



Immigration Issues

HOMELAND SECURITY BILL PASSED WITH FEW CIVIL RIGHTS, IMMIGRANT PROTECTIONS

The United States Congress has passed legislation to create a cabinet-level homeland security department, legislation that omits important provisions proposed by the immigrants' and civil rights communities. Consequently, the profound impact that the new department will have on immigrants is likely to be negative. A more detailed description of the legislation will appear in the next issue of IMMIGRANTS' RIGHTS UPDATE.

The mission of the Dept. of Homeland Security (DHS) is to fight against terrorism. But the immigration services section, which will be called the Bureau of Citizenship and Immigration Services, is buried within the DHS as though non-U.S. citizens

are indistinguishable from terrorists. Immigration enforcement is placed in the Bureau of Border Security within the DHS Directorate of Border and Transportation Security, but little provision has been made for coordination between immigration enforcement and services. The reorganization does not address the significant deficiencies that have historically plagued the Immigration and Naturalization Service in its dealings with noncitizens.

Protection of the civil rights of noncitizens is critical. But the bill provides for a DHS officer for civil rights and civil liberties, who can only "review and assess" information alleging civil rights and civil liberties abuses and racial and ethnic profiling by employees and officials of the DHS. The bill makes no mention of any power on the part of the civil rights officer to investigate these practices. The DHS's inspector general will have investigative authority, but the DHS secretary, who is the head of the

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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.

agency, will be able to restrict significantly that power. The undersecretary for Border and Transportation Security will be able to conduct investigations of noncriminal allegations of misconduct, corruption, and fraud involving employees of the Bureau of Border Security that are not subject to investigation by the inspector general. However, such investigations will, in effect, amount to a department investigating itself, and not an independent investigation. An ombudsman within the Bureau of Citizenship and Immigration Services will have the authority only to assist in resolving "problems" within the Bureau. Significantly, the ombudsman's background must be in customer service and immigration law, not investigations.

The homeland security legislation keeps the immigration court system (Executive Office for Immigration Review, or EOIR) within the Dept. of Justice. But it does not guarantee that the EOIR will operate fairly or remain truly independent. While matters related to unaccompanied immigrant minors are transferred to the Office of Refugee Resettlement in the Dept. of Health and Human Services, the bill fails to protect unaccompanied minors who need court-appointed guardians ad litem and lawyers.

Although the immigrants' rights, civil rights, and human rights communities actively promoted measures to protect the rights of noncitizens, they are largely absent from the bill that is about to become law.

INS EXPANDS EXPEDITED REMOVAL TO HAITIANS ARRIVING BY SEA –

In an attempt to deter future arrivals of undocumented non-U.S. citizens by sea, the Immigration and Naturalization Service has issued a notice stating its intent to place in the expedited removal process all such persons who arrive by sea, boat, or other means who are not admitted or paroled into the United States and have not been continuously physically present in the U.S. for two years. The new policy clearly is aimed primarily at Haitians, who recently have been arriving in increasing numbers along the southern coast of Florida. In one recent incident, a ship carrying 211 Haitians and 3 Dominicans ran aground on Oct. 29. The main effect of the policy is that most Haitians who apply for asylum will be ineligible for bonds and thus will be detained while their applications are being processed and decided. The new policy went into effect on Nov. 13, 2002.

Expedited removal (INA § 235(b)) was created as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is a process imposed on individuals who arrive in the U.S. with false or no documents. The law also allows the INS to apply expedited removal procedures to additional classes of immigrants who have not been admitted or paroled into the U.S. and have not been continuously present for the two-year period immediately prior to the date that their inadmissibility is determined. This notice is the first time the INS has exercised its authority to designate such a class.

Persons subject to expedited removal are summarily removed from the U.S. unless they articulate a fear that they will be persecuted in their homeland. Asylum officers interview individuals who express such a fear to determine whether they meet the "credible fear" standard. A person's expressed fear is determined to be credible if the person shows that there is a significant possibility that he or she is eligible for asylum. Persons who meet the stan-

dard may present the merits of their asylum case before an immigration judge. The law requires that individuals be detained until it is determined whether they have a credible fear of persecution, which occurs during the asylum interview. However, the INS maintains most such asylum seekers in custody until their cases are resolved; some are even held until their appeals are decided.

According to the notice, individuals who arrive by sea have the burden of demonstrating that they are not subject to the expedited removal provision because they have been present in the U.S. for the previous two-year period. Anyone who cannot provide such proof is to be considered part of this newly designated class. Any individual within the class who articulates a fear of persecution will be interviewed by an asylum officer and, depending on the individual's credibility, may be referred to an immigration judge. The notice also indicates that an immigrant who meets the credible fear standard will be detained throughout his or her asylum application proceedings and will not be eligible for a bond.

The INS notice notes that the agency will consider humanitarian exceptions to the detention policy. Finally, the notice also notes that expedited removal proceedings will not be initiated against nationals or citizens of Cuba who arrive by sea. The disparity of treatment is based in statute: both the Cuban Adjustment Act and the expedited removal law allow for more favorable treatment of Cubans.

The INS's stated rationale for imposing the policy is couched in terms of national security as well as concerns for safety for the smuggled immigrants who travel by sea. However, the main reason for instituting the policy is to authorize detention of Haitians and thereby deter people from attempting the voyage from Haiti. According to the INS statement accompanying the notice, "Release of aliens may increase future mass migrations by sea. . . ."

67 Fed. Reg. 68,923 (Nov. 13, 2002).

DOJ REQUIRES CERTAIN NONIMMIGRANTS ADMITTED TO THE U.S. BEFORE SEPT. 11, 2002, TO APPEAR FOR "SPECIAL REGISTRATION" BY DEC. 16, 2002 –

Citing national security concerns and intelligence considerations, the attorney general has expanded the new special registration program known as the National Security Entry-Exit Registration System (NSEERS). Prior to this announcement, the only individuals who were subject to the special registration requirements were given notice of these requirements at the time they were admitted to the United States. In contrast, the new requirement applies to certain nonimmigrants who were not given any notice concerning the special registration requirements at the time they were admitted to the United States.

The new requirements were announced in two notices published in the Federal Register. The first notice applies to certain nonimmigrants who were admitted to the U.S. on or before Sept. 10, 2002, who now must appear in person at an Immigration and Naturalization Service office by Dec. 16, 2002, or face possible loss of their status and be subject to removal. The second notice applies to certain nonimmigrants admitted on or before Sept. 30, 2002, who must appear for special registration on or before Jan. 10, 2003. (For more on the special registration requirements, see "DOJ Issues Final Rule on Registration of Nonimmigrants," IMMIGRANTS' RIGHTS UPDATE, Sept. 10, 2002, p. 3; "DOJ Proposes

Rules to Monitor Certain Nonimmigrants," IRU, July 29, 2002, p. 2; and "INS Issues Notices and Guidance to Implement Special Registration Requirements for Certain Nonimmigrants," IRU, Oct. 21, 2002, p. 1.)

The requirements announced in the first notice apply to males born on or before Nov. 15, 1986 (i.e., who are 16 years old or older); who are nationals or citizens of Iran, Iraq, Libya, Sudan, or Syria; who were inspected and last admitted to the U.S. on or before Sept. 10, 2002; and who will remain in the U.S. until at least Dec. 16, 2002. To register, such nonimmigrants must appear before an immigration officer at any of the locations listed in the appendix to the notice on or before Dec. 16, 2002.

The requirements announced in the second notice apply to males born on or before Dec. 2, 1986 who are nationals or citizens of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen; who were inspected and last admitted to the U.S. on or before Sept. 30, 2002; and who will remain in the U.S. until at least Jan. 10, 2003. Such nonimmigrants must appear at one of the designated locations on or before Jan. 10, 2003.

According to the notices, these nonimmigrants must present travel documents, including a passport, a Form I-94 issued upon admission, and any other forms of government-issued identification; proof of residence, including any land title, lease, or rental agreement; proof of matriculation at an educational institution (if applicable), and proof of employment (if they are employed). The notices also state that such individuals must present any other information requested by the immigration officer. Once registered as part of the NSEERS program, registrants must appear before the INS annually, within ten days of the anniversary of their registry date. They must also report any change of address on Form AR-11 within ten days of any move to a new residence or address.

The notices state that the special registration requirements apply to individuals even if they are dual citizens of other countries not specified in the notices. The notices exempt lawful permanent residents, asylum applicants who applied for asylum on or before Nov. 6, 2002 (for the first notice) or Nov. 22, 2002 (for the second notice), asylees, and foreign diplomats from the special registration requirements.

