors of the bill. Explaining his motivation for offering the amendment, Grassley said that he had been "sold on this bill for one reason—education, education, education" and had felt "somewhat cheated by the overreach of the legislation" before it was amended.

The following are the most important changes included in the Grassley-Feinstein amendment as adopted by the committee:

- It would require schools to enter DREAM Act beneficiaries' names into the Student Exchange and Visitor Information System (SEVIS), a computerized database that now is used exclusively to track foreign nonimmigrant students who come to the U.S. to attend college on international student visas;

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FOUNDED IN 1979, THE NATIONAL IMMIGRATION LAW CENTER PROVIDES technical help to legal services programs, community-based non-profits, and pro bono attorneys throughout the United States. NILC also counsels impact litigation, conducts policy analysis and trainings,

and publishes legal reference materials. NILC's staff specializes in immigration law and in immigrants' employment and public benefits rights. In addition to this newsletter, NILC produces legal manuals, a referral directory, and other community education materials.

- It would eliminate the community service option, so that all DREAM Act students would be required to attend at least two years of college or spend two years in the military before being granted unconditional lawful permanent resident (LPR) status;
- It would eliminate DREAM Act students' eligibility for federal student aid grants, including Pell grants. (However, as passed by the committee, the bill retains the provision that would allow them access to work study and student loans.)

The Grassley-Feinstein amendment came as a surprise to advocates. It was not circulated to the committee until late in the evening before the markup, and Feinstein did not announce her cosponsorship until the markup itself. As a result, there was not adequate time to formulate an effective response to the most problematic changes, some of which appear sensible on the surface but do not stand up to scrutiny.

Despite the changes, immigrant and education advocates are encouraged by the overwhelming and strongly bipartisan committee vote to report the DREAM Act to the Senate floor, and they are hopeful that the most egregious changes made by the Grassley-Feinstein amendment can be revisited or moderated as the bill moves towards final passage.

The following details the changes made to the DREAM Act as it was approved by the Senate Judiciary Committee on Oct. 23, 2003. The summary of the DREAM Act on NILC's Web site has been updated to reflect these changes.

#### COMMUNITY SERVICE OPTION

The DREAM Act would set up a process by which undocumented young people could become lawful permanent residents of the U.S. A student who has grown up in the U.S., has good moral character, and has graduated from a U.S. high school would be granted "conditional" status, normally for six years. At the end of the six years, the student would be granted full LPR status if certain conditions were met. Under the previous version of the DREAM Act, the condition could have been met in any of three ways: (1) by going to college for at least two years; (2) by enlisting in the military for at least two years; or (3) by performing at least 910 hours of community service. The Grassley amendment eliminates the community service option, so that all DREAM beneficiaries would be required to either attend college or enlist in the military, or else face deportation. The bill provides for hardship exemptions from these requirements, however.

In defending the amendment, Grassley and Feinstein argued that the 910-hour requirement would be minimal—only three hours per week if spread across all six years. "Volunteerism is good for the community as a whole," said Grassley, "but the purpose of this bill is to enhance the productivity of the individual coming here who is in a situation through no fault of their own, and education is the way of doing it."

This change is ironic in that it would, in essence, *require* college attendance (or military service) for a group of young people who currently are effectively *precluded* from higher education (and also from military service). Compulsory college attendance is problematic for a number of reasons. College is not the best option for all young people, and not everyone is prepared or financially able to attend college.

Higher education has never been compulsory in the United States. According to the census, only about half of all adult

Americans over age 25 have ever attended any college, and less than 30 percent of all Hispanic adults over 25 have.

#### SEVIS REQUIREMENT

The Grassley-Feinstein amendment would impose a new requirement that schools enter students helped by the DREAM Act into the Student Exchange and Visitor Information System. SEVIS, a computer tracking system for the approximately 500,000 international students, scholars, and scientists in the U.S. on temporary (F and J) visas, was created by Congress in 1996. Participation by all colleges with nonimmigrant international students was mandated by the USA PATRIOT Act of 2001. Schools and universities enter the name and other data for all visiting students into the SEVIS system and are responsible for ensuring that the students remain in compliance with the academic requirements for their visas.

It makes no sense to adopt SEVIS for tracking DREAM students. SEVIS is a trouble-plagued and controversial system intended to prevent misuse of student visas—e.g., by potential foreign terrorists. Most DREAM students will have never known any other home but the United States, so there is no reason whatsoever to link them with nonimmigrant visitors arriving from overseas with the express intent to do harm. Moreover, the SEVIS system is a costly burden on colleges, which generally charge international students between \$100 and \$350 to defray their costs for having to participate in it. Such charges would be much more difficult for most DREAM students to bear than for international students, many of whom come from privileged or wealthy families.

Moreover, the entire SEVIS program will likely have to be reconfigured to accommodate DREAM students, who are not "visiting" and therefore would not possess the information that SEVIS currently requires, such as an F or J visa number, a foreign address, etc. The SEVIS program tracks enrollment and grades, because a student who falls below certain academic standards or drops out loses the right to remain in the U.S. There are no such requirements for DREAM students, other than that they must complete at least two years of credits within six years of obtaining conditional permanent resident status. The changes in SEVIS that would be needed to comply with the Grassley-Feinstein amendment would stress a system that is already fragile, compromising the SEVIS program's antiterrorist purpose.

#### FEDERAL GRANTS

Under current law, LPRs, refugees and U.S. citizens are eligible for all federal higher education grants and loans, including Pell Grants, while undocumented immigrants and many miscellaneous categories of immigrants are ineligible. Under the original DREAM Act, beneficiaries also would have been eligible for these federal higher education loans and grants once they were granted conditional resident status, but the Grassley-Feinstein amendment would eliminate eligibility for federal grants.

This change would create a situation wherein students would be required to go to college to avoid deportation but would not receive the financial help they may need to be able to do so. In support of this provision, Feinstein argued that she did not want "to be in the position of denying a legal person a Pell grant to give it to somebody that is here illegally." In fact, no such trade-

off would be required. Rather, the DREAM Act would effect a small increase in the amount of money available for Pell grants, about \$35 million per year in a program with an annual budget of about \$11 billion. And the return on investment for this expenditure would be enormous. Beneficiaries would earn more money, pay more taxes, and cost less in social services and criminal justice expenditures.

#### OTHER CHANGES

**Retroactivity.** The committee modified the "retroactivity" provision of the DREAM Act so that beneficiaries who have already satisfied the education or military service options before the act's date of enactment would be required to wait at least three years in conditional status before qualifying for full LPR status.

Under current law, with a few exceptions an immigrant can obtain LPR status without going through any conditional status period. The most common exception is adjusting status via marriage to a U.S. citizen. An individual who adjusts status via marriage must endure two years of conditional status before becoming an LPR, and, in most respects, conditional status is identical to LPR status. After the conditional period, the immigrant must apply to U.S. Citizenship and Immigration Services to have the condition removed and full LPR status granted.

