



Immigration Issues

AG'S PRECEDENT DECISION DENIES HAITIAN'S RELEASE ON BOND BASED ON GENERALIZED NATIONAL SECURITY CONCERNS

– Attorney General John Ashcroft has invoked his authority to reverse a decision of the Board of Immigration Appeals ordering the release of an 18-year-old Haitian asylum applicant on a \$2,500 bond. The attorney general based his extraordinary decision principally on general national security concerns unrelated to the specific factors in the respondent's case.

The respondent in this case, David Joseph, fled Haiti along with 216 other Haitians who arrived in Miami on Oct. 29, 2002. As it reached Key Biscayne, the boat Joseph was in ran aground and many of its occupants jumped into the sea and swam towards the shore. When they reached land, many of them attempted to flee authorities who were attempting to detain them. It is unclear from

the opinion whether Joseph was among those who swam to shore and ran from authorities. Nevertheless, he was detained.

Joseph filed for asylum and sought to be released from detention on bond. The Immigration and Naturalization Service (now the Dept. of Homeland Security, or DHS) objected to his being released on bond, arguing that releasing him "would stimulate further surges of such illegal immigration by sea and threaten important national security interests." The immigration judge granted Joseph's release on a \$2,500 bond, and the INS appealed to the BIA. In a per curiam decision (i.e., a short decision made by a panel of BIA members and not authored by an individual panel member), the BIA concluded that, "absent contrary direction from the Attorney General," the broad national security interests invoked by the INS were not appropriate considerations for the purposes of determining release on bond.

Following that decision, Asa Hutchinson, undersecretary for the Border and Transportation Security Dept. under the newly

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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.

structured DHS, referred the case to the attorney general. In the referral he noted that pursuant to regulations, the BIA decision ordering Joseph's release would be automatically stayed. In addition, he asked that the attorney general stay the adjudication of all other bond requests from individuals who arrived in the U.S. by boat with Joseph on the same day. The attorney general opted to review the case and now has issued a precedent decision.

The attorney general's opinion notes that under section 236(a) of the Immigration and Nationality Act, he has wide discretion over detentions of non-U.S. citizens and their release from custody. The opinion finds that neither the statute nor the regulations give respondents any right to release on bond, but rather, "the statute merely gives the Attorney General the authority to grant bond *if* he concludes, in the exercise of broad discretion, that the alien's release on bond is warranted" (emphasis in original). The opinion departs from a long-established approach to custody and bond determinations. It does not discuss or even cite *Matter of Patel*, 15 I. & N. Dec. 666 (1976), the precedent decision in which the BIA found that release on bond is appropriate except where a respondent presents a flight risk or a danger to the community. Rather than considering whether Joseph, as an individual, posed a risk of flight or a danger to the community, the attorney general focused on general factors unrelated to the specific circumstances of the respondent, reviewing the incidence of increased migration to the Florida coast by Haitians and whether as a whole their increased migration presents a national security concern. The attorney general concluded that these generalized factors warranted Joseph's detention without bond.

In the opinion, the attorney general asserts that he did consider "the individual aspects" of Joseph's claim for bond but found nothing that would warrant his release on bond when balanced against the "compelling factors that militate against such release in the case of undocumented aliens attempting illegal entry into the United States" under the circumstances presented by the recent influx of Haitians. However, the only individualized consideration discussed in the opinion is the attorney general's finding that Joseph had not demonstrated that he was *not* among the individuals who jumped off the boat and swam ashore in an effort to evade apprehension, thereby placing the evidentiary burden on Joseph. Therefore, the attorney general denied Joseph's release from custody because he could not prove that he was not a flight risk.

However, the decision clearly is based on the attorney general's assessment of national security concerns. The government asserted that the increasing number of boats arriving in the U.S. from Haiti and other parts of the Caribbean have heavily taxed the U.S. Coast Guard. According to the attorney general's logic, if Joseph and others were freed from detention, their release would signal to other Haitians that they should attempt similar journeys to the U.S. Their arrival would continue to divert the U.S. Coast Guard from responding to other national security concerns. In addition, the attorney general cited State Dept. declarations stating that it had noticed an increase in the use of Haiti as a staging point for migration by other third country nationals such as Palestinians and Pakistanis.