67 Fed. Reg. 67,765-68 (Nov. 6, 2002) (first notice);

67 Fed. Reg. 70,525-28 (Nov. 22, 2002) (second notice).

FEDERAL DRIVER'S LICENSE LEGISLATION INTRODUCED DURING 2002 REVIEWED – Since the attacks on New York City and Washington, D.C., of Sept. 11, 2001, several members of Congress have introduced legislation designed to shift from the states to the federal government the responsibility for setting the standards for how driver's licenses are issued and who is eligible to obtain them. This despite the fact that several states have already considered or passed legislation that restricts the ability of non-U.S. citizens to obtain driver's licenses.

The states' legislative efforts were prompted, at least in part, by reports that some of the men involved in the 9/11 attacks had state-issued driver's licenses. To date, proposed or approved driver's license-related provisions include new requirements that license applicants provide proof of lawful immigration status, new

special time limits on the validity of licenses, and new requirements that applicants provide proof of the validity of the Social Security numbers they present. (A more complete listing of state driver's license-related legislation is available at the NILC Web site: www.nilc.org.) State government organizations such as the Council of State Governments are also promoting methods to ensure that states issue secure driver's licenses and have access to information from other states about drivers' records.

Some of the federal bills introduced by U.S. representatives and senators are directly aimed at restricting access to licenses by non-U.S. citizens. But some of the bills also would affect citizens, because their passage could eventually lead to the establishment of a national identification system or the collection of data on everyone who applies for a driver's license, regardless of their immigration status. Though none of the proposed federal bills have passed Congress, they are likely to be reintroduced in the next session.

Here is a brief summary of these bills:

HR 4043 (Rep. Flake, introduced Mar. 3, 2002). This bill would bar federal agencies from accepting any state-issued driver's license unless the state requires licenses issued to nonimmigrant aliens to expire when their nonimmigrant visas expire. The House Subcommittee on Immigration and Claims approved the bill on May 2, 2002, and forwarded it to the full Judiciary Committee, which took no further action.

HR 5322, Driver's License Integrity Act (Rep. Cantor, introduced Sept. 4, 2002). This bill would limit the period of validity of a nonimmigrant's state-issued driver's license card to the period of validity of the his or her visa. It was referred to the House Committee on the Judiciary on Sept. 4, 2002, and then to the Subcommittee on Immigration, Border Security and Claims on Oct. 7, 2002. The latter committee took no further action on the bill.

HR 4633, Driver's License Modernization Act (Rep. Moran, introduced May 1, 2002). This bill would require states, within five years of its passage, to embed computer chips in the driver's license cards they issue so that the cards would electronically store the data written on the card, as well as biometric data, and encryption and security software. The bill would also require that the cards have the capacity to accept data or software written to them by nongovernmental devices (with the holder's consent). The bill also would require the states to participate in programs to link their motor vehicle department databases, would require that driver's license cards incorporate tamper-resistant security features, and would compel states to adopt procedures for documenting applicants' identity and residence. The bill was referred to the House Committee on Transportation and Infrastructure, the Committee on the Judiciary, and the Committee on Science, and from there to various subcommittees, none of which took further action.

S. 3107, Driver's License Fraud Prevention Act (Senators Durbin and McCain, introduced Oct. 10, 2002). This bill would require the U.S. secretary of Transportation to conduct a study to determine the viability of using a "unique identifier," including some form of biometric identifier, on or in state-issued driver's licenses. It also would allow the secretary to set minimum standards for the processing of applications for driver's licenses and I.D. cards and for preventing fraud in the issuance and use of driver's licenses, although states whose rules conflicted with the standards would

not be required to follow them. It would set up a new driver record verification system, to which any law enforcement official would have access. The bill does not contain any proposed explicit restrictions based on immigration status, however. It was referred to the Senate Committee on Commerce, Science and Technology, which took no further action.

The above-described driver's license bills would insert the federal government directly into an area that traditionally has been exclusively under state control. The Flake and Moran bills would make it harder for non-U.S. citizens, whether documented or undocumented, to obtain driver's licenses. The proposals ignore the complexity of immigration law and the problems inherent in verifying a person's immigration status; they would allow untrained state driver's license department employees to make determinations about applicants' immigration status. Moreover, they do nothing to ensure public safety on the roads, which is the fundamental purpose of issuing licenses to drivers.

The Moran and Durbin-McCain bills raise the specter of huge new databases of information being created on citizens and non-citizens alike, to which both governmental and nongovernmental entities likely would have access. This worries privacy, civil rights, and immigrants' rights advocacy groups, which also warn that creation of a national identity card would be the next step.

And while the Moran and Durbin-McCain bills do not provide for explicit restrictions on access to driver's licenses based on the applicant's immigration status, they do not preclude the secretary of Transportation from establishing such restrictions. These or similar bills are sure to be reintroduced in the next session of Congress.

POLICIES TO PERMIT POLICE TO ENFORCE IMMIGRATION LAW COULD UNDERMINE PUBLIC SAFETY, VIOLATE CIVIL RIGHTS—

Enforcement of civil immigration law has historically been a federal obligation considered off-limits to state and local law enforcement. But since Sept. 11, 2001, Attorney General John Ashcroft and other Bush administration officials have issued a series of sometimes contradictory announcements that reverse this policy and blur the critical difference between noncitizens and terrorists. The federal government has also entered into the first formal agreement with a state to permit the state's enforcement of immigration laws under section 287 of the Immigration and Nationality Act. And it has issued regulations allowing state and local police agencies to enforce immigration laws when there is an emergency due to a mass influx of noncitizens.

The National Crime Information Center. The government appears to be using the National Crime Information Center (NCIC) as the vehicle for state and local authorities to enforce immigration laws. According to the Dept. of Justice, the NCIC is the nation's principal automated information-sharing tool for law enforcement and provides on-the-street information to over 650,000 local, state, and federal officials. With the exception of domestic violence civil orders, the information stored in the NCIC databases has principally involved criminal arrests and convictions.

The historic policy that treats the enforcement of immigration laws as strictly a federal responsibility is reflected in a 1996 DOJ Office of Legal Counsel opinion, which held that state and local police lack recognized legal authority to enforce the civil provi-

sions of immigration law. The first step towards changing this view came in Dec. 2001 when Immigration and Naturalization Service Commissioner James Ziglar announced that the INS had begun sending the names of more than 300,000 noncitizens to the NCIC for inclusion in its database. These were individuals who had remained in the U.S. despite having a deportation or removal order issued against them. This new INS program was later named the Absconder Apprehension Initiative. In Mar. 2002 Commissioner Ziglar announced that under the program, the names of all noncitizens who violated criminal law by failing to depart as ordered would be entered in the NCIC database. Furthermore, state and local police were authorized to detain these individuals—non-U.S. citizens who committed a federal crime. In Apr. 2002 the AG announced that the names, photos, and other identifying data of all known or suspected terrorists would also be entered into the NCIC database.

In June 2002 the AG announced the National Security Entrance and Exit Registration System (NSEERS) program, purportedly to track nonimmigrants deemed to be national security risks. Nonimmigrants from Iraq, Iran, Libya, and Sudan (Syria was later added) would be fingerprinted and photographed as they entered the country and required to report to the INS both 30 days and one year later. These individuals would also be permitted to leave the country only from certain specified places. Identifying information about those who violated these requirements would be entered into the NCIC database. According to the AG, "[W]hen federal, state and local law enforcement officers encounter an alien of national security concern who has been listed on the NCIC for violating immigration law, federal law permits them to arrest that person and transfer him to the custody of the INS. The Justice Dept.'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 states."

But that legal opinion has never been made public. The Justice Dept. refused to disclose it when immigrants' and civil rights groups sought its release under a Freedom of Information Act (FOIA) request, whose refusal is now on appeal. In late June 2002 White House counsel Alberto Gonzalez wrote to the Migration Policy Institute (which had inquired about the new policy) that only information about high risk aliens who fit a terrorist profile would be placed in the NCIC. Gonzalez's view seems to be at odds with the policy enunciations of INS Commissioner Ziglar and the AG.

In late Sept. 2002, a confidential memo issued by the attorney general on Sept. 5 was published in the immigration law journal *Interpreter Releases*. This memo gives immigration inspectors broad authority to subject a wide variety of nonimmigrants entering the U.S. to registration requirements. On Nov. 5, 2002, the DOJ expanded the NSEERS program to include males 16 years of age and older from the countries listed above who entered before the earlier registration requirement went into effect.

It is completely unclear which types of information regarding immigration matters are actually entered in the NCIC databases. NILC filed a FOIA request with the FBI in order to find out. On Oct. 28, 2002, the FBI advised the National Immigration Law Cen-

ter that the attorney general had declared the NCIC to be exempt from the Privacy Act, thereby precluding NILC's FOIA request. In a subsequent telephone call, the FBI recanted that across-the-board position but has not yet provided any of the information requested by NILC.