The DREAM Act contains a similar conditional period, only it is six years long and has different requirements (as described above). Originally, the retroactivity section of the bill provided that an immigrant who, before the date of the law's enactment, had already satisfied the requirements for lifting the condition could obtain full LPR status without the requisite six-year conditional period. The committee modified this retroactivity provision so that an immigrant who, before the date of enactment, has already satisfied the requirements for lifting the condition would still be required to wait three years in conditional status before qualifying for full LPR status.

**High School Graduation from U.S. Schools.** The committee clarified that the high school graduation requirement must be satisfied by graduation from a high school in the U.S. (The DREAM Act would require a student who has grown up here and stayed out of trouble to graduate from high school before becoming eligible for relief, and this provision clarifies that the high school in question must be a U.S. school.)

**List All Secondary Schools Attended.** The committee added a new requirement for DREAM beneficiaries to list all secondary education institutions they have attended in the U.S. on the petition to lift their conditional status.

The DREAM Act would require a beneficiary who has been granted conditional status to file a petition to remove the condition after the six-year conditional period has ended. The petition would have to contain various facts and information, such as that the immigrant has maintained good moral character during the conditional period. This provision of the Grassley-Feinstein Amendment would require DREAM Act beneficiaries to list all secondary education institutions they have attended in the U.S.

Although many advocates are disappointed with the weaker bill that passed out of the Senate Judiciary Committee, most are committed to maintaining their support for the DREAM Act, with the intention of working to improve it if it goes to the Senate floor early next year.

**US-VISIT: "VERY RISKY" ELECTRONIC ENTRY/EXIT SYSTEM SLATED FOR 2004 DEBUT** – The entry part of a new electronic entry/exit system that U.S. government officials hope will be able to keep more accurate track of who has entered the country, who has exited it, and who has overstayed their nonimmigrant visa will be in place at U.S. air and seaports "starting January 5, 2004," the Dept. of Homeland Security (DHS) has announced. According to the DHS's Oct. 29, 2003, press release, the department expects that the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system "will be in place at 115 airports and 14 major seaports in early 2004" and that it "will be phased in at U.S. land borders throughout 2005 and 2006."

The wording of the announcement ("starting January 5") indicates that the DHS does not expect to have finished installing the US-VISIT system in the air and seaports until sometime after Jan. 5, despite a statutory deadline of Dec. 31, 2003, for doing so. Other statutory deadlines that will be missed, if the announcement's projections hold true, are those for installing the system at the 50 busiest land ports of entry (Dec. 31, 2004) and at all ports of entry (Dec. 31, 2005).

The DHS is rushing to implement the first phase of the system as soon after the initial deadline as possible, despite a warning by the U.S. General Accounting Office (GAO), contained in a Sept. 2003 report, that one of the factors making the US-VISIT program "a very risky endeavor" is its planned use of interim, temporary systems until more permanent (and presumably more reliable) ones can be developed and implemented. Besides being driven by the statutory deadlines, the haste to implement US-VISIT is also a result of pressure the DHS feels to show something for the money that has been poured into the program thus far—\$380 million appropriated for fiscal year 2003 and \$330 million for FY 2004 (though the Bush administration had requested \$444 million for 2004).

When fully implemented, US-VISIT should make it possible to record electronically the entry of non-U.S. citizen visitors into the U.S. as well as their exit from the country, and to verify each visitor's identity via biometric identifiers encoded in their travel documents. In theory, the system also will tell immigration officials which foreign visitors have failed to leave the country by the date they were supposed to have left.

Under the new system, all arriving nonimmigrant visitors will be interviewed by U.S. Customs and Border Protection (CBP) officers, who will review their travel documents and ask them questions about their planned stay in the U.S. While being interviewed, each visitor will be required to place the index finger of each hand on an electronic fingerprint scanner, and a photograph will be taken of the visitor's face. The "biographic" information (i.e., name, address, etc.) the visitor provides, along with the biometrics data (i.e., the fingerprint scans and photograph), will be run through the system to verify the visitor's identity and check whether he or she is on a "watch list" (i.e., a list of suspected terrorists, wanted criminals, etc.). Depending on the results the officer receives from the system, the officer will either admit the visitor or require that he or she be examined further.

When they are about to depart the U.S., visitors will "check out" at a special "departure kiosk" located in the secure area of the air or seaport through which they are departing. The check-out process will consist of visitors again having their fingerprints

scanned, as well as their travel documents. This process is intended to be a do-it-yourself one, though plans call for the kiosks to be staffed by attendants who will help people needing it. However, the departure kiosk part of the system will not be operational until sometime later in 2004, according to the DHS. Until then, electronic passenger manifests that air and sea carriers are required by law to transmit to immigration authorities before their vessels land in or leave the U.S. and I-94 forms that are completed upon passengers' arriving in and departing from the U.S. "will be reconciled to verify departures."

The electronic records of visitors who fail to check out of the U.S. via the kiosks or within the time allotted by their visas will be flagged, according to the DHS. The consequences of failing to comply with the terms of their visas or with the US-VISIT system requirements may include being removed from the U.S. or refused entry into the U.S. on a subsequent attempt to visit.

In order to do the job required of it, the US-VISIT system will need to be able to collect and record electronically all the information it uses. To make this possible, the essential information contained in the travel documents used by persons seeking to visit the U.S. will have to be "machine-readable"—i.e., readable by a scanning machine that sends the information to a computer database. For this reason, section 303 of the Enhanced Border Security and Visa Entry Reform Act of 2002 requires that, by Oct. 26, 2004, countries that are part of the Visa Waiver Program—i.e., those whose nationals may travel to the U.S. as visitors without first obtaining a visa—must, in order to continue their participation in the program, certify that they have instituted programs for issuing tamper-resistant, machine-readable passports that incorporate "biometric and document-authentication identifiers that comply with applicable . . . standards established by the International Civil Aviation Organization." And by that same date, visas and other travel documents issued by the Depts. of State or Homeland Security also must incorporate biometric identifiers and be machine-readable. After Oct. 26, 2004, no person from a country that is part of the Visa Waiver Program will be granted entry to the U.S. without a visa unless his or her passport incorporates biometric identifiers and is machine-readable.

If it works as planned, ultimately the US-VISIT system will be able to tell those with access to it the dates that a visitor arrived and departed the U.S., the visitor's nationality, and whether the visitor is an immigrant or a nonimmigrant. In addition, the system will contain the biometric identifiers—i.e., two scanned fingerprints and one photograph—for each nonimmigrant visitor. (However, unless current policy is changed, "most Canadians [will not be] subject to US-VISIT," according to a question-and-answer "backgrounder" available from the DHS at [www.dhs.gov/interweb/assetlibrary/USVISIT\\_QnA\\_102703.PDF](http://www.dhs.gov/interweb/assetlibrary/USVISIT_QnA_102703.PDF).) And who will have access to this information? According to the DHS, the long list of those with access will include CBP officers at ports of entry, special agents of U.S. Immigration and Customs Enforcement (ICE), adjudications staff at U.S. Citizenship and Immigration Services (CIS) offices, U.S. consular officers, as well as "appropriate" federal, state, and local law enforcement personnel.