The attorney general also considered and rejected the BIA's suggestion that a new policy imposing expedited removal on per-

sons arriving by sea already sent a message that individuals would be detained during the pendency or their removal hearings. (In Nov. 2002, the Dept. of Justice exercised its discretion to apply expedited removal to individuals who arrive in the U.S. by sea who cannot prove that they have lived continuously in the U.S. for two years. See "INS Expands Expedited Removal to Haitians Arriving by Sea," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 2002, p. 2). Joseph had argued that the new expedited removal policy would send the message that future arrivals by sea would be met with prolonged detention. However, the attorney general responded by saying that because the new policy did not apply to parolees or those arriving by other means, it was "not airtight." Moreover, any releases from custody would undercut the message provided by the implementation of the new policy.

Joseph had also argued that denial of his release violates due process. He cited several appellate court decisions that had found INA sec. 236(c), another section of the detention statute, unconstitutional. However, the attorney general pointed out that while a number of decisions had struck down mandatory detention provisions as unconstitutional, those decisions were decided on behalf of lawful permanent residents. (For more on these decisions, see "3d and 9th Circuits Hold Mandatory Detention Provision Unconstitutional," IRU, Feb. 28, 2002, p. 11. However, these decisions were recently reversed by the U.S. Supreme Court. See "Supreme Court Upholds Mandatory Detention," p. 7 of this issue.) In contrast, Joseph is a non-U.S. citizen and would enjoy no such due process rights. On this basis the attorney general rejected Joseph's claim to a right to an individualized bond hearing. The attorney general also dismissed Joseph's international law arguments by declaring that such legal instruments are only advisory, not binding.

In re D-J, 23 I. & N. Dec. 572 (A.G. 2003).

DHS SECRETARY EXTENDS TPS FOR HONDURANS AND NICARAGUANS ANOTHER 18 MONTHS AND AUTOMATICALLY EXTENDS THEIR WORK AUTHORIZATION

The secretary of Homeland Security has published notices in the Federal Register extending the designation of Honduras and Nicaragua as countries whose nationals and residents currently in the United States qualify for temporary protected status (TPS). The designations, which had been due to expire on July 5, 2003, will be in effect until Jan. 5, 2005. The notices also automatically extend the validity of employment authorization documents (EADs) issued under the Honduran and Nicaraguan TPS program until Dec. 5, 2003.

TPS is granted to persons from countries that are designated by the attorney general as experiencing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. The attorney general first made the current TPS designations for Honduras and Nicaragua in Jan. 1999, in the wake of the devastation caused by Hurricane Mitch. The authority to make this designation was transferred to the secretary of Homeland Security as part of the legislation creating that department, and the secretary has now decided to extend the designations for Honduras and Nicaragua for a further eighteen months. The current notices regarding the extension state that "[a]lthough there has been

significant progress in reconstruction efforts, recent droughts as well as flooding from Hurricane Michelle in 2001 have added to the humanitarian, economic, and social problems initially brought on by Hurricane Mitch in 1998.”

To register for the extension, nationals of Honduras and Nicaragua (and individuals of no nationality who last habitually resided in those countries) previously granted TPS must apply for it during the registration period that began on May 5, 2003, and ends on July 7, 2003. Such persons need only file Form I-821, Application for Temporary Protected Status (without the filing fee), Form I-765, Application for Employment Authorization, and two identification photographs (1½" x 1½"). Applicants who seek work authorization under the extension must submit the \$120 filing fee or a fee waiver request with the Form I-765; those who do not need work authorization must still submit Form I-765, but without the fee. Applicants who previously registered for TPS and were fingerprinted do not need to be refingerprinted and do not need to submit the \$50 fingerprinting fee. Prior registrants who were not previously fingerprinted because they were under 14 years of age but who now must be fingerprinted also must pay this fee.

Late initial registration is also available under the extension. In order to apply, an applicant must:

- be a national of Honduras or Nicaragua (or a person with no nationality who last habitually resided in either of those two countries);
- have been continuously physically present in the U.S. since Jan. 5, 1999;
- have continuously resided in the U.S. since Dec. 30, 1998; and
- be admissible as an immigrant, except as otherwise provided under Immigration and Nationality Act sec. 244(c)(2)(A), and not ineligible under INA sec. 244(c)(2)(B).

Each applicant for late initial registration must also be able to show that, during the registration period beginning Jan. 5, 1999, and ending Aug. 20, 1999, 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 pending or subject to further review or appeal;
- was a parolee or had a request for parole pending; or
- was the spouse or child of an individual currently eligible to be a TPS registrant.