Agreement between Florida and the DOJ. The first formal agreement between the federal government and a state to permit the state's enforcement of immigration laws under section 287 of the INA came in a Memorandum of Understanding (MOU) signed by Florida and the U.S. in mid-2002. This is a pilot project authorizing 35 state and local enforcement officers working as part of Florida's Regional Domestic Security Task Force to perform certain immigration enforcement functions, including arresting, detaining and questioning noncitizens. The MOU states that its focus is on counter-terrorism and domestic security goals. The Florida Dept. of Law Enforcement reported in a press release that training of the 35 officers was completed in Aug. 2002. NILC has filed a request under Florida public records procedures for information about the training received by the officers, the program's operations, and any procedures for filing complaints against actions carried out under the MOU, but has not yet received a response.

Local Law Enforcement and Mass Influxes. On July 24, 2002, the DOJ issued regulations under section 103(a)(8) of the INA deputizing state and local police to enforce immigration laws if the attorney general declares an emergency due to a mass influx of aliens.

Effects of State and Local Law Enforcement of Immigration Laws. The government may be entering information about noncitizens with final removal orders in a database for criminal and terrorism-related information. This action paints with a broad brush, grouping noncitizens with criminals and terrorists, and diverts attention from the real threats to public safety and national security. The NCIC database would have entered into it information from the INS, which is notoriously unreliable and inefficient. For example, when the attorney general announced rigorous enforcement of the requirement that noncitizens notify the INS of a change of address within ten days of the change, the INS was unable to process in a timely fashion the thousands of notices that were filed. Many people who appear to have a final order of deportation may not have been notified of hearings or may have adjusted their status in other ways.

The task that the AG entrusted to state and local authorities is by no means a "narrow, limited mission," since it requires untrained authorities to determine violations of complex immigration law. No oversight or audit mechanism exists to monitor or limit the reporting of information to the NCIC database or the NSEERS program. Mechanisms to ensure that information sent to the NCIC is correct and that incorrect information can be removed also do not exist. The federal government's contradictory statements about which kinds of information will be entered and the situations in which state and local authorities can enforce immigration laws will likely bring about uneven and error-ridden enforcement. The system also encourages racial and ethnic profiling and discrimination, since only those who appear foreign will be subject to local enforcement of immigration laws.

The ways in which immigration issues and imperatives of local law enforcement can collide, and the tenuous connection of re-

cent policies to domestic security are made clear in two recent events. In the recent spate of sniper killings in Washington, D.C., two undocumented immigrants, one from Mexico and the other from Guatemala, were arrested and then turned over to the INS. They had the misfortune to stop at a pay phone that had been placed under surveillance because of its possible connection to the shootings. Those arrests generated fear in the immigrant community. In response, INS Commissioner Ziglar announced that the INS would not inquire about the immigration status of noncitizens who provided information relevant to the sniper investigation. In fact, Ziglar stated, the agency would look favorably on giving a special visa to anyone who materially helped the investigation. Likewise, on Oct. 22, 2002, the Montgomery County Police Dept. issued a plea to the Latino community to come forward with information relevant to the shootings, assuring that law enforcement officials would not ask about immigration status.

In Oct. 2002 the Florida Dept. of Law Enforcement Region 6 Domestic Security Task Force, the INS, the Collier County Sheriff's Office, and other state law enforcement agencies carried out a driver's license sting operation and arrested 19 noncitizens (7 from Mexico, 5 from Guatemala, and 7 from Turkey) and 1 U.S. citizen for allegedly trying to buy Florida driver's licenses. Although the arrests were portrayed as a major domestic security operation, none of these countries is in the list of nations subject to the NSEERS. Moreover, it is not clear whether this operation was carried out by the state and local officers trained under the MOU.

The National Immigration Forum has accumulated dozens of condemnations by high ranking officials in police departments and associations of the effort to have state and local police enforce immigration laws. (These can be viewed on the Forum's Web site at www.immigrationforum.org/currentissues/articles/100102_quotes.htm.) These officials recognize that the ability of police to prevent and solve crimes is compromised if noncitizens fear police due to their enforcement of immigration laws. The Forum is also gathering stories of local police enforcement and the impact on immigrant communities. These may be sent to ltramonte@immigrationforum.org.

The federal government has yet to indicate how it will resolve the inherent conflict between, on the one hand, enhancing public safety so that everyone—citizen and noncitizen alike—feels protected by law enforcement and, on the other hand, assuaging the immigrant community's fear that state and local law officers will enforce immigration laws against them.

REFUGEE ADMISSIONS FOR FY 2003 SET AT 70,000, BUT TARGET MAY NOT BE REACHED – After consulting with Congress, President George W. Bush has determined that for fiscal year (FY) 2003 the United States may admit 70,000 refugees. Federal FY 2003 began Oct. 1, 2002, and will end Sept. 30, 2003.

The presidential determination allocates only 50,000 admissions numbers to different parts of the world, leaving 20,000 of the admissions numbers in an "unallocated reserve," to be used if needed. Based on recent experience, it is likely that the U.S. will not use all of the 50,000 admissions numbers that are allocated. According to the Lutheran Immigration and Refugee Service, although 70,000 refugee admissions were allocated for FY 2002,

only 27,058 refugees were actually admitted, indicating that the admissions process has slowed greatly since Sept. 11, 2001.

The 70,000 prospective refugee admissions have been allocated among the world's geographic regions as follows: Africa (20,000); East Asia, including Amerasians (4,000); Eastern Europe (2,500); the former Soviet Union (14,000); Latin America and the Caribbean (2,500); the Near East and South Asia (7,000); and the unallocated reserve (20,000). In addition, 10,000 refugee admission numbers are to be made available for the adjustment to permanent residence of persons who have been granted asylum in the U.S.

According to the president's announcement, the administration will grant refugee admission to nationals of Cuba, Vietnam, and countries of the former Soviet Union even if they are still in their countries of origin.

Presidential Determination No. 2003-02 (Oct. 16, 2002).

AG EXTENDS TPS FOR NATIONALS OF SIERRA LEONE – The attorney general has extended the temporary protected status designation for Sierra Leone. The 12-month extension took effect on Nov. 2, 2002, and will last through Nov. 2, 2003. To maintain their status and work authorization, nationals of Sierra Leone previously granted TPS must reregister during the 60-day period that began on Oct. 31, 2002, and will end on Dec. 30, 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.

Although Sierra Leone's decade-long civil war was declared over in Jan. 2002, and the nation has made significant progress towards stability, the broader region continues to be marked by uncertainty. According to the Federal Register notice extending TPS for Sierra Leone, the situation in neighboring Liberia remains unstable (in Oct. 2002, the AG designated Liberia for TPS; see "TPS Newly Designated for Liberia and Extended for Burundi and Sudan," IMMIGRANTS' RIGHTS UPDATE, Oct. 21, 2002, p. 2). In addition, various United Nations initiatives intended to transition the country towards peacetime stability have just gotten underway. As a result, despite the AG's consultation with the State Dept. and National Security Council, the complicated picture in Sierra Leone kept him from determining whether the country continues to meet the INA's standards for TPS extension. Accordingly, because he did not make the determination by the time prescribed by statute (i.e., 60 days before the termination of the original designation), the present extension is automatic. The AG exercised discretion to lengthen the automatic extension from the usual six months to one year, "to allow a sufficient period of time to monitor further developments."

To reregister for TPS under the extension for Sierra Leone, applicants must submit the following:

- Form I-821 (without the \$50 filing fee);
- Form I-765 (Application for Employment Authorization); and
- two identification photographs (1 ½ x 1 ½ inches).

An applicant must file both forms with the local Immigration

and Naturalization Service district office that has jurisdiction over the applicant's 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 at 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.

Some nationals of Sierra Leone 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 Sierra Leone (or a person with no nationality who last habitually resided in Sierra Leone);
- have been "continuously physically present" in the U.S. since Nov. 9, 1999;
- have continuously resided in the U.S. since Nov. 9, 1999;
- 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. or be ineligible for admission under INA section 208(b)(2), which bars persecutors of others, persons who have committed certain crimes, and security risks).

An applicant for late initial registration must also show that during the initial registration period (Nov. 9, 1999, through Nov. 2, 2000), 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 termination of the conditions described above.

At least 60 days before this extension's termination on Nov. 2, 2003, the AG will review the conditions in Sierra Leone and determine whether conditions for TPS designation continue to be met. He estimates that there are approximately 2,209 nationals of Sierra Leone who currently receive TPS benefits and are eligible for the extension.

67 Fed. Reg. 66,423-25 (Oct. 31, 2002).

INS ESTABLISHES ONLINE CASE STATUS SERVICE – The Immigration and Naturalization Service has established a service that provides case status information to individual applicants and their representatives via the Internet. The service, Case Status Online, may be accessed on the INS Web site, www.ins.gov (Web visitors should note that this section of the INS's site employs secu-

rity features compatible with only the latest versions of browsers).