However, those who are charged with developing and implementing US-VISIT will have to overcome formidable obstacles if the system is to work reliably as conceived. As the GAO's Sept. 2003 report notes, the task that US-VISIT is intended to accom-

plish is "large in scope and complex." For example, it involves multiple federal departments and agencies—including ICE, CBP, CIS, the Transportation Security Administration, the Depts. of Transportation and State, and the General Services Administration—and it necessitates "interconnect[ing] about 20 existing systems" that are not necessarily compatible with each other. In addition, the existing systems on which US-VISIT will have to rely, at least initially, have been plagued by troubles of their own, including problems that limit the availability of the data they collect.

In order to meet daunting deadlines while being neither fully staffed nor with the necessary systems in place to do all the planning and research required to develop an efficient, bug-free system, US-VISIT staff and contractors are being forced to make initial assumptions that may later turn out to be deficient or erroneous and thus eventually force sizeable and expensive system overhauls, the GAO report warns. And, especially with respect to land ports of entry, a number of existing facilities are not equipped to handle *existing* processes adequately, much less the new ones that will be necessary to make US-VISIT fully operational. Wait times at land ports of entry that handle a very high volume of traffic shoot up when any new process adds even a couple of seconds to the time it takes to clear each vehicle for entry into the U.S., the GAO report warns. And until interim, and then permanent, systems have been developed and debugged, any planning for and construction of new facilities—or modification of existing ones—will be highly problematic.

All this complexity will make US-VISIT hugely expensive to implement and subject to enormous cost overruns. The DHS's original estimate of the system's total cost—\$7.2 billion through fiscal year 2014—is "outdated," according to the GAO's report, and does not include large, necessary expenses such as the cost of developing and implementing machine-readable visas that incorporate biometric identifiers, which the GAO estimates could add \$15 billion to US-VISIT's overall cost through 2014.

The program that has become US-VISIT was conceived by the same conservative Congress that began the dismantlement of the U.S.'s social welfare safety net, which included stripping non-U.S. citizen immigrants of their access to most safety-net programs. Section 110 of the act that accomplished that—the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—provided that the attorney general was to develop an automated entry and exit control system, to make a record of the entry to and exit from the country of each noncitizen visitor. IIRIRA sec. 110 was amended and replaced by the Immigration and Naturalization Service Data Management Improvement Act of 2000, which mandates that the separate electronic systems being used by the Depts. of Justice and State to record the arrivals and departures of foreign visitors be integrated with each other.

Then came the attacks of Sept. 11, 2001, followed by the hasty drafting and passage of the USA PATRIOT Act of 2001. That act requires that the implementation of the automated entry/exit record system be hastened, that the White House Office of Homeland Security be consulted about the development and implementation of the system, and that biometrics be incorporated into the system. And finally, the Enhanced Border Security and Visa Entry Reform Act of 2002 moved up preexisting statutory deadlines for implementing a more fully electronic entry/exit system, im-

posed new requirements regarding the incorporation of biometrics into travel documents, and required that the system be compatible with systems used by other law enforcement and intelligence agencies, in addition to requiring that air and sea carriers electronically transmit detailed arrival and departure manifests (containing information about passengers) to immigration/border control officials prior to the carriers' vessels landing in or departing from U.S. air and seaports.

**ALABAMA STATE TROOPERS SAID TO RECEIVE "CLEAR AUTHORITY" IN CIVIL IMMIGRATION ENFORCEMENT**—Alabama has become the second state in the U.S. with state or local police who have "clear authority," under a memorandum of understanding (MOU) signed by Gov. Bob Riley and U.S. Undersecretary of Border and Transportation Security Asa Hutchinson, to detain and arrest non-U.S. citizens suspected of being illegally in the U.S., and to transport them to federal custody. Twenty-one state troopers received that authority on Oct. 3, 2003, when they graduated from a five-week training program conducted by U.S. Immigration and Customs Enforcement (ICE) at the federal government's Center for Domestic Preparedness in Anniston, Alabama.

Last year, Florida became the first state to enter into such an MOU under a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) that allows the federal government to enter into written agreements with any state or political subdivision to permit the state or locality's officers to perform immigration functions. (For more on the INS-Florida MOU, see "INS and Florida Enter MOU to Allow State Officers to Enforce Immigration Law," IMMIGRANTS' RIGHTS UPDATE, Sept. 10, 2002, p. 3.) The original Florida MOU was effective until September of this year, and Florida has renewed it.

The 21 Alabama state troopers received training in immigration law, civil rights, intercultural issues, public complaint procedures, and anti-racial profiling, according to Col. Mike Coppage, director of the Alabama Dept. of Public Safety. Coppage said that the troopers will engage in immigration law enforcement activity only when occasions to do so arise during the course of performing their normal duties as troopers. "[T]hey will not take part in 'sweep' searches for illegal aliens," he said.

Despite these assurances, leaders of Alabama's Latino community expressed deep concern that troopers are likely to abuse their new powers. "We are definitely afraid that people out there will be pulled over or stopped for driving while Latino," Isabel Rubio, executive director of the Hispanic Interest Coalition of Alabama, told the University of Alabama's student newspaper. In a letter to Jeff Sessions, U.S. senator from Alabama and one of the MOU's main boosters, Reinaldo Ramos Jr., a Presbyterian minister and head of the Hispanic Business Council, wrote, "Enabling state troopers to become enforcement agents opens the door for the violation of civil rights through the use of racial profiling." The letter to Sessions, which was signed by about a dozen mostly Latino groups, was sent to the senator before the MOU took effect and was quoted in the Alabama State Trooper Association's online newsletter.

That the MOU and the troopers' completion of the prescribed training endows them with "clear authority to arrest illegal aliens" is a claim expressed in an Oct. 3, 2003, news release from Sessions's office. Presumably, the inclusion of the term "clear" in that phrase

is meant to imply that the senator believes state and local police already possess such authority, even without the benefit of an MOU. Whether they do or not is a question that the Bush administration appears to want to leave without a clear answer. Under a Feb. 5, 1996, legal opinion published by the U.S. Justice Dept.'s Office of Legal Counsel (OLC):

Subject to the provisions of state law, state and local police may constitutionally detain or arrest aliens for violating the criminal provisions of the Immigration and Naturalization Act [sic].

State and local police *lack* recognized legal authority to stop and detain an alien solely on suspicion of *civil deportability*, as opposed to a criminal violation of the immigration laws or other laws [emphasis added].

This clear statement of the federal position vis-à-vis the authority (or, rather, the lack thereof) of state and local police over civil immigration matters has been obscured by reports leaked from the Justice Dept. in Apr. 2002 that, under Attorney General John Ashcroft, the OLC had reversed the above opinion. To date, however, the Justice Dept. has refused to release its analysis to the public, despite the fact that the opinion/policy reversal was widely reported on when it was first leaked.

The issue of how much authority state and local law enforcement agencies have to enforce civil immigration law has been further confused by other policies that the Bush administration has instituted since the attacks of Sept. 11, 2001. For example, since late 2001 it has been the Justice Dept.'s policy to enter the names of persons who have outstanding deportation orders into the National Crime Information Center (NCIC) database. This database is accessible to state and local law enforcement officers so they can check, for example, to see if someone they have pulled over during a traffic stop is a criminal wanted in some other jurisdiction. However, many non-U.S. citizens whose names appear in the NCIC database either have never received a deportation hearing notice or have obtained some form of temporary relief from deportation. The inclusion of their names in this database of wanted criminals implies that the federal government expects local law enforcement officers who happen to stop them to detain them, despite the fact that they may actually be in legal status and not have committed any criminal offense.