The notices also announce the automatic extension of the employment authorization documents of Hondurans and Nicaraguans who received EADs under the TPS program. The reason for this extension is that because of the large number of individuals eligible for the extension, many reregistrants will not receive new EADs until after their current ones have expired. The extension applies to Hondurans and Nicaraguans who currently hold EADs that expire on July 5, 2003, and have the notation "A-12" or "C-19" (under "Category," for Form I-766 EADs) or "274a.12(a)(12)" or "274a.12(c)(19)" (under "Provision of Law," for Form I-688B EADs). Such cards are automatically valid now until Dec. 5, 2003. However, the individuals who benefit from this extension still must reregister for TPS by July 7, 2003, in order to have employment authorization throughout the

extended TPS period. 68 Fed. Reg. 23744-47 (May 5, 2003) (Honduran TPS extension); 68 Fed. Reg. 23748-51 (May 5, 2002) (Nicaraguan TPS extension).

FIVE VETERAN BIA MEMBERS FORCED TO RESIGN – In a move that some observers called a purge, Bush administration officials have pressured five of the longest-serving and most “pro-immigrant” members of the Board of Immigration Appeals to resign, according to a Mar. 12, 2003, *Los Angeles Times* article. The BIA hears appeals of Bureau of Citizenship and Immigration Services (BCIS) and immigration judge decisions and is the highest administrative body within the U.S. Dept. of Justice (other than the attorney general) that interprets U.S. immigration law. The Justice Dept. itself to date has made no official announcement of the decision to ask these members to leave the BIA, or of their resignations.

This development follows the attorney general’s Sept. 2002 issuance of a final rule providing that the BIA would be reduced from 23 to 11 members after a 6-month transitional period. During that period, the BIA’s substantial case backlog was to be reduced. The reduction in the BIA’s size is just one component of the rule’s provision for “streamlining” BIA procedures, which also includes eliminating the BIA’s jurisdiction to review factual findings *de novo*, making most appeals subject to review by a single Board member rather than a 3-member panel, making it easier to summarily dismiss appeals, allowing immigration judges’ decisions to be affirmed without a BIA opinion, and setting strict time limits for deciding cases (see “Attorney General Issues Final Rule to Reform BIA,” IMMIGRANTS’ RIGHTS UPDATE, Sept. 10, 2002).

The members who were asked to leave the BIA were Noël Brennan, Cecelia Espenosa, John Guendelsberger, Paul Schmidt, and Gustavo Villageliu. Schmidt had served for a time as BIA chairman. Critics charge that these members were targeted for removal from the BIA mainly for ideological reasons. According to the supplementary information to the rule providing for the reduction in the Board’s size, the reduction is intended to help the BIA “reach consensus on legal issues.” The critics say that eliminating dissenting voices is one way of accomplishing that goal.

A spokesperson for the Center for Immigration Studies, which advocates more severe limits on immigration, endorsed the removal of the five members. “Even if this were a way to remove particular officials because of their pattern of decisions, there would be nothing wrong with that,” the *Times* quoted Mark Krikorian as saying. “. . . Board members should clearly represent the attorney general’s views, since they are carrying out his responsibility.”

The pressure to decide cases quickly and in line with the attorney general’s views has resulted in a dramatic rise in the percentage of BIA rulings that go against immigrant appellants. On Jan. 5, the *L.A. Times* reported that BIA members had been deciding cases in minutes, often issuing two-line decisions, and that in Oct. 2002, 86 percent of all rulings on appeals were going against immigrants compared to a 59 percent rulings-against rate at the same time a year before. According to the *Times*, some Board members were deciding 50 cases a day.

Immigrants' advocates have challenged the rule that restructures the BIA. The Capital Area Immigrants' Rights (CAIR) Coalition and the American Immigration Lawyers Association (AILA) filed a federal lawsuit alleging that the attorney general issued the rule without taking into account the views of the public, including nongovernmental organizations that filed comments on the rule before it was issued. In their comments, groups had argued that the proposed changes would put great pressure on BIA members to decide cases in a way that was pleasing to the administration and that fairness would be sacrificed in the race to decide cases quickly. The suit, filed on Oct. 25, 2002, also charges that the Justice Dept. did not articulate a reasoned basis for the changes. On May 21, 2003, a U.S. district court judge in Washington, D.C., granted the defendants' motion for summary judgment, ruling that the Justice Dept. adequately explained its decision to resolve most BIA cases through the single-member review and summary affirmance policy required by the rule. Significantly, the judge concluded that the CAIR Coalition had standing to bring the case and that the rule was subject to judicial review.

Two federal courts of appeal have ruled that the affirmance without opinion procedure instituted by the BIA reform rule was not unlawful as applied to the petitioners in the cases on which the courts were ruling. The American Immigration Law Foundation's Legal Action Center has prepared a practice advisory with arguments for distinguishing those cases, which is available at the following URL: http://www.aifl.org/lac/lac_pa_postalbathani_032503.pdf.