To look up their case's status online, individuals who have submitted a petition or application to an INS service center must use their case receipt number. According to the Oct. 28, 2002, announcement, individuals who do not have a receipt number may obtain information about the status of their cases by calling the National Customer Service Center at 800-375-5283 or 800-767-1833 (TTY for the hearing impaired), or by visiting a local INS office.

INS SEEKS I-589 AS ALTERNATIVE EAD APPLICATION FOR ASYLEES –

The Immigration and Naturalization Service has requested that the Office of Management and Budget (OMB) approve the use of the asylum application (Form I-589) as an alternate application for the employment authorization document (EAD). Before the INS requested this change, asylees had to file a separate application (Form I-765) to obtain an EAD, which is used to establish the holder's work authorization and identity. In the Federal Register notice announcing the request, the INS noted that both the I-765 and the I-589 collect the same biographic information. Thus, when an applicant is granted asylum, information from the latter could also be used to generate the EAD. The INS sought emergency review from the OMB on Oct. 22, 2002, and requested approval by Oct. 24, 2002. If granted, the emergency approval is valid for 180 days.

The INS requested this change in order to comply with the requirements of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act) (Pub.L. 107-173 May 14, 2002). Section 309 of the Border Security Act requires the INS to establish procedures for issuing employment authorization cards with a photo and fingerprint to asylees "immediately" upon the grant of asylum. Such procedures must be in place as of Nov. 10, 2002.

It should be noted that under 8 C.F.R. section 274a.12(a)(5), asylees are authorized to work by virtue of their status as asylees. For this reason, they should be able to obtain an unrestricted Social Security number without having an EAD, if they have other documentation showing their asylee status, such as Form I-94 (see "Asylees to Receive Unrestricted Social Security Cards," IMMIGRANTS' RIGHTS UPDATE, May 10, 2001, p. 10).

67 Fed. Reg. 64,911 (Oct. 22, 2002).

REP. GEPHARDT INTRODUCES LEGALIZATION BILL –As Congress was getting ready to adjourn prior to this month's general election, Rep. Richard Gephardt (D-Mo.) introduced legislation that would adjust the status of undocumented immigrants, including college-bound students, with long-time residence in the U.S. to lawful permanent residence. The legislation would also remove immediate relatives (spouses, unmarried minor children, and parents) of U.S. citizens from the worldwide cap on family-sponsored immigrants, thereby reducing the current backlog of visa applicants. Gephardt introduced his Earned Legalization and Family Unification Act on Oct. 10, 2002.

Although the bill has backing from immigrants' rights advocates as well as the U.S. Chamber of Commerce, at present it lacks

bipartisan support. For it to have a chance of being approved in the next congressional session, the bill would need Republican sponsorship, especially given the fact that Republicans will control both houses beginning in January.

Below are highlights of the bill:

- Persons with five years of continuous residence who are employed for 520 days during a five-year period, pay taxes, and demonstrate minimum English skills and knowledge of American history would be eligible to adjust their status.

- Children and spouses of immigrants who do not otherwise qualify under the law would be able to adjust if they are accompanying or following to join the eligible immigrant.

- Persons whose parents are lawful immigrants and who are under 25 years of age, but who do not otherwise qualify for adjustment through their parents, would be able to adjust their status if they are enrolled in school at or above the seventh grade level, have continuously resided in the U.S. for five years, and are of good moral character. The bill would not allow parents to legalize their immigration status through their children except through the family-based visa system currently in place.

- Persons with three misdemeanors or a felony would be ineligible to adjust under this new legalization provision. However, certain grounds of inadmissibility, including those pertaining to document fraud, student visa abuse, and unlawful presence, could be waived. Other grounds, such as those related to criminal convictions, drug offenses, and national security concerns, could not be waived. Although the public charge ground of inadmissibility could not be waived, a special rule would allow applicants to demonstrate that they are not likely to become a public charge by presenting proof that they have a history of employment and self-support without resorting to public assistance.

- Applicants and eligible dependents would be eligible for work authorization while their cases were pending.

- Persons who provided false statements would be penalized.

- Applications would be confidential except in instances where fraud is suspected or a law enforcement agency requests information in connection with a criminal investigation or prosecution.

- If they presented a prima facie case for eligibility, individuals would not be removed from the U.S. and would be eligible for work authorization while their cases were pending.

- The legislation provides for a single level of administrative review of decisions on applications, followed by judicial review for a denial of an application.

Litigation

TEXAS DISTRICT COURT GRANTS HABEAS AND CERTIFIES CLASS CHALLENGING MANDATORY DETENTION –

A federal district court in Texas has granted a habeas corpus petition and certified a class action lawsuit filed by two lawful permanent residents who challenged their detention under the mandatory detention provision of Immigration and Nationality Act section 236(c). The two petitioners sought to enjoin implementation of section 236(c) as unconstitutional. Following the reasoning of the Third, Ninth, and Tenth Circuit Courts of Appeal, the district court held that the statute violates due process because it requires that the petitioners be

detained indefinitely instead of being afforded a bond hearing. The government appealed the case to the Fifth Circuit Court of Appeals, which has temporarily stayed the decision..

The mandatory detention provision was passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1986 (IIRIRA). Under section 236(c), the Immigration and Naturalization Service may detain any non-U.S. citizen who is deportable or inadmissible because he or she has committed a crime of moral turpitude, an aggravated felony, a violation of controlled substance laws, certain firearms offenses, or other security-related crimes. Except in limited circumstances involving the need to protect witnesses or persons cooperating in criminal investigations, the INS considers that it has no discretion to release persons to whom the mandatory detention provision applies.

Several persons subject to the provision have challenged its constitutionality and have prevailed in actions brought before federal district and appellate courts. (For a listing of such cases, send an e-mail request to Liliana Garces of the American Civil Liberties Union (Lgarces@aclu.org). See also "3d and 9th Circuits Hold Mandatory Detention Provision Unconstitutional," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2002, p. 11, and "10th Circuit Holds Mandatory Detention Unconstitutional," IRU, Apr. 12, 2002, p. 6. These abstracts are also posted in the immigration policy section of the NILC Web site (www.nilc.org).)

The decisions in the cases challenging the mandatory detention statute follow the decision in *Zadvydas v. Davis*, 121 S.Ct. 2491 (2001) (see "Supreme Court Holds That INA Does Not Authorize Indefinite Detention," IRU, Aug. 31, 2001, p. 10). *Zadvydas* held that the indefinite detention of lawful permanent residents posed serious constitutional problems. It also held that in a civil proceeding that is presumptively nonpunitive, the INS must provide adequate justification for detaining individuals indefinitely. Following *Zadvydas*, the Ninth Circuit issued a decision in *Kim v. Zigler*, holding that because the INS could not possibly show that the statute covers only non-U.S. citizens who are dangerous to the public, any justification for its detention policy could not qualify as the special justification required under *Zadvydas*.

The federal district court in Texas found the arguments in *Kim* persuasive. Relying on *Kim* as well as on decisions in the Third and Tenth Circuits, the court granted the habeas petition, certified the class, and ordered bond hearings for the two individually named petitioners.

Reyna-Montoya v. Trominski,
Civ. No. B-02-026 (S.D. Tex. Sept. 10, 2002).

2D CIRCUIT FINDS STAY OF REMOVAL PENDING REVIEW OF HABEAS APPEAL NOT SUBJECT TO HEIGHTENED STANDARD, BUT AEDPA RESTRICTIONS ON 212(c) RELIEF APPLY TO POST-AEDPA CONVICTION BASED ON PRE-AEDPA CONDUCT – The U.S. Court of Appeals for the Second Circuit has ruled that section 242(f)(2) of the Immigration and Nationality Act, which prohibits courts from enjoining the removal of non-U.S. citizens unless they meet an extremely high standard, does not apply to temporary stays pending the appeal of a habeas case. However, in this case the court denied a stay, finding the petitioner unlikely to win on the merits. The decision finds that under the court's prior decision in *Domond v. INS*, 244 F.3d 81 (2d Cir. 2001), the restrictions on eligibility for 212(c) waivers enacted by the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA) apply to individuals who committed disqualifying offenses before the AEDPA's enactment date but who were convicted after that date. In so finding, the court concluded that the Supreme Court's subsequent ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001), did not affect the rationale for the decision in *Domond*.

The petitioner in this case, a Mr. Mohammed, is a national of Trinidad who was admitted to the United States as a lawful permanent resident in 1990. He criminally possessed stolen property in Mar. 1996 and was found guilty of the offense by a New York state court in Sept. 1997. For the conviction, he was sentenced to a term of two to four years. He was subsequently placed in removal proceedings. An immigration judge found him removable for having committed an aggravated felony and ineligible for 212(c) relief because of the restrictions of the AEDPA. On appeal, the Board of Immigration Appeals upheld the IJ's decision.