The National Security Entry-Exit Registration System (NSEERS) also relies on entering the names of certain non-U.S. citizens into the NCIC database, with the expectation that if state or local law enforcement officers encounter these people during the course of their regular work, the officers will arrest them. Under NSEERS, persons from countries deemed by the Bush administration to be suspect because of ties to terrorist organizations must register—i.e., be fingerprinted, photographed, etc.—and reregister periodically with immigration authorities. The names of those who violate the terms of the registration program, including those who violate the terms of their visas, are entered into the NCIC database. In announcing the NSEERS in June 2002, Ashcroft said, "The Justice Department's Office of Legal Counsel has concluded that this narrow, limited mission that we are asking state and local police to undertake voluntarily—arresting aliens who have violated criminal provisions of the Immigration and Nationality Act or civil provisions that render an

alien deportable, and who are listed on the NCIC—is within the inherent authority of the states.”

That same month, White House General Counsel Alberto Gonzales, in a letter addressed to the Migration Policy Institute, wrote that “state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws *and whose names have been placed in the National Crime Information Center (NCIC)*” (emphasis in the original). Rather than clarifying anything, Gonzales’s letter created more confusion by implying that states’ and localities’ “inherent authority” over civil immigration matters extends only to those involving people whose names appear in the NCIC database, a position that contradicts the attorney general’s apparent position that their inherent authority in this area is more expansive.

When these policies and statements and agreements to enter into MOUs are considered collectively, it is possible to conclude that, though the Bush administration would like to, in effect, deputize all state and local law enforcement agencies to help enforce civil immigration law, it may be reluctant to alienate local jurisdictions by insisting that they participate in such activity. If this is indeed the case, its reluctance could be a result of the stiff resistance many local jurisdictions—including many police departments—have expressed against suggestions by hardcore immigration restrictionists that they take on the role of immigration agents. Local agencies resist such suggestions, in most cases, on the ground that taking on such a role would undermine whatever trust they enjoy from the immigrant communities among which they work and thus make their regular law enforcement duties much harder to perform.

Rubio, the executive director of the Hispanic Interest Coalition of Alabama, articulated this concern from the standpoint of an advocate when she pointed out that many in Alabama’s Latino immigrant community are already reluctant, due to having had bad experiences with law enforcement authorities in their native countries, to report crimes or call police when they need help. She expressed concern that this distrust is only likely to deepen as Alabama state troopers begin to detain and arrest people they suspect of being undocumented.

(For more detailed information and analysis regarding the issue of state and local police authority over civil immigration matters, see the National Immigration Forum’s “Backgrounder: Immigration Law Enforcement by State and Local Police,” at [www.immigrationforum.org/currentissues/articles/Backgrounder\\_SLPolice.pdf](http://www.immigrationforum.org/currentissues/articles/Backgrounder_SLPolice.pdf). Past IMMIGRANTS’ RIGHTS UPDATE articles that have dealt with this issue include “Sweeping Legislation Introduced to Require Local Police to Enforce Immigration Law” (Sept. 4, 2003, p. 1, or [www.nilc.org/immlawpolicy/arrestdet/ad070.htm](http://www.nilc.org/immlawpolicy/arrestdet/ad070.htm)), “Justice Department Order Exempts Crime Database from Accuracy Requirement” (June 3, 2003, p. 6, or [www.nilc.org/immlawpolicy/arrestdet/ad066.htm](http://www.nilc.org/immlawpolicy/arrestdet/ad066.htm)), and “Policies to Permit Police to Enforce Immigration Law Could Undermine Public Safety, Violate Civil Rights” (Nov. 22, 2002, p. 4, or [www.nilc.org/immlawpolicy/arrestdet/ad059.htm](http://www.nilc.org/immlawpolicy/arrestdet/ad059.htm)).

**“NONLEGITIMATED” CHILDREN OF NATURALIZED MOTHERS ELIGIBLE FOR DERIVATIVE CITIZENSHIP, CIS CLARIFIES** – A non-U.S. citizen child “who was born out of wedlock and has not been legitimated is eligible for derivative citizenship when the [child’s] mother be-

comes a naturalized citizen” of the U.S., if the child meets all the other requirements for citizenship under sections 320 or 322 of the Immigration and Nationality Act, according to a memorandum dated Sept. 26, 2003, issued by William R. Yates, acting associate director of U.S. Citizenship and Immigration Services (CIS).

Yates issued the memo to clarify how CIS officers are to interpret the definition of “child” in INA sec. 101(c)(1) when adjudicating applications for citizenship under INA secs. 320 and 322. Under sec. 320, the non-U.S. citizen child of a U.S. citizen automatically derives U.S. citizenship from the parent if the child is residing in the U.S. and otherwise meets the requirements for citizenship; and sec. 322 provides that the noncitizen child of a U.S. citizen who regularly resides outside the U.S. may naturalize to U.S. citizenship via an application made by his or her U.S. citizen legal guardian or grandparent.

According to the memo, the directions in it supercede previously issued policy clarifications “concerning children who are eligible for benefits under the Child Citizenship Act [of 2000] . . . and is to be followed in all cases that are pending on [Sept. 26, 2003], as well as in cases filed on or after that date.” (The Child Citizenship Act provides that certain foreign-born, non-U.S. citizen children may acquire U.S. citizenship automatically rather than having to apply for it via naturalization.) But even for cases that were adjudicated *before* Sept. 26, the new policy clarification is to be considered “a sufficient basis to grant an otherwise untimely motion to reopen or reconsider a previous decision, if the child is still otherwise eligible,” according to the memo.

This latest clarification was issued as a result of a request made by the Immigration and Naturalization Service to the Justice Dept.’s Office of Legal Counsel that it provide a legal opinion regarding whether a “nonlegitimated” child may derive U.S. citizenship under the Child Citizenship Act. CIS, which took over the service functions of the INS when the latter was dissolved earlier this year, received the legal opinion on July 24, 2003.

**TWO NEW CITIZENSHIP APPLICATION FORMS REPLACE THREE WITHDRAWN FORMS** – As of Nov. 1, 2003, U.S. Citizenship and Immigration Services (CIS) is accepting applications for certificates of citizenship only on the revised Form N-600 (Application for Certificate of Citizenship) and Form N-600K (Application for Citizenship and Issuance of Certificate under Section 322). These two forms have replaced three older forms: the previous edition of the N-600; Form N-643 (Application for Certificate of Citizenship on Behalf of an Adopted Child); and Form N-600/N-643 Supplement A (Application for Transmission of Citizenship Through a Grandparent). The current, acceptable Form N-600 bears an edition date of Nov. 15, 2002, or later, while the new Form N-600K bears an edition date of Apr. 30, 2003, or later.