Other cases challenging the procedure are pending in the Third and Ninth Circuits. While no federal court of appeal has yet explicitly rejected the new procedure, AILF's Legal Action Center reports that many cases challenging the procedure have been remanded to the BIA for reconsideration. Moreover, in some petition-for-review or habeas corpus cases challenging an affirmance without opinion, the government has asked that the case be remanded to the BIA because the case was erroneously affirmed without opinion, and the BIA itself has reportedly *sua sponte* reopened proceedings when a petition for review was pending. AILF has asked that information about similar cases to be sent to lhall@aifl.org.

At the request of the American Bar Association's Commission on Immigration Policy, Practice and Pro Bono, the law firm of Dorsey & Whitney is conducting a study called "Board of Immigration Appeals: Procedural Reforms to Improve Case Management" and has asked practitioners to provide information about cases affected by the rule changes, especially affirmance-without-opinion cases, brief order cases, one-judge-review cases where the wrong standard of review may have been applied, or where de novo review would have led to a different result, or where simultaneous filing of briefs caused prejudice, confusion, or waste. Details of such cases should be sent to moccio.kathleen@dorseylaw.com.

For most immigrants, the BIA is the court of last resort. Review beyond the BIA is limited by statute, judicial deference to BIA decisions, and the inability of immigrants to pay for or find lawyers who can appeal their cases. The BIA's independence and fairness has long been questioned, because both it and the Immigration and Naturalization Service were part of the Justice

Dept., subject to decisions of the attorney general. The legislation creating the Dept. of Homeland Security (DHS) abolished the INS, and its enforcement and service activities now reside in the DHS. The immigration court system, including the BIA, remains in the Justice Dept.. The new appeal procedures and the removal of BIA members sympathetic to immigrants' rights make clear that the BIA's independence and fairness are even more in question now.

LEGISLATION ADDRESSES ISSUES FACED BY U.S.-RAISED UNDOCUMENTED YOUTH

– The issues and challenges faced by U.S.-raised undocumented youth have been the subject of a surge of interest by advocates and lawmakers over the past year. These young people arrived in the United States as children, attended school here, and frequently have had limited contact with or knowledge of their countries of origin, but they have nevertheless derived undocumented immigration status from the circumstances of their arrival in this country with undocumented parents or other adults. The Urban Institute, a Washington-based think tank, estimates that from 50,000–65,000 such young people graduate from high school each year after having lived in the U.S. for at least five years. Under current law, they are treated the same as any other undocumented immigrant, unable to work legally and subject to deportation to countries of which they may have only the vaguest memories.

Efforts on behalf of these young people have focused on ensuring that they have a fair opportunity to attend college and giving them a chance to apply for legal residency. At the federal level, concern for these students has manifested itself in growing attention to bipartisan legislation—the Student Adjustment Act (H.R. 1684) in the House and the soon-to-be reintroduced DREAM Act in the Senate—that would address both of these issues. At the state level, it has led to a large number of impressive campaigns to convince state legislatures to permit some of these students to attend state-funded institutions at the same tuition rate as other state residents.

Federal law currently limits, but does not prohibit, a state's ability to offer any higher education benefits, including in-state tuition rates for state colleges and universities, to residents without regard to immigration status. As a result, many immigrants are forced to pay nonresident rates, which are generally two to five times higher than the in-state rates, or else to forego college altogether.

The federal limitation is found in section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, 8 U.S.C. sec. 1623), which provides that any state that grants a higher education benefit to state residents who are not lawfully present in the U.S. must provide the same benefit to U.S. citizen residents of other states. Section 505 would be repealed by the DREAM Act and the Student Adjustment Act, each of which would also provide a path to legalization for students who have lived in the U.S. for at least five years and who can show that they are of good moral character.

But state organizers and advocates have not waited for section 505 to be repealed. Instead, they have pressed their legislatures to pass laws that meet the requirements of section 505 while permitting most undocumented students to attend state schools

at in-state rates. Though the specifics differ, the state proposals essentially do this by providing in-state rates regardless of residency to students who have attended and graduated from in-state high schools.

The first state to enact such legislation was Texas, in 2001, followed later that year by California. In 2002, Utah and New York followed suit. This year three more state legislatures passed proposals; the governors of Washington, Oklahoma, and Illinois signed the legislation in May. Fifteen other states have introduced similar bills, many of which are either still pending or have made sufficient progress that prospects appear good for passage next year.