Mohammed then filed a petition for writ of habeas corpus to challenge the removal order, claiming that he should have been allowed to apply for 212(c) relief. He argued that the AEDPA's restrictions on 212(c) eligibility should not apply to him because his criminal conduct took place before the enactment of the statute. In May 2002, the district court denied the habeas petition, issuing a published opinion. *Mohammed v. Reno*, 205 F.Supp.2d 39 (E.D.N.Y. 2002). In the opinion, the district court judge contended that in light of the Supreme Court's analysis in *St. Cyr*, the Second Circuit's ruling in *Domond* was wrongly decided. However, the district court concluded that it was bound to follow *Domond*. The court kept the stay of removal that it had issued in effect, "unless it is lifted by the court of appeals." The Immigration and Naturalization Service then filed a motion to lift the stay with the Second Circuit.

In the motion to lift the stay, the government argued that INA section 242(f)(2) restricts the power of the court to stay the petitioner's removal pending consideration of the appeal. Section 242(f)(2) restricts the power of courts to "enjoin the removal of any alien pursuant to a final order . . . unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." In rejecting this argument, the court agreed with the reasoning of the Ninth and Sixth Circuits, which have found that section 242(f)(2) does not apply to temporary stays pending review of the appeal of a removal order. *Andrieu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (*en banc*) (stay pending adjudication of petition for review); *Maharaj v. Ashcroft*, 295 F.3d 963 (9th Cir. 2002) (stay pending review of habeas appeal); *Beijani v. INS*, 271 F.3d 670 (6th Cir. 2001) (for more concerning the decision in *Andrieu*, see "9th Circuit Holds That IIRIRA Did Not Modify the Standard for a Stay of Removal," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2001, p. 11; "9th Circuit Rules That Heightened Injunction Standard Not Applicable to Stay Pending Court's Review of Habeas Denial," IMMIGRANTS' RIGHTS UPDATE, July 29, 2002, p. 11).

Finding section 242(f)(2) not applicable to the stay, the court then looked to the traditional standard to determine whether the stay should remain in effect. The court noted that four factors are relevant to this determination: "the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public inter-

est.” The court concluded that the degree of likelihood of success that must be shown depends upon the other factors. In the context of determining whether to stay a removal order pending a habeas appeal, the court noted that “the gravity of injury to the alien if a stay is denied, compared to the lesser ‘injury’ to the Government if one alien is permitted to remain while an appeal is decided, suggests that the degree of likelihood of success on appeal need not be set too high.”

However, the court concluded that Mohammed had no possibility of prevailing on appeal. The court decided that the reasoning of the decision in *Domond* remains valid and is not undermined by the Supreme Court’s opinion in *St. Cyr*. Therefore, the court granted the motion to lift the stay.

Mohammed v. Reno, No. 02-2443 (2d Cir. Oct. 24, 2002).

LAWSUIT CHALLENGES BIA RESTRUCTURING REGULATIONS – Two organizations concerned about preserving immigrants’ rights have filed a lawsuit to challenge the final rule issued by Attorney General John Ashcroft to reduce the size of the Board of Immigration Appeals and streamline its work. The lawsuit, filed in federal district court in the District of Columbia, is based on the Administrative Procedure Act (APA). The plaintiffs contend that in issuing its final rule to implement the changes, the Dept. of Justice failed to properly consider public comments. The suit further contends that the agency acted arbitrarily and capriciously in establishing a rule that dramatically changes the structure and procedures of the BIA.

The DOJ issued a proposed rule to reduce and restructure the BIA on Feb. 19, 2002. The agency proposed to reduce the BIA from 23 to 11 members, with the reduction to be complete at the end of a six-month transitional period following the final rule’s effective date. The agency also proposed to change significantly the procedure for filing and pursuing appeals, eliminate the BIA’s jurisdiction to review factual findings *de novo*, and limit appellate review in most cases to review by only a single BIA member.

Despite providing only a 30-day period for public comment, the proposed rule elicited detailed comments from more than 68 organizations. The comments mostly expressed serious concerns with and objections to the proposal. Nevertheless, on Aug. 26, 2002, the DOJ issued a final rule which, in most respects, adopted verbatim the language of the proposed rule (for further background on the proposed rule and the final rule, see “Attorney General Proposes Major Changes at BIA,” IMMIGRANTS’ RIGHTS UPDATE, Feb. 28, 2002, p. 1, and “Attorney General Issues Final Rule to Reform BIA,” IMMIGRANTS’ RIGHTS UPDATE, Sept. 10, 2002, p.1).

The plaintiffs contend that in issuing the final rule, the DOJ failed to respond reasonably to significant comments and adverse evidence, departed without explanation from its own past practices, and failed to provide reasoned and consistent explanations for important aspects of the rule. The plaintiffs also contend that a series of memoranda issued by the acting chair of the BIA prior to the adoption of the final rule constituted an evasion of the APA’s notice-and-comment requirements. The memoranda expanded the categories of cases subject to “summary affirmance” under the 1999 “streamlining regulations.”

The lawsuit was filed on Oct. 25, 2002. The plaintiffs in the

case are the Capital Area Immigrants’ Rights Coalition and the American Immigration Lawyers Association.

6TH CIRCUIT UPHOLDS RULING AGAINST OHIO TROOPER WHO SEIZED GREEN CARDS

– The U.S. Court of Appeals for the Sixth Circuit has upheld a federal district court’s ruling in favor of the plaintiffs in a lawsuit brought against the Ohio State Highway Patrol (OSHP). The ruling upholds the district court’s finding that an OSHP trooper was not entitled to the defense of qualified immunity against the claim that he violated the equal protection rights of two plaintiffs in interrogating them about their immigration status after a traffic stop, because of their Hispanic appearance. The ruling also rejects the trooper’s qualified immunity defense against a claim that he violated the plaintiffs’ Fourth Amendment rights when he seized their permanent resident (or “green”) cards and held them for four days. Finally, the ruling upholds the district court’s grant of partial summary judgment to the two plaintiffs on the claim concerning the seized green cards.

The decision concerns only a part of the original litigation, which has a long history. The case was brought as a class action on behalf of migrant workers who claimed that the OSHP violated the Fourth Amendment and the equal protection clause of the Fourteenth Amendment by stopping and interrogating them concerning their immigration status, based on their Hispanic appearance. In some cases, the plaintiffs alleged, the OSHP confiscated their immigration documents. In 1997 the federal district court issued a preliminary injunction prohibiting the OSHP from questioning motorists as to their immigration status “absent consent or reasonable suspicion based on articulable objective facts,” and from seizing immigration documents “absent lawful cause for doing so.” *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 991 F.Supp. 895, 907 (N.D. Ohio 1997). However, in 1998 the court dissolved the preliminary injunction and granted summary judgment on the Fourth Amendment claims to all defendants, except for defendant Trooper Kevin Kiefer. The court found that the Fourth Amendment did not prohibit the OSHP from questioning individuals regarding their immigration status, as long as the questioning occurred in the context of lawful traffic stops and did not make the stop longer than usual. The most recent decision concerns the claims against Kiefer.

In the 1998 decision, the court granted summary judgment against Kiefer on the claim that he violated the Fourth Amendment by unreasonably detaining the green cards of two plaintiffs, a Mr. Aguilar and a Ms. Esparza, in seizing the cards and holding them for four days after a traffic stop. However, the court also found that Kiefer’s questioning of the plaintiffs regarding their immigration status did not violate the Fourth Amendment. It was uncontested that the traffic stop itself was justified because of a defective headlight. After pulling the plaintiffs over, Kiefer proceeded to question them regarding their immigration status, examining their green cards. He asked them whether they had “paid for them,” and the plaintiffs, who have limited English-speaking ability and believed that the trooper was asking whether they had paid the required application fees, answered “yes.” This occurred on a Sunday, and Kiefer took the cards back to his office to verify them with the Immigration and Naturalization Service. The plaintiffs, who had been stopped en route from Chicago to To-

ledo, Ohio, then retained an attorney to recover their cards. However, the attorney was not immediately able to find out what happened to the cards, because Kiefer took the next few days off from work. It was not until the next Thursday that Kiefer verified the cards as authentic and returned them to the plaintiffs.