Although the instructions on the current editions of these two forms state that the filing fee is \$195 for applications filed on behalf of anyone other than an adopted child, or \$155 if the application is filed on behalf of an adopted child, the correct fees are \$185 and \$145, respectively. At the time the forms with the Nov. 15, 2002, and Apr. 30, 2003, edition dates were printed, a new “rulemaking” that would have raised the fees was pending, but it has not yet received “clearance,” according to the Federal Register notice announcing the implementation of the new forms.

Applications submitted on older editions of the Form N-600

(i.e., forms bearing an edition date before Nov. 15, 2002) or on Form N-643 that were mailed, postmarked, or otherwise filed on or before Oct. 31, 2003, will be accepted for the purpose of establishing a filing date. However, applicants who are subject to current eligibility requirements that these now obsolete forms do not address may be required to complete and submit either additional information or a valid current Form N-600 or N-600K in order to complete their application. Those who are required to submit such a supplemental filing will not have to pay an additional fee, however.

Implementing the new forms and withdrawing the old ones was made necessary, according to the Federal Register notice, by changes in eligibility requirements and procedures resulting from the enactment of the Child Citizenship Act of 2000 and Public Law 107-273 (enacted Nov. 2, 2002). The former act made it possible for certain foreign-born children residing in the U.S. to automatically acquire U.S. citizenship without having to apply for naturalization. The latter act, according to the notice, "prescribes procedures by which children born of or adopted by a [U.S.] citizen parent and residing abroad may be naturalized under section 322 of the Immigration and Nationality Act . . . , on the application of their U.S. citizen legal guardian or grandparent."

Copies of the current N-600 and N-600K can be obtained by calling the CIS Forms Line at 1-800-870-3676, or the forms can be viewed at and printed out from the CIS Web site at [www.uscis.gov](http://www.uscis.gov). 68 Fed. Reg. 56643-44 (Oct. 1, 2003).

## Litigation

**9TH CIRCUIT REVERSES ILLEGAL REENTRY CONVICTION BASED ON DUE PROCESS AND RETROACTIVITY PRINCIPLES** – The U.S. Court of Appeals for the Ninth Circuit has overturned the conviction for unlawful reentry following deportation of a lawful permanent resident, finding that the deportation on which the conviction was based violated due process because the immigration judge failed to advise him of his appeal rights and possible eligibility for relief. The court found two bases on which the defendant was prejudiced by the due process violation: (1) that he could have argued that the retroactive application of the expanded definition of "aggravated felony" enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to his pre-IIRIRA conviction violated due process; and (2) that despite the IIRIRA's repeal of section 212(c) of the Immigration and Nationality Act, he was eligible for a waiver under that provision.

The defendant in this case, Isidro Ubaldo-Figueroa, is a Mexican national who came to the United States in 1985 at the age of 14 years. He became an LPR in 1992, through the Special Agricultural Worker program of the Immigration Reform and Control Act of 1986.

In 1993 he pled guilty to one count of attempted first degree burglary of a dwelling, for which he was sentenced to three months of home confinement and three years' probation. The record in the most recent case contains evidence that Ubaldo-Figueroa pled guilty in reliance on the fact that this conviction did not make him deportable under immigration law, as it existed at that time. In 1995, the court revoked Ubaldo-Figueroa's probation and he was sentenced to two years in state prison.

Section 321 of the IIRIRA (enacted in 1996) expanded the definition of "aggravated felony" to include burglary offenses for which a term of incarceration for at least one year is imposed. Section 321 expressly provides that the expanded definition applies "regardless of whether the conviction was entered before, on, or after the date of enactment" of the new definition. In 1998, the Immigration and Naturalization Service initiated removal proceedings against Ubaldo-Figueroa, charging him with being deportable for having been convicted of an "aggravated felony."

At his removal hearing, Ubaldo-Figueroa was represented by counsel. The immigration judge did not advise him that he might be eligible for a waiver under INA sec. 212(c), and the IJ in fact stated that he had concluded that there was no relief for which Ubaldo-Figueroa was eligible. The IJ issued a removal order and asked Ubaldo-Figueroa's counsel whether he reserved appeal, to which the counsel replied, "No." However, this discussion took place only in English, and no advisal of the right to appeal was provided to Ubaldo-Figueroa in Spanish. He did not appeal and was deported to Mexico.

In June 2000, Ubaldo-Figueroa was arrested by the INS and subsequently charged with two counts of being found in the United States after deportation, in violation of 8 USC sec. 1326. In his criminal case, he moved to dismiss his indictment, collaterally attacking the 1998 removal proceedings on due process grounds. The district court found that his due process rights had been violated because the removal proceedings were not translated into Spanish and Ubaldo-Figueroa was not advised of the grounds of deportability he was charged with, possible eligibility for relief, or the right to appeal the IJ decision. However, the court concluded that these errors were harmless, finding they could not have affected the outcome of the removal proceedings. Ubaldo-Figueroa was convicted, and he appealed the case to the Ninth Circuit.

On appeal, the Ninth Circuit affirmed the district court's holding that the IJ's failure to inform Ubaldo-Figueroa of his appeal rights and his possible eligibility for relief violated due process. The appellate court reversed the district court's conclusion that the errors were harmless, finding two "plausible legal challenges" to removal that Ubaldo-Figueroa could have pursued had he been properly advised.

First, the court found that Ubaldo-Figueroa presented a plausible argument that IIRIRA sec. 321's explicitly retroactive reach violates due process. The court stated that "[t]he Due Process Clause of the Fifth Amendment forbids Congress from enacting legislation expressly made retroactive when the 'retroactive application [of the statute] is so harsh and oppressive as to transgress the constitutional limitation,'" quoting *United States v. Carlton*, 512 U.S. 26, 30 (1994). In finding that the explicit retroactive application of sec. 321 raises serious due process concerns, the court noted the absence of any time limit on the retroactive reach of the statute, the lack of any explanation in the legislative record for this sweeping reach, and the harsh consequences of the application of the statute to lawful permanent residents who pled guilty to crimes that at the time were not a basis for deportation. The court concluded that Ubaldo-Figueroa was prejudiced by the lack of advisals at his removal hearing because he could otherwise have pursued this challenge to his removal.

The court's second ground for finding that Ubaldo-Figueroa

was prejudiced by the defects in his removal proceedings is that he could otherwise have pursued relief under former INA sec. 212(c). Even though the IIRIRA repealed sec. 212(c), under *INS v. St. Cyr*, 533 U.S. 289 (2001), this relief remains available to certain immigrants whose removal proceedings are based on convictions entered prior to the enactment of the IIRIRA. In this case, the government argued that Ubaldo-Figueroa was not eligible for 212(c) relief because he was not eligible for this relief at the time he pled guilty, since at that time the conviction did not make him deportable. However, in *United States v. Leon-Paz*, 340 F.3d 1003 (9th Cir. 2003), the court rejected this argument, holding that individuals who were not deportable at the time they pled guilty, but who became deportable after their convictions were reclassified as aggravated felonies pursuant to IIRIRA sec. 321, are eligible for 212(c) relief.