It is interesting to note that more than 60 percent of all undocumented immigrants residing in the U.S. live in states that have already passed legislation permitting undocumented students to attend state schools at in-state rates. Of the states that have not yet done so, the largest undocumented population is in Florida, where prospects for passage next year appear excellent. The Florida bill enjoys strong bipartisan backing, including the support of legislative leaders and Governor Jeb Bush.

Those states that have already passed legislation are making a human capital investment in these young people that is likely to be repaid many times over in increased tax receipts and decreases in social services and criminal justice costs. But for that to happen, the federal government will have to relax immigration laws as provided by the DREAM Act and the Student Adjustment Act so that the students can adjust their immigration status and pursue their careers.

For a comprehensive table of state-proposed or enacted legislation regarding immigrant access to higher education, please visit www.nilc.org. The table can be found by selecting the "Immigration Law and Policy" link.

DHS ESTABLISHES US-VISIT PROGRAM TO TRACK NONCITIZENS – Dept. of Homeland Security officials have announced the establishment of an automated entry-exit system that will "collect, maintain and share information, including biometric identifiers, through a dynamic system, on foreign nationals." The United States Visitor and Immigrant Status Indicator Technology program (US-VISIT) will electronically record non-U.S. citizens' physical characteristics in order to track when they enter and leave the country. The institution of such an automated entry-exit system has been required by a series of provisions passed by Congress, the earliest in 1996. It will be implemented incrementally.

According to a DHS fact sheet, by the end of 2003, US-VISIT is expected to capture and read a biometric identifier for foreign nationals arriving at air and sea ports of entry, and will be capable of "scanning travel documents and taking fingerprints and pictures of foreign nationals, which then could be checked against databases to determine whether the individual should be detained or questioned concerning possible terrorist or criminal involvement." Other methods of identifying travelers biometrically, such as via face recognition and iris scan technology, are under study. The information collected on each traveler will be stored in DHS and U.S. State Dept. databases as part of the person's travel record. Exit tracking under the new system will not apply at land borders. Visitors from those countries (primarily in Western Eu-

rope) whose citizens are not required to obtain visas in order to travel to the U.S. as tourists are subject to other rules under which more limited arrival and departure information is collected.

Initial news reports indicated that US-VISIT was intended to replace the National Security Entry-Exit Registration System (NSEERS), in which nationals of designated countries (primarily Arab and Muslim) were required to register and be photographed, fingerprinted, and questioned upon entering or leaving the country or, if already in the U.S., were required to register and be photographed, fingerprinted, and questioned at immigration offices by specified dates.

While US-VISIT is ostensibly not a visitor's-country-of-origin-based program, it seems likely that the same factors used in singling out those who were required to register under NSEERS will be used to determine who will receive special processing at ports of entry—i.e., factors such as country of origin, ethnicity, religious affiliation, etc. The fact sheet describes those selected for NSEERS registration as "deemed to be of risk to national security," and it states that "[i]nspectors at ports of entry have the discretion, based on national security criteria and intelligence reports, to refer an individual from any country to a more detailed secondary inspection." Moreover, the fact sheet describes NSEERS as a pilot project and does not suggest that its components, such as call-in registration, have ended. In fact, it indicates that once the US-VISIT system is fully implemented, any remaining elements of NSEERS will become part of the new system.

Many questions remain unanswered. What limits will there be on the kind of information collected under US-VISIT? How will the information be used and shared? What limits will there be on the time information will be stored? How accurate is the biometric technology that will be used? How will errors be corrected? Likewise, criticisms of NSEERS remain unanswered—that a program based on ethnic profiling violates noncitizens' civil rights and does not enhance national security; that it was carried out arbitrarily; and that noncitizens may remain at risk as a result of its implementation.

The US-VISIT fact sheet is available online at <http://www.dhs.gov/dhspublic/display?content=736>.

SIX OF NUMEROUS DRIVER'S LICENSE BILLS INTRODUCED IN STATE LEGISLATURES HAVE BECOME LAW – Over 103 bills that address immigrants' ability to obtain a driver's license were introduced in state legislatures during 2003. The bills fall into two broad categories: proposals that expand immigrants' access to driver's licenses and proposals that restrict immigrants' access. While it is expected that most of these bills will die in committee, six have become law to date.