In 2000 the district court granted partial reconsideration of the 1998 decision. The prior decision had not addressed the claims of the plaintiffs that the questioning about their immigration status violated equal protection. In the 2000 decision, the court concluded that the plaintiffs had presented sufficient evidence to make a prima facie case that the OSHP discriminated against them on the basis of their Hispanic ethnicity. It also ruled that the defendants had failed to rebut this showing. Accordingly, the court granted summary judgment to plaintiffs Aguilar and Esparza on this claim against Kiefer. The court also denied Kiefer's motion for summary judgment based on qualified immunity against this claim, finding that he had failed to offer any legitimate race-neutral explanation for the investigation. *Farm Labor Org. Comm.*, 95 F.Supp.2d 723 (N.D. Ohio 2000). Kiefer then filed an interlocutory appeal of these decisions with the Sixth Circuit.

Ruling on the appeal, the Sixth Circuit first discussed the limited nature of an interlocutory appeal of a denial of qualified immunity. For purposes of the appeal, the version of the facts presented by the plaintiffs must be assumed to be true. The court must determine "whether the facts, viewed in the light most favorable to the plaintiffs, show a violation of the plaintiffs' constitutional rights."

The court found that for the plaintiffs to establish that Trooper Kiefer's questioning regarding their immigration status violated equal protection, they must show that they were treated unequally based upon their race or ethnicity, despite the fact that the traffic stop was otherwise lawful. The court noted that the Supreme Court "has explained that a claimant alleging selective enforcement of facially neutral criminal laws must demonstrate that the challenged law enforcement practice 'had a discriminatory effect and that it was motivated by a discriminatory purpose,'" citing *Wayte v. United States*, 470 U.S. 598, 608 (1985). Since the record did not show that the OSHP uses racial criteria or "admits to racially-motivated decision making," in order to establish a "discriminatory effect" the plaintiffs must show that similarly situated non-Hispanics were not questioned about their immigration status. As noted above, the district court had found that the plaintiffs had submitted sufficient evidence to make a prima facie case of intentional discrimination—that they were investigated because they are Hispanic. The appellate court found that, because of the limited nature of the review in an interlocutory appeal of a denial of qualified immunity, it could not review this determination. And, for purposes of the appeal, Trooper Kiefer did not dispute that he questioned the plaintiffs because they are Hispanic. Rather, he claimed that to establish a violation of clearly established law, plaintiffs would have to show that the sole motive for his conduct was their Hispanic appearance. Kiefer argued that he was also motivated by the plaintiffs' limited English-speaking ability, which he claims is a valid race-neutral basis for investigating their immigration status.

The court rejected these claims, finding that the plaintiffs need only show that the discriminatory motive played a determinative role. The court also found that while an inability to speak English

may be a proper race-neutral factor, the fact that the plaintiffs spoke Spanish is not. In so ruling, the Sixth Circuit noted that the district court had found that the plaintiffs' evidence supported the inference that OSHP officers focus on motorists' limited English abilities largely as an "indicator [] of Hispanic ethnicity" [sic]. The court found that whether this is in fact the case is an issue properly left for trial.

The Sixth Circuit concluded that the district court had properly denied Kiefer's motion for summary judgment on the equal protection claim. As noted above, the court also upheld the denial of qualified immunity against the claim that the seizure of the green cards was unreasonable under the Fourth Amendment. Finally, the court upheld the grant of summary judgment to plaintiffs Aguilar and Esparza on this latter claim. The only reason offered by Kiefer for holding the green cards for four days was that he took a few days off from work. The unreasonableness of the seizure was, the court held, exacerbated by Kiefer's failure to inform the plaintiffs about how long the documents would be held or how they would be returned.

Farm Labor Organizing Committee v. Ohio State Highway Patrol, ___ F.3d ___, No. 00-3653 (6th Cir. Oct. 17, 2002).

COURT GIVES FINAL APPROVAL TO SETTLEMENT IN FAMILY UNITY CLASS

ACTION – The federal district court in Santa Ana, California, has given final approval to the settlement in *Escutia v. Ashcroft*, a class action lawsuit that challenged the failure of the Immigration and Naturalization Service 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.

Enacted as part of the Immigration Act of 1990, the Family Unity program allows the spouses and children of permanent residents who legalized through the 1986 amnesty program to remain and work in the U.S. This relief is mandatory under 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 Aug. 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 from NILC's website (www.nilc.org). The settlement was approved and took effect on Oct. 28, 2002.

Escutia, et al. v. Reno, No. SACV 00-841 AHS (C.D. Cal., settlement approved, Oct. 28, 2002).

Employment Issues

FEDERAL JUDGE DENIES GOVERNMENT'S MOTION TO DISMISS AIRPORT SCREENER'S SUIT – A federal court judge in Los Angeles has denied a U.S. Dept of Justice motion to dismiss a lawsuit that challenges as unconstitutional a provision of the Aviation and Transportation Security Act that requires all airport security screeners to be U.S. citizens. (For background on the law, see “Newly Enacted Citizenship Requirement to Displace Thousands of Airport Security Screeners,” IMMIGRANTS' RIGHTS UPDATE, Dec. 20, 2001, p. 13.) The suit was brought by a group of screeners who lost their jobs because of the citizenship requirement. Judge Robert Tagasuki, who sits in the Central District of California, made the ruling on Nov. 12, 2002.

Generally, when a law singles out a group of persons (such as noncitizens) for disparate treatment, it must pass a legal test called “strict scrutiny.” Under strict scrutiny, the government must show that the disparate treatment results from “a narrowly tailored measure that furthers compelling governmental interests.” The DOJ argued that under two exceptions to strict scrutiny, the test should not be applied to the citizenship requirement for airport screeners. The requirement, the DOJ argued, falls under the “governmental function exception” and also qualifies as an action that is due the special deference that must be accorded to the political branch of the government in immigration and naturalization matters. Therefore, the DOJ contended, the government need only show that the citizenship requirement is rationally related to a legitimate governmental purpose.

However, Judge Tagasuki found that neither exception applies in this case. First, he held that the “governmental function” exception applies only to jobs that “perform a fundamental obligation of government to its constituency,” such as police officers or school teachers. The function of a security screener is, he ruled, “a more common occupation to the community” and does not fall into the same category.

The judge also held that in barring all noncitizens, including lawful permanent residents, from jobs as screeners, the government is not due special deference. The restriction, the judge ruled, does not implicate the political branches' foreign relations powers, and the incentive it provides for noncitizens to be naturalized is insufficient to trigger the deference exception.

The judge noted that improving aviation security is a compelling government interest. But because neither exception to the “strict scrutiny” test applies to the restriction, the government must show that the exclusion of all noncitizens from employment as screeners is the least restrictive means of furthering that compelling interest. The judge held that at this early stage in the case, the government had not made that showing. Accordingly, he allowed the case to go forward.

This decision does not mean that the citizenship requirement has been found unconstitutional, as was erroneously reported by some media outlets. Rather, it simply means that the parties can now engage in discovery and that the government will have to present evidence to satisfy the strict scrutiny test.

Gebin et al. v. Mineta et al., No. 02-0493 (N.D. Cal. Jan. 2002).

EEOC REACHES SETTLEMENT FOR \$1,525,000 ON BEHALF OF IMMIGRANT WORKERS IN A SEXUAL HARASSMENT CASE – In an egregious sexual harassment and retaliation case, in which a group of immigrant workers alleged that their supervisors even raped them, the U.S. Equal Employment Opportunity Commission (EEOC) announced a \$1,525,000 settlement of an employment discrimination lawsuit brought under Title VII of the Civil Rights Act of 1964. The women—mainly from Latin America—worked at a DeCoster Farms' plant in Iowa. They were sexually assaulted and harassed, as well as threatened with retaliation if they complained.

The EEOC's settlement was approved by the U.S. District Court, through a consent decree that the parties negotiated. The settlement provides monetary relief for the affected employees, as well as a contribution to the Iowa Coalition Against Domestic Violence (ICADV), which assisted the workers in filing the charges in Aug. 2001. While DeCoster Farms did not admit liability, it agreed to conduct annual training for managers and employees and continue to enforce antiharassment and antiretaliation policies. In addition, the company has committed to working closely with the EEOC over the next three years to ensure compliance with the settlement. Finally, because some of the women were undocumented, the EEOC secured deferred status for them, ensuring that they would not be removed from the U.S. while they assisted governmental agencies with the prosecution of the case.

The EEOC press release on this settlement can be found at www.eeoc.gov/press/9-30-02-b.html.

OSC OBTAINS ITS LARGEST SETTLEMENT EVER – The U.S. Dept. of Justice recently announced that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) reached a landmark settlement with Swift & Company, a division of ConAgra, Inc., in which the company agreed to pay \$174,088 in civil penalties and \$13,412 in back pay to workers it had discriminated against. This settlement represents the largest ever won by the agency against an employer accused of unfair immigration-related hiring practices.