In this case, the district court had concluded that Ubaldo-Figueroa was not prejudiced because he did not present sufficient equities to be granted a 212(c) waiver. The appellate court reversed this conclusion, finding that he presented substantial equities, including a history of gainful employment and substantial family ties in the U.S., including a U.S. citizen wife and children. The court thus concluded that the fact that Ubaldo-Figueroa could have pursued 212(c) relief is a second basis for finding prejudice.

Because Ubaldo-Figueroa was prejudiced by the due process violations that took place at his removal proceedings, the court reversed his convictions.

*United States v. Ubaldo-Figueroa*, No. 01-50376  
(9th Cir. Oct. 17, 2003).

**10TH CIRCUIT FINDS DWI OFFENSE NOT A "CRIME OF VIOLENCE" AGGRAVATED FELONY** – The U.S. Court of Appeals for the Tenth Circuit has ruled that the offense of driving while intoxicated does not constitute a "crime of violence" such as to be an "aggravated felony" within the definition of section 101(a)(43)(F) of the Immigration and Nationality Act. The ruling replaces the court's prior decision in *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001), and brings the Tenth Circuit into accord with other circuits that have ruled on this issue and with the revised position of the Board of Immigration Appeals (see "Three Circuit Courts Rule Felony DUI Conviction Not 'Aggravated Felony,'" IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2001, p. 12; and "BIA Overrules Prior Decisions to Find DUI Conviction Not a Crime of Violence 'Aggravated Felony,'" IRU, July 29, 2002, p. 7).

The ruling comes on the appeal from a district court's order applying a sentence enhancement to a defendant's criminal conviction on the grounds that under *Tapia-Garcia* his prior DWI conviction constituted an aggravated felony. In distinguishing *Tapia-Garcia*, the court explained that in the prior decision the court had deferred to the Board of Immigration Appeals, finding that its conclusion that a DWI offense was a crime of violence was a reasonable interpretation of the statute. Subsequently, the BIA reversed its position on this issue (*In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002)), and the court now agrees with the other circuits that have ruled that DWI does not meet the definition of a "crime of violence."

*United States v. Lucio-Lucio*,  
No. 03-2025 (10th Cir. Oct. 28, 2003).

## Employment Issues

### 9TH CIRCUIT GRANTS COURT POWER TO ENFORCE ARBITRATION CLAUSES IN CODE-OF-CONDUCT AGREEMENT

– In a recent decision, the Ninth Circuit Court of Appeals reversed a district court's dismissal of a union complaint to compel arbitration between the union and an employer concerning alleged contractual violations during an organizing drive. At issue was whether section 301 of the Labor Management Relations Act (LMRA) gave the federal court or the National Labor Relations Board (NLRB) jurisdiction over a code-of-conduct agreement between the union and the employer. The Ninth Circuit's decision rested upon determining whether the union's complaint invoked a "primarily representational or primary contractual" dispute. Determining that the primary issue to be decided in the case—the arbitrability of the alleged violations of the labor agreement—is a contractual and not representational matter, the appellate court reversed the District Court for the Central District of California and entered an order compelling arbitration of the alleged contractual violations.

The Service Employees International Union, Local 399 (SEIU) and St. Vincent Medical Center had entered into an agreement setting forth, among other things, guidelines that would govern the parties' conduct during an organizing drive. The agreement also provided that disputes arising from the agreement would be resolved through arbitration. The SEIU then embarked on an organizing drive at St. Vincent. Pursuant to an option in the agreement, the union requested that the NLRB administer the secret ballot representational election at St. Vincent. The election resulted in a majority of votes against the union, and the NLRB certified that no labor organization is the exclusive representative of St. Vincent's healthcare workers.

The SEIU then sent a letter to the employer, alleging that it had committed 18 violations of the agreement during the union's organizing drive, including: (1) encouraging workers to vote against unionizing; (2) having its supervisors wear anti-union buttons; (3) threatening workers with loss of benefits to discourage them from voting to unionize; and (4) making inflammatory religious appeals about their support for the union. The employer refused to recognize the applicability of the arbitration provision of the code-of-conduct agreement, stating that the provision did not apply because the NLRB ran the election. When the SEIU filed a complaint to compel arbitration in district court, the employer argued that the district court lacked jurisdiction because the issue involved a purely representational matter over which the NLRB has primary jurisdiction and thus the union's complaint was not subject to the court's jurisdiction under LMRA sec. 301. The judge in the district court ruled in favor of St. Vincent.

In overturning the district court's decision and ruling in favor of the SEIU, the Ninth Circuit found that the heart of the dispute involved a contractual rather than representational matter. Specifically, the court found that the issue in the case involves whether the employer's alleged violations during the organizing drive is a dispute that invokes the arbitration clause of the agreement. The court found that the dispute does not involve a representational matter because the interpretation of the agreement in this case does not depend entirely or even partially on "the question of whom the union represents." Indeed, the court recognized that its conclusion would be different if the SEIU had challenged the



outcome of the election rather than alleged violations of a contract. Importantly, the opinion states, "Although this case concerns alleged violations of the Agreement's restrictions on the parties' behavior during an organizing drive before a representational election, the major issue cannot be characterized as primarily representational. A case does not fall on the NLRB's primary jurisdictional line merely by having 'representational overtones.'" The court also affirmed the principle of granting a strong preference for finding that an arbitration clause covers an asserted dispute.

*SEIU v. St. Vincent Medical Center*,  
344 F.3d 977 (9th Cir. 2003).

**N.Y. COURT, RELYING ON *HOFFMAN*, DENIES WORKER'S LOST EARNINGS AWARD**—A New York trial court has dismissed a worker's lost wages claim by granting the defendants' motion for partial summary judgment, holding that under the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the employee's claim must be dismissed if he cannot establish that he is eligible to work in the United States. (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10.)

The case involved an immigrant worker from Poland, Stanislaw Majlinger, who brought a claim to recover damages in the form of lost wages for injuries he allegedly sustained when he fell from a scaffold while installing siding. His claim was based on the defendants' alleged negligence and other labor law violations. After Majlinger initiated his claim, the defendants asked the court to compel him to providing evidence regarding his immigration status and his eligibility to work in the U.S., and the court granted their request. Majlinger admitted that he did not have any of the required documents to establish his work authorization.

The defendants then asked the court to dismiss Majlinger's claim for lost wages, arguing that the *Hoffman* decision rendered him ineligible for such an award. The court rejected Majlinger's argument that New York law specifically permits the recovery of lost wages by undocumented workers and that the *Hoffman* decision does not apply to his case because it was not intended to impact state laws.

Judge Christopher J. Mega of the Supreme Court of New York ruled in favor of the employers. In doing so, he wrote, "Although New York law has, in the past, permitted the recovery of lost wages for undocumented illegal aliens . . . the interpretation afforded to the Immigration Reform and Control Act (IRCA) by the United States Supreme Court in *Hoffman* would appear to require this court to conclude that plaintiff should not be permitted to recover for lost wages given his inability to prove he is legally authorized to work in this country." In making his ruling, the judge found the rationale guiding the *Hoffman* decision "critical," namely that to award back pay to undocumented immigrants for work not performed undermines the policy objective underlying IRCA of making the knowing employment of such immigrants unlawful and, consequently, "serves to marginalize federal immigration laws."