Efforts to oppose restrictive proposals were challenged this year by the involvement of the Federation for American Immigration Reform, an anti-immigrant organization, in state campaigns. Immigrants' rights advocates, however, along with law enforcement, religious organizations, labor, and businesses have been successful in educating policymakers about the ineffectiveness of these restrictive proposals and preventing them from moving out of legislative committees. In Colorado, Connecticut, Georgia, Idaho, Kentucky, Minnesota, Missouri, New Mexico, and other

states, coalitions emerged where none had previously existed to rally around the driver's license issue.

There are approximately 36 bills that seek to remove restrictions such as Social Security number (SSN), lawful presence, or documentation requirements, which prevent many immigrants from securing driver's licenses and automobile insurance. Other proposals include allowing documents, such as the individual taxpayer identification number (ITIN) and foreign identity cards, to be accepted as forms of identification. Thus far, Kansas and New Mexico have enacted such bills into law. The Kansas law allows applicants for a driver's license, instruction permit, or state identification card to submit an ITIN if they do not have an SSN. If the applicant does not have an SSN or an ITIN, he or she must submit a sworn statement attesting to that fact. The New Mexico law allows applicants to submit an ITIN in place of an SSN and directs the secretary of Motor Vehicles to issue regulations that name other documents acceptable as substitutes for an SSN or ITIN.

There are approximately 54 bills that seek to impose restrictions. These include requirements to make the license expire with the immigration document presented as evidence of eligibility; submission of fingerprints with the application; elimination of foreign identity cards as a form of identification; and the placement of marks on immigrants' licenses to distinguish them from others. Thus far, Colorado, New Jersey, Virginia, and West Virginia have enacted such bills into law.

The Colorado law was signed by the governor on May 22, 2003, and prohibits a public entity (agency, department, board, division, bureau, commission, council, or political subdivision of the state) from accepting an identification document unless it is a document issued by a state or federal jurisdiction or recognized by the U.S. government. The document also must be verifiable by federal or state law enforcement, intelligence, or homeland security agencies. The requirement would not apply to a person reporting a crime; to a public official accepting a crime report, conducting a criminal investigation, accepting an application for services under the Women, Infants and Children (WIC) nutrition program, or providing emergency medical services; to a peace officer in the performance of the officer's duties and within the scope of the officer's employment; or instances in which federal law mandates acceptance of a document.

The central goal of the New Jersey law is to eliminate the state's department of motor vehicles and to replace it with the New Jersey Motor Vehicle Commission. However, the law also authorizes the commission to implement additional proofs of identity for a license, seek the assistance of the federal government to verify documents' authenticity, require fingerprinting of all applicants for commercial driver's licenses, and link the expiration of the license to the length of time that the person is authorized to be in the U.S.

The Virginia law requires applicants for licenses or identification cards to provide documentation of lawful presence, nonimmigrant applicants to be issued a temporary license that is valid only as long as the person is authorized to be in the U.S., and conformance with the USA Patriot Act with regard to issuing hazardous waste endorsements for commercial drivers. The West Virginia law links the expiration of the license to the length of time that the person is authorized to be in the U.S.

In addition, there are 11 proposals to require all applicants to register with the Selective Service. Only Kentucky has enacted this requirement into law. For more detail on state driver's license proposals, see the table "2003 State Driver's License Proposals" which can be accessed via NILC's Web site at www.nilc.org/immspbs/DLs/index.htm, or contact Tyler Moran at moran@nilc.org.

BIA RULES THAT TAKING OATH OF ALLEGIANCE PURSUANT TO A NATURALIZATION APPLICATION DOES NOT ESTABLISH ACQUISITION OF U.S. NATIONALITY

– The Board of Immigration Appeals has ruled that that a lawful permanent resident who took an oath of allegiance to the United States in conjunction with his application for naturalization did not thereby acquire U.S. nationality.

Section 101(a)(22) of the Immigration and Nationality Act defines a U.S. national as an individual who "owes permanent allegiance to the United States." All U.S. citizens are also nationals of the United States. In addition, Congress by statute has conferred U.S. nationality upon individuals born in certain U.S. territories. INA § 308. Under this statute, individuals born in American Samoa are U.S. nationals, even though they are not U.S. citizens. The BIA's decision finds that this is the only means by which noncitizens may meet INA sec. 101(a)(22)'s definition of an individual who "owes permanent allegiance to the United States."

The BIA's decision rejects the suggestion of the Ninth Circuit Court of Appeals that applying for naturalization may confer U.S. nationality on a lawful permanent resident. In *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001), the court stated that, for a noncitizen to qualify for status as a U.S. national, "a person must, at a minimum, demonstrate (1) birth in a United States territory or (2) an application for United States citizenship." *Id.* at 757. In *Hughes*, the petitioner had not applied for naturalization. At least one district court has found a naturalization applicant to be a U.S. national under this definition. *Lee v. Ashcroft*, 216 F.Supp.2d 51 (E.D.N.Y. 2002). However, the BIA's recent decision rejects the concept that applying for naturalization can confer U.S. nationality.