The OSC conducted a two-year investigation after a U.S. citizen complained to the agency that the defendant refused to hire her because it believed that she was undocumented. The OSC discovered that since 1990, one of Swift & Company's plants in Worthington, Minn., had been engaging in a pattern or practice of citizenship status discrimination and imposing unfair documentary requirements during the hiring process against U.S. citizens and lawful work-authorized immigrants. Citizens who were believed to look or sound “foreign” and work-authorized immigrants were subjected to greater scrutiny during the employment eligibility verification process than was applied to individuals who “appeared to be” U.S. citizens.

As part of the agreement, the defendant agreed to receive employment discrimination training for its human resource personnel, as well as offer interviews and positions to the affected workers. The settlement was approved by Judge Robert L. Barton Jr. of the Office of the Chief Administrative Hearing Officer.

OFFICE OF SPECIAL COUNSEL ANNOUNCES 2002–03 GRANTEES – The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) of the U.S. Dept. of Justice's Civil Rights Division has awarded close to \$900,000 in grants to 15 nonprofit groups serving communities throughout the country, to conduct public education programs for workers and employers about immigration-related job discrimination under the Immigration and Nationality Act.

Ranging from \$40,000 to \$100,000, the grants will fund grantees' efforts to assist workers who believe they have been discriminated against as a result of their citizenship status or national origin, or due to document-related abuse committed by employers in administering the I-9 employment eligibility verification process. Grantees will assist workers in filing claims with the OSC; conduct trainings for workers, employers and, immigration service providers; distribute educational materials in various languages; and place advertisements in local communities through both mainstream and ethnic media.

The recipients of the OSC grants for the period from Oct. 1, 2002, through Sept. 30, 2003, are the Asian Pacific American Legal Resource Center (APALCR) in the Washington, D.C., metro area; Catholic Charities of Dallas; Catholic Charities of Galveston/Houston; City of New York's Commission on Human Rights; City of Seattle's Office for Civil Rights; Coalition of Florida Farm Worker Organizations; Employers Association of New Jersey; Georgia Hispanic Chamber of Commerce; Hogar Hispano/Catholic Charities, based in Arlington, Texas; International Rescue Committee, based in San Diego, California; Legal Services of Eastern Michigan, located in Flint, Michigan; Lutheran Social Services of Minnesota; North Carolina Justice & Community Development Center, headquartered in Raleigh, North Carolina; University of Nevada/Small Business Development Center; and the National Immigration Law Center.

Under its OSC grant, NILC will continue providing technical assistance to immigrant workers' advocates, service providers, and pro bono attorneys throughout the country on immigration-related employment issues such as citizenship status discrimination, the I-9 process, document abuse and reverification, SSA no-match letters, and other issues affecting low-wage immigrants. NILC will provide educational materials on these issues and conduct four regional seminars in the West, Southwest, Northwest, and Midwest.

Workers or advocates who have questions about potential immigration-related job discrimination can contact the OSC at their employee hotline (800-255-7688 or 202-616-5594) or via e-mail at osc.crt@usdoj.gov. Businesses can reach the OSC through the employer hotline at 800-255-8155.

The OSC's press release regarding the new grantees and links to each of the organizations can be found at www.usdoj.gov/crt/osc/.

Immigrants & Welfare Update

CONGRESS ADJOURNS WITHOUT REAUTHORIZING TANF – Congress adjourned on Nov. 22, 2002, having put off most of the difficult spending decisions it faced, including those regarding the Tem-

porary Assistance for Needy Families (TANF) program, until next year. The House of Representatives and Senate passed resolutions that extended funding for federal agencies at current levels until Jan. 11, 2003, and extended the welfare law, which created TANF, through Mar. 31, 2003.

Lawmakers have negotiated for months on how best to renew the 1996 welfare law, which expired on Sept. 30, 2002. In late Sept. 2002, Congress approved a three-month extension allowing states to continue receiving federal funds while lawmakers work out an agreement on a longer extension of the program. Because that extension is scheduled to expire on Dec. 31, 2002, and Congress adjourned without reauthorizing the welfare law, it approved the three-month extension that is due to expire on Mar. 31, 2003.

One of the key issues dividing lawmakers is the question of whether or not to include immigrant child health and prenatal care restorations. Although the White House had been unsupportive of them, advocates had hoped that the restorations would be adopted by Congress in its post-election session, as part of a TANF reauthorization compromise.

Before adjourning for the election earlier this month, the Senate Finance Committee had been considering a three-year extension of the TANF program that would maintain current funding levels. In negotiating this compromise, Democrats and Republicans identified two or three priority issues that should be included in the final bill. Republicans are seeking funding for marriage promotion programs and trying to toughen work requirements. Democrats have highlighted a number of priorities, including additional childcare funding and the immigrant restorations that were included in the Senate Finance Committee's TANF bill (for details of the immigrant provisions included in the Senate Finance Committee TANF bill, see "Senate Finance Committee Votes to Include Restorations of Benefits to Immigrants in TANF Bill," IMMIGRANTS' RIGHTS UPDATE, July 29, 2002, p. 14). But the White House and Senate Republicans have strongly opposed the inclusion of any immigrant restorations, expressly rejecting proposals to include the Immigrant Children's Health Improvement Act (ICHIA). ICHIA would allow states the option of covering lawfully present pregnant women and children under Medicaid and the State Children's Health Insurance Program (SCHIP).

The opposition of the Bush administration is particularly surprising given that just a few months ago, in regulations that allow states to provide prenatal care by extending coverage to fetuses, the administration held that "it would be inconsistent with [the goal of maximizing the availability of prenatal care and promoting the overall health of infants and children] to tie services for prenatal care to the immigration status of the mother." In making this statement, the administration appeared to agree that the welfare law's restrictions on immigrant eligibility for benefits—including prenatal care and health care for legal immigrant children—undermine public health goals. Yet the administration has pushed against the inclusion of ICHIA during negotiations.

The administration's position is also surprising considering that President Bush and his political advisors have been courting the Latino vote. Due in part to the confusion created by the welfare law's restrictions as well as the hostile message they send, Latino children are among the most likely to lack health insurance in the nation.

DRIVER'S LICENSES FOR IMMIGRANTS: BROAD DIVERSITY CHARACTERIZES STATES' REQUIREMENTS— In the past year, due to heightened security concerns, increased attention has been paid to driver's license requirements for immigrants. After examining the rules in each state, the American Immigration Lawyers Association, National Council of La Raza, National Employment Law Project, and NILC have prepared a table of driver's license requirements. This article summarizes that table, which can be downloaded from NILC's Web site at www.nilc.org.

Most states require that applicants for driver's licenses produce proof of identity as well as a Social Security number (SSN). However, 7 states do not require an SSN at all, and 36 states provide exemptions from the requirement. For example, 34 states require an SSN only of persons who have been assigned one, and 5 states have other exceptions.

The Social Security Administration (SSA) has discouraged the use of SSNs for purposes that are not related to work or the receipt of government benefits. For several years, the federal agency has encouraged states to discontinue SSN requirements for driver's licenses and instead develop alternative identifiers for this purpose. Numbers can be useful as identifiers, particularly to avoid confusing persons with similar names. But the SSN is not the only number that could be used. In issuing licenses, some states use their own numbering system, and five states accept the individual taxpayer identification number (ITIN).

Approximately half of the states require that applicants for driver's licenses be lawfully present in the country. In the last year, this requirement was newly imposed in Louisiana, Ohio, Indiana, and Minnesota. Proposals to add a lawful presence requirement were defeated in seven states.

Some states have expanded the range of documentation that applicants can use to prove identity for purposes of securing a driver's license. Currently, 14 states accept the *matrícula consular*, an identity document issued by the Mexican consulate. Numerous states accept other foreign documents, such as passports, birth certificates, and military cards.

States that require an SSN for a driver's license with no exceptions (5): Alabama, Washington, D.C., Hawaii, New Jersey, and West Virginia.

States that do not require an SSN for a driver's license (7): Georgia, Kansas, Maryland, Minnesota, Mississippi, Oregon, and Vermont.

States that require an SSN for a driver's license only of people who have been assigned one or are eligible for one (35): Arizona, Alaska, Arkansas, California, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

- Arizona, Colorado, Indiana, Missouri, Rhode Island, Tennessee, Wisconsin, and Wyoming allow applicants without SSNs to submit an affidavit stating that they have either never been issued an SSN or are ineligible for one.

- Idaho, Kentucky, Louisiana, Massachusetts, Montana, New York, North Dakota, Pennsylvania, South Carolina, Texas, and Virginia require applicants without SSNs to submit verification from the SSA that none has been assigned or a denial letter from

the SSA.

- The following states allow applicants without SSNs to submit an ITIN: Kentucky, Pennsylvania (also requires denial letter from the SSA), Rhode Island, and Utah.

- California, Idaho, and Nebraska require applicants without SSNs to verify lawful presence.