The judge found that Majlinger's case was similar—i.e., that the court would run contrary to "both the letter and the spirit of IRCA" if it sanctioned the recovery of Majlinger's lost wages for

work not performed. He added, "It would be consistent to reserve lost wages awards to those workers who have demonstrated a right to be lawfully employed and reinstated in their jobs." However, the judge also recognized that other courts in New York have expressed contrary opinions, and he suggested at the conclusion of his opinion that the New York appellate courts may need to provide guidance to resolve this issue.

*Stanislaw Majlinger v. Casino Contracting, et al.*,  
2003 N.Y. Misc. LEXIS 1248 (Oct. 1, 2003).

**FEDERAL COURT IN KANSAS EXPANDS *HOFFMAN* TO PERSONAL INJURY CASE**—A federal court in Kansas has ruled that the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), does not prevent undocumented employees from recovering unpaid wages for work actually performed, nor does it prevent such employees from recovering traditional remedies.

The decision came in a negligence lawsuit brought by two undocumented workers who were injured when the van in which they were riding ran into the rear of a semi-tractor/trailer and then collided with another vehicle. The defendants in the case were the van driver's employer and the driver of the semi.

After the plaintiffs, Benito Hernandez-Cortez and Bonafacio Hernandez, filed their negligence claim, the defendants filed motions to dismiss and for summary judgment. The court found that any negligence by the van's driver, Andres Perez, should be imputed to the plaintiffs, since they had "conspired" with the van's driver in accomplishing their unauthorized entry into the United States. The court also found that one of the plaintiffs was precluded from recovering lost wages that he might have earned in the future (i.e., lost future income).

In reaching its decision, the court relied heavily on the plaintiffs' testimony at their depositions. They admitted to having been smuggled into the U.S. over the Mexico-Arizona border, and that they had already paid Perez \$700 to be brought to the U.S. and were to pay him an additional \$500 once they found jobs in North Carolina.

While the plaintiffs did not actually recall the name of the van's driver, the parties stipulated that the person driving the van when the accident occurred was Perez. And, apparently, it was undisputed that Perez was driving while in the course and scope of his employment, and that his employer would be vicariously liable for his "negligence or other culpable acts." However, it is unclear if Perez was transporting the plaintiffs to jobs in North Carolina that his employer had waiting for them. After their deposition, the plaintiffs submitted affidavits stating that, while they did pay someone to smuggle them into the U.S., the person they paid was not Perez, whom they said they met only after arriving in Arizona. However, the defendants moved to strike that affidavit because it contradicted the plaintiffs' deposition testimony, and the court ruled in the defendants' favor.

The plaintiffs conceded that Perez was violating the immigration laws by transporting undocumented immigrants and that they were in the U.S. unlawfully. Therefore, the court decided that any negligence by Perez should be imputed to the plaintiffs, because in paying Perez to transport them they engaged in a "conspiracy to transport illegal aliens" in violation of the transportation and harboring provisions of the Immigration and Nationality Act (8 USC § 1324(a)(1)(A)(v)(I)).

Finally, the court held that, though the Supreme Court's decision in *Hoffman* (holding that an undocumented worker is not entitled to back pay, a remedy available under the National Labor Relations Act) does not prevent undocumented employees from recovering unpaid wages for work actually performed nor from recovering traditional remedies, it does preclude plaintiff Hernandez-Cortez from recovering any lost income based on projected future earnings in the U.S. In ruling in favor of Hernandez-Cortez on the former point, the court cited to *Flores v. Amigon*, 233 F. Supp.2d 462, 463 (E.D.N.Y. 2002). In rejecting his claim for lost future wages, the court rejected Hernandez-Cortez's argument that, given the current state of the U.S. work force (i.e., the existence of a shortage of employment-authorized workers willing to do the low-wage jobs that undocumented people are willing to perform), he is not necessarily precluded from finding work in the U.S. Despite the fact that, though neither plaintiff was eligible to be employed in the U.S., both subsequently obtained employment here, the court dismissed the expert testimony offered on Hernandez-Cortez's behalf by an economist because, the court said, the expert did not take into account "crucial factors regarding Hernandez-Cortez's [immigration] status."

The court distinguished Hernandez-Cortez's claim from *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp.2d 1056 (N.D. Cal., 2002), in which the court ruled against the employer's argument that, as a result of *Hoffman*, an undocumented employee was not entitled to any recovery under the Fair Labor Standards Act. In *Singh*, the court said, the employer was seeking to block the worker's entire recovery, whereas in Hernandez-Cortez's case the employers acknowledged that the employees "are entitled to recover from the persons responsible for the physical injuries they sustain and for any impact on their ability to generate income in their country of origin directly attributable to the injury" (emphasis added).

This case is troubling in several respects, including the court's reasoning that the plaintiffs were co-conspirators of smuggling themselves into the U.S. and therefore responsible for the negligence of the person who smuggled them. In addition, the breadth of information contained in the record regarding the plaintiffs' immigration status, as well as who their current employers are and their subsequent contacts with immigration authorities, is a reminder of the critical importance of limiting the type of immigration information disclosed in litigation, especially at the discovery stage. Finally, the fact that the district court relied on *Hoffman* and extended the Supreme Court's reasoning in that case to a personal injury case highlights the need for immigration attorneys and advocates to be working closely with attorneys who represent such plaintiffs and to educate workers about the importance of not disclosing their immigration status and other related information, though the smuggling aspect of this case presents a different scenario from most cases.

*Hernandez-Cortez, et al., v. Hernandez, et al.*,  
2003 U.S. Dist. LEXIS 19780 (Nov. 4, 2003).

**SENATE PASSES WIA REAUTHORIZATION BILL BY UNANIMOUS CONSENT** – The Workforce Investment Act Amendments of 2003 (S. 1627), a bill that would reauthorize the 1998 Workforce Investment Act, passed the Senate by unanimous consent on Nov. 14,

2003. All provisions that would assist limited English proficient (LEP) workers remained in the final Senate bill. Two key provisions include authorizing \$10 million in demonstration grants for programs that integrate language acquisition and job training, and an amendment to the funding formula for Adult Basic Education (which includes English-as-a-second-language instruction) to include the number of immigrants in each state. (For a complete summary of the Senate bill, see "Senate HELP Committee Passes WIA Reauthorization Bill," IMMIGRANTS' RIGHTS UPDATE, Oct. 21, 2003, p. 12.)

Because there are significant differences between the House and Senate versions of the WIA reauthorization bill, it is unlikely that the conference committee whose job it will be to reconcile the two versions will meet until sometime early in 2004. In the meantime, a table that compares the LEP provisions in the House and Senate versions of the bill will be posted on NILC's Web site.