In re Navas-Acosta, 23 I. & N. Dec. 586, Int. Dec. 3489 (BIA Apr. 29, 2003).

JUSTICE DEPT. ORDER EXEMPTS CRIME DATABASE FROM ACCURACY REQUIREMENT

– The Justice Dept. has an information problem. First an FBI agent embarrassed her bosses last year by pointing out that the agency had failed to follow up investigative leads that might have led to foiling the Sept. 11, 2002, conspiracy. Now the department that couldn't connect the dots is degrading the quality of the country's most important database. In a little-noticed order on Mar. 24, 2003, the Justice Dept. ruled that data from the National Crime Information Center (NCIC) do not have to be accurate.

The NCIC is the nation's biggest collection of "actionable" crime information—the system that police officers hook up to when they want to know whether the person they've just stopped, or arrested, is on any wanted list of ordinary criminals or terrorists. Some 650,000 federal, state and local officers have access to the system, which is administered by the FBI.

The Justice Dept.'s order exempted the NCIC from a long-

standing legal requirement that information in major law enforcement databases be "accurate, relevant, timely and complete." It justifies the change on the curious basis that requiring accurate information would interfere with law enforcement.

The information in the NCIC database already was off limits, for the most part, to people whose names were in its files, with few mechanisms to correct errors. Until recently, it included records related mainly to crimes, terrorists, and domestic-violence orders. But as of last year, the NCIC also includes the names of supposed immigration law violators.

Immigration records are the perfect example of how NCIC information can go awry. For years, the General Accounting Office and the Justice Dept.'s own inspector general condemned the Immigration and Naturalization Service for the poor quality of its records. These records are—as anyone who has dealt with the agency can testify—unreliable, incomplete, or simply missing. In the polite bureaucratise of a GAO report this year: "The INS continues to face significant data-accuracy problems."

Last year, the agency let hundreds of thousands of change-of-address notifications sit unread in warehouses. Early this year, a federal grand jury in Los Angeles indicted two employees of an agency contractor who dealt with a backlog of passports, birth certificates, visa applications, and a host of other often irreplaceable documents by shredding some 90,000 of them.

Congress has dissolved the INS and divided its constituent parts into three new divisions of the Homeland Security Dept. Presumably the INS employees brought their data management techniques with them. Immigrants with no ties to terrorists have every reason to fear the consequences of having their names run through the NCIC. With non-U.S. citizens' access to due process eroded since Sept. 11, data errors can lead to detention and even deportation. Immigrants won't be the only ones to pay the price. The Justice Dept. solution to the data crisis simply passes it on to the nation's first responders—the patrol officer or the investigator trying to identify possible conspirators. Their time would be better spent following good leads. In Attorney General John Ashcroft's words after Sept. 11, "Information is the best friend of prevention." But only if it's accurate.

(This article originally appeared as an opinion essay in the Miami Herald under the title "Official Crime Information Should Be Accurate" and was posted in the Herald's Mon., Apr. 28, 2003, online edition. Its author, Joan Friedland, is a policy attorney with NILC's Washington, D.C., office. Reprinted with permission.)

Litigation

SUPREME COURT UPHOLDS MANDATORY DETENTION – The U.S. Supreme Court has upheld the constitutionality of section 236(c) of the Immigration and Nationality Act, which provides for mandatory detention, while removal proceedings are pending, of non-U.S. citizens who are deportable as a result of specified criminal offenses. The decision reverses a ruling by the Ninth Circuit Court of Appeals and overrules three other circuits—the Third, Fourth, and Tenth—all of which had found that the mandatory detention of lawful permanent residents, when they are not afforded a hearing in which they could show that their detention is

not warranted, violates due process.

The respondent in this case, Hyung Joon Kim, is a citizen of South Korea who first entered the United States in 1984 at the age of six and two years later became an LPR. In 1996 he was convicted of first-degree burglary, and the following year he was convicted of a second crime, petty theft with priors. The Immigration and Naturalization Service initiated proceedings against Kim based on the criminal convictions, and he was detained without a bond hearing pursuant to sec. 236(c). Sec. 236(c) authorizes detention of non-U.S. citizens who are inadmissible or deportable because they have committed specified crimes, including an aggravated felony, and two crimes involving moral turpitude. Kim conceded deportability and did not seek a hearing pursuant to *In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999), to contest whether sec. 236(c) applies to his case.