States that require an SSN but have other exceptions to the rule (5): Connecticut and New Hampshire require SSNs only of new applicants, while Illinois and Kentucky provide a religious objection—exemption to the SSN requirement. Iowa does not require SSNs of nonimmigrants.

States that have lawful presence requirements (27): Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Washington, D.C., Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Nebraska, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming.

States that don't have lawful presence requirements (24): Alaska, Hawaii, Illinois, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin.

States that accept the ITIN as a form of ID (5): Kentucky, North Carolina, Pennsylvania, Rhode Island, and Utah.

States that accept the Matrícula Consular as a form of ID (13): Idaho, Indiana, Michigan (accepted on case-by-case basis), Nebraska, North Carolina, New Mexico, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin.

U.S.-MEXICO BORDER COUNTIES COALITION RELEASES REPORT ON THE COST OF UNREIMBURSED HOSPITAL CARE TO UNDOCUMENTED PERSONS

A private group representing counties along the southwestern U.S.-Mexico border has conducted a study of the costs incurred by those counties in providing uncompensated healthcare. The U.S./Mexico Border Counties Coalition, which commissioned the study with funds secured by Sen. John Kyl (R-AZ), released its report in Sept. 2002. Although the study's researchers acknowledge that U.S. citizens and lawfully present persons receive most of the services that go uncompensated, they chose to focus on undocumented recipients.

The report concluded that 25 percent of unreimbursed emergency medical costs incurred by the 24 counties that touch the Mexican border were due to undocumented immigration. The researchers estimated the cost as approximately \$190 million a year, plus an additional \$13 million for emergency transportation. However, as explained below, a number of questionable assumptions and omissions informed the researchers' approach, casting doubt on the validity of some of the study's findings.

The researchers used two different methodologies in developing their report. First, they attempted to survey 77 hospitals and 82 emergency medical services (EMS) providers through a written instrument, followed by in-person interviews. Only 14 hospitals and 15 EMS providers returned the surveys. This rate of response cannot yield statistically valid results, but the researchers considered the responses they did receive helpful in understanding "the nature and scope of the problem." The survey asked hospitals about the number of patients who did not

have (or did not provide) Social Security numbers (SSNs) and the study used that figure as a proxy for undocumented status. Hospitals were also asked to estimate the amount of charity care and local indigent health care funds used to serve undocumented persons, as well as the "bad debt" they incurred in serving such individuals. EMS providers were simply asked to estimate the amounts of bad debt and reimbursements they could attribute to undocumented persons.

Not surprisingly, the field researchers found that respondents had difficulty estimating the percentage of undocumented persons among the patients they served. Many hospital respondents said they did not know their emergency room patients' immigration status because the federal Emergency Medical Treatment and Labor Act (EMTALA) prohibits them from asking about it. When pressed for estimates, which varied from 5 to 80 percent, hospital officials made them on the basis of their knowledge of the service area and "a gut reaction from experience in the institution."

The second methodology used a ratio of uncompensated care to revenues for each hospital. These ratios were compared with the uncompensated care-to-revenue ratios of hospitals in a set of 107 nonborder counties selected for their similarity to the border counties in terms of "essential characteristics . . . with respect to the demand for emergency services." Factors examined included the percentage of people in poverty, median age of the populations served, income, and domestic and international migration. No variables related to rates of health insurance coverage were included.

The validity of making such a comparison is questionable. As the researchers themselves note, the counties on the U.S.-Mexican border are "strikingly different" from most other counties in the U.S. The researchers point out that the percentage of persons identified as Latino in border counties far exceeds the national average. However, they excluded other counties with large Latino populations from their counterfactual examples, explaining that "[i]ncluding a highly Hispanic nonborder county in a counterfactual set will bias the final calculation of excess uncompensated costs borne by border counties downward. This is true to the extent that the percent[age of the overall population in border counties made up by the] Hispanic population is positively correlated with the presence of undocumented immigrants. . . ."

In addition to presupposing a correlation between the presence of undocumented persons and the demand for uncompensated care, this reasoning ignores other critical facts. According to the Pew Hispanic Center, all Latinos, including citizens and lawfully present immigrants, are significantly less likely than other ethnic groups to have health insurance and suffer above-average rates of certain chronic and infectious diseases. (In its *Fact Sheet, Hispanic Health – Divergent and Changing*, the Pew Hispanic Center details findings from the 2000 Census, which show that 33.2 percent of Latinos have no health insurance, compared to 10 percent of non-Latino whites and 19 percent of African-Americans. Among low-income communities, 43.7 percent of Latinos are uninsured, compared to 25.5 percent of non-Latino whites and 26.2 percent of African-Americans who are poor.) As noted above, the researchers did not include rates of health insurance coverage among the variables used to identify like coun-

ties, despite the direct relationship between insurance coverage and the need for uncompensated care.

The researchers also acknowledge that residents of border counties suffer some of the most extreme poverty in the U.S. They fail, however, to acknowledge the poor state of border counties' basic infrastructure for clean drinking water and sanitation, and its effect on the spread of contagious disease and the demand for emergency medical services.

As the researchers point out, the costs of providing uncompensated care have effects that extend beyond the reduction in hospital revenues, including increased insurance costs and threats to the viability of safety net providers. Helping hospitals meet their charity care obligations is in everyone's interest. Towards that end, the researchers summarized the study's conclusions in an eight-point list of findings and offered a corresponding list of recommendations. Some of the recommendations are useful, such as the suggestions to liberalize certain Medicaid reimbursement policies and to increase federal funding to reimburse providers for serving undocumented patients. But the researchers also make other suggestions that may cause greater harm, such as the recommendation to use a person's lack of an SSN as a proxy for undocumented status. Useful or not, all of the study's suggested solutions focus on compensating border states for providing services to undocumented persons. This emphasis will likely produce policy changes that fall short of the mark.

As the American Hospital Association testified before the Federal Trade Commission in Sept. 2002, hospitals face a challenging operating environment. Hospital costs have risen in recent years, due to factors that include workforce shortages, increased professional liability premiums, and the cost of funding advances in medical science. Medicare and Medicaid reimbursement rates have declined relative to inflation. These rates will decline further unless Congress reverses scheduled reductions in the Disproportionate Share Hospital program, which provides funding for those reimbursements. Private providers have also become increasingly demanding and sophisticated in devising contracts with the government to provide hospital services. At the same time, many nonprofit hospitals are facing increased competition from for-profit specialty care providers, which are taking profitable lines of business away from community hospitals without providing community access to unprofitable services like emergency departments. This trend was reported in a *New York Times* article of Oct. 30, 2002, "Hospitals Battle For-Profit Groups for Patients."

While additional funding for unreimbursed emergency services would benefit the hospitals that received it, simply increasing federal support to border hospitals for services to undocumented persons amounts to placing a small patch on a large and complicated problem. Such proposals look past both the needs of hospitals throughout the country and the unreimbursed care provided to citizens and lawfully present immigrants, who received a substantial majority of the unreimbursed care reported by the researchers. A better solution would be to expand the scope of emergency Medicaid to cover more of the low-income uninsured population, in every state and without regard to immigration status.

As the researchers explain, emergency Medicaid covers emergency medical services delivered to persons who would be eli-

gible for Medicaid except for their immigration status. In order to qualify for Medicaid, a person must fit into an eligibility category, as well as meet income and residency requirements. The eligibility categories generally include children, pregnant women, indigent families with children, and the aged and disabled. Thus, a hospital cannot receive emergency Medicaid reimbursement for services to a low-income childless, able-bodied adult, whether she is a new migrant at the border or a citizen living on the streets of Chicago.

Expanding the scope of emergency Medicaid in the manner described above would also eliminate the need to identify persons as undocumented in order for providers to receive reimbursement. The researchers' suggestion that identifying undocumented persons be accomplished by using SSNs as a proxy for undocumented status raises privacy concerns. This practice could deter persons with immigration concerns from seeking needed medical treatment.

The researchers also note that undocumented persons often

fail to complete the emergency Medicaid application. In addition to being encouraged to implement presumptive eligibility more widely, as the researchers recommend, states should be provided incentives for simplifying their Medicaid application processes.

The researchers' decision to focus on undocumented immigrants as the source of funding and resource problems affecting public and private hospitals reflects a recent trend among some members of Congress. As noted previously, the Border Counties Coalition study was conducted at the behest of Sen. Kyl. In addition, Rep. Mark Foley (R-FL) has asked the General Accounting Office to conduct a study "on the financial impacts of illegal immigrants on our nation's hospital system," and even the Congressional Hispanic Caucus has asked for a similar report. On the news Web site CNSnews.com, Foley was quoted as saying on July 21, 2002, that the U.S. health care system must be "inoculated against the parasitic effects" of undocumented immigration "before we can no longer afford to take care of Americans."

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