**FIRST SENATE, THEN HOUSE PASS EXTENSION AND EXPANSION OF EMPLOYMENT ELIGIBILITY VERIFICATION BASIC PILOT** – Despite warnings about the program's deficiencies, the U.S. Senate has approved by unanimous consent a bill (S. 1685) that would extend for another five years, and expand from six states to all fifty, a pilot program to check electronically whether newly-hired workers are eligible to be employed in the United States. The program would, however, remain only voluntary. The bill, which passed on Nov. 12, 2003, also would require the secretary of Homeland Security to submit a report by next June on actions taken to resolve any outstanding problems identified in an independent study which concluded that the program should not be expanded. (For more on this study, see "House Bill Would Extend Employment Eligibility Verification Pilot and Expand It Beyond Employment Context," IMMIGRANTS' RIGHTS UPDATE, Oct. 21, 2003, p. 11). But, under the Senate's bill, the extension and expansion would take place even if none of the deficiencies had been resolved.

The House of Representatives failed to pass a pilot program extension and expansion bill (HR 2359) last month that had no reporting requirements or provisions for fixing the problems with the program. That bill went even further than the Senate version and would have authorized federal, state, or local governments to use the pilot program to access the federal government databases it uses to find information about any citizen or immigrant for any purpose within their purview. The vote was 231 in favor to 170 against, but the bill did not garner the two-thirds majority needed to pass a bill that is on the fast-track Suspension Calendar, as the House's version was.

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An unsigned memo circulating among congressional staffers (and likely prepared by the Dept. of Homeland Security) argues that deficiencies in the program will be cured by switching to a Web-based "customer processing system." But this program is new and untested, and it raises its own data security and privacy issues that are given scant attention in the memo. Likewise, the memo's claims that accuracy and timeliness of data input have been substantially improved are entirely unverified.

The track record of the now defunct Immigration and Naturalization Service for keeping timely and reliable records was abysmal. The Homeland Security Dept.'s recent claims about its new

Web-based system and quick, reliable data input should be independently evaluated before any expansion in the pilot program takes effect. Moreover, any expansion should be contingent on both new and old problems being resolved.

On Nov. 19, the House passed the Senate version of the basic pilot extension bill, and Pres. Bush is expected to sign it.

## Public Benefits Issues

**IMMIGRANT CHILDREN ELIGIBLE FOR FOOD STAMPS, REGARDLESS OF THEIR ENTRY DATE** – Effective Oct. 1, 2003, “qualified” immigrant children became eligible for food stamps, regardless of their date of entry into the United States. According to the U.S. Dept. of Agriculture, approximately 60,000 children will benefit from this change.

Under federal public benefits law, the category of “qualified” immigrants includes lawful permanent residents (LPRs); refugees; persons granted asylum, withholding of deportation/removal, or conditional entry; persons granted parole into the U.S. for at least one year; Cuban/Haitian entrants; and battered spouses and children with a pending or approved (1) self-petition for an immigrant visa, or (2) immigrant visa petition filed on behalf of a spouse or child, or (3) application for cancellation of removal/suspension of deportation. Parents and children of the battered child/spouse may also be “qualified.”

Under the provision that became effective on Oct. 1, children are not subject to “immigrant sponsor deeming” rules, which means that their sponsor’s income and resources will not be counted in determining their eligibility for benefits. These children are the third and final group of immigrants whose food stamp benefits were restored under the 2002 farm bill (i.e., the Farm Security and Rural Investment Act of 2002). In Oct. 2002, food stamps were restored to “qualified” immigrants receiving disability-related benefits, regardless of their date of entry into the United States, and in Apr. 2003, persons who have lived in the U.S. in “qualified” immigrant status for at least five years secured access to these critical benefits. The Bush administration estimated that, once the restorations are fully implemented, the 2002 farm bill will have restored nutrition assistance to over 400,000 immigrants, including low-wage working families, children, seniors, and persons with disabilities.

The following immigrants are now eligible for food stamps:

- Children under 18 years of age.
- Refugees, persons granted asylum or withholding of deportation/removal, Cuban/Haitian entrants, Amerasian immigrants, and victims of trafficking. Eligibility continues even if these immigrants become LPRs.
- Persons who have been in “qualified” immigrant status for at least five years.
- LPRs with credit for 40 quarters of work history. This includes work performed by a spouse during the marriage and by parents before the immigrant was 18 years old.
- Veterans, active duty military personnel, their spouses, unremarried surviving spouses and children who are “qualified” immigrants.
- “Qualified” immigrants who are receiving disability-related assistance.

- Seniors born before Aug. 22, 1931, who were lawfully residing in the U.S. on Aug. 22, 1996, and are now “qualified” immigrants.

- Hmong and Laotian tribe members who are lawfully present in the U.S.

- Members of federally recognized Indian tribes or American Indians born in Canada.

Immigrant adults whose sponsors signed an enforceable affidavit of support (Form I-864) may be subject to immigrant sponsor deeming and/or sponsor liability. Deeming does not apply to children under 18. For details on other exceptions to these rules, please see the USDA guidance, “Non-Citizen Requirements in the Food Stamp Program” at [www.fns.usda.gov/fsp/rules/Legislation/pdfs/Non\\_Citizen\\_Guidance.pdf](http://www.fns.usda.gov/fsp/rules/Legislation/pdfs/Non_Citizen_Guidance.pdf), or NILC’s summary of this guidance at <http://www.nilc.org/immspbs/fnutr/foodnutr015.htm>.

**TANF PROGRAM EXTENDED FOR SIX MONTHS** – Congress has enacted a six-month extension of the Temporary Assistance for Needy Families (TANF) program, which had been set to expire on Sept. 30, 2003. This latest extension—the fifth since the program’s initial, statutory expiration date—is scheduled to expire at the end of March 2004.

The House of Representatives passed its TANF reauthorization proposal this past February. The Senate Finance Committee passed a TANF reauthorization bill on Oct. 3, 2003, and the Senate leadership has suggested that they will bring TANF reauthorization up for consideration by the full Senate in February 2004.

Neither the House nor the Senate versions of TANF reauthorization provide for restoring health or TANF benefits to immigrants who are lawfully present in the U.S. Congressional supporters of restoring the benefits, including Sens. Bob Graham (D-FL) and Jeff Bingaman (D-NM), have indicated that they plan to offer amendments restoring them when the entire Senate considers the bill next year.

### **DEC. 8 IS NEW DEADLINE FOR COMMENTS ON HHS LEP GUIDANCE**

The U.S. Dept. of Health and Human Services (HHS) has issued a notice changing the due date for comments on its Guidance to Recipients of Federal Financial Assistance Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. The new due date for comments is Dec. 8, 2003, almost a month earlier than the original one. Advocates are urged to submit comments reaffirming the importance of language assistance to LEP persons. (For details about what the guidance contains, see “Final Guidance on Access to Services for LEP Persons Published,” IMMIGRANTS’ RIGHTS UPDATE, Sept. 3, 2003, p. 10.) 68 Fed. Reg. 49843 (Aug. 19, 2003).

## Miscellaneous

**WORKERS’ RIGHTS TRAINING SLATED FOR UTAH, DEC. 10** – The immigrant workers’ rights training originally scheduled for Nov. 12, 2003, in Salt Lake City, Utah, now will be held on Dec. 10.

Information about the content of this training and how to register for it will be available on NILC’s Web site: [www.nilc.org/trainings/index.htm](http://www.nilc.org/trainings/index.htm).

## **The National Immigration Law Center . . .**

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