Kim filed a habeas corpus petition with the federal district court, contending that his detention without a hearing violated due process. The district court found sec. 236(c) unconstitutional and required that Kim be granted a bond hearing. He was then released by the INS on a \$5,000 bond. The INS appealed the district court decision, and the Ninth Circuit affirmed the district court in *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002). The INS then sought review of this decision in the Supreme Court.

Writing on behalf of a majority of the justices, Chief Justice Rehnquist first concluded that the Court has jurisdiction over the case. INA sec. 236(e) provides that "[t]he Attorney General's discretionary judgment regarding the application of [sec. 236] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of parole." The Court concluded that this provision does not apply to this case, which is not a challenge to a discretionary determination, but rather to the constitutionality of mandatory detention under the statute. Moreover, sec. 236(e) does not explicitly bar habeas jurisdiction, as the Court requires for a statutory provision to be considered to eliminate review by habeas corpus.

Turning to the merits, the Court first noted that Kim did not contest the fact that mandatory detention applies to him because of his convictions, nor did he contest that he is deportable based on those convictions. The Court concluded that at least in these limited circumstances, sec. 236(c)'s requirement of mandatory detention for immigrants convicted of specified convictions, "for the brief period necessary" to conclude removal proceedings, does not violate due process. The Court found that it was reasonable for Congress to require detention in order to ensure that deportable immigrants can be removed, since Congress had before it "evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings." The Court also based its conclusion on the finding that removal proceedings are of short duration, noting statistics showing that in 85 percent of cases subject to mandatory detention, removal proceedings are completed in an average time of 47 days. The Court therefore distinguished this case from the indefinite detention that was at issue in *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Justice O'Connor, joined by Justices Scalia and Thomas, concurred in the judgment of the Court and in the majority opinion's

discussion of the merits of the case. They disagreed with the Court's conclusion regarding jurisdiction, and they would find that sec. 236(e) deprives the Court of jurisdiction over this case.

Justice Souter, joined by Justices Stevens and Ginsburg, concurred with the majority opinion's finding of jurisdiction and dissented from the opinion on the merits. They would find that mandatory detention without an individualized opportunity to show that detention is not warranted by risk of flight or danger violates due process.

Demore v. Kim, 123 S.Ct. 1708 (Apr. 29, 2003).

9TH CIRCUIT FINDS NO JURISDICTION TO REVIEW BIA'S DETERMINATION THAT CANCELLATION HARDSHIP REQUIREMENT NOT MET – The U.S. Court of Appeals for the Ninth Circuit has ruled that the Board of Immigration Appeals' determination that an applicant for non-lawful permanent resident cancellation of removal has failed to establish that his or her removal would result in "exceptional and extremely unusual hardship" is a discretionary determination. The court therefore concluded that, on petition for review, it does not have jurisdiction over such decisions, because of section 242(a)(2)(B) of the Immigration and Nationality Act. That provision, enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), bars the court of appeals from reviewing discretionary judgments of the BIA. In so ruling, the court noted that the respondent in the case before it did not challenge any factual determinations made by the BIA, and therefore the court did not decide whether it would have "jurisdiction to review underlying, disputed factual determinations."

Romero-Torres v. Ashcroft, 327 F.3d 887 (9th Cir. 2003).

9TH CIRCUIT RULES BIA'S FAILURE TO CONSIDER POST-HEARING EVIDENCE VIOLATED DUE PROCESS – The U.S. Court of Appeals for the Ninth Circuit has issued an en banc decision finding that the Board of Immigration Appeals violated a respondent's right to due process by failing to consider post-hearing evidence supporting his eligibility for suspension of deportation. The decision turns on unexplained inconsistencies in the BIA's treatment of requests to supplement the record in deportation proceedings in different cases, as well as on the particular circumstances of the case.

The respondent in this case, Ramon Ramirez-Alejandre, is a Mexican national who entered the United States without inspection approximately 23 years ago. He has worked steadily since then, and started a family. He has one U.S. citizen child and five lawful permanent resident brothers, in the U.S.

In 1990, the Immigration and Naturalization Service initiated deportation proceedings against Ramirez-Alejandre. At his hearing in 1992, he applied for suspension of deportation, and the immigration judge granted the application. The IJ described Ramirez-Alejandre as "a role model" who "would be relegated to the grinding poverty of . . . Mexico without . . . any hope for anything in the future" if he were deported. The IJ also found that respondent's citizen daughter would suffer extreme hardship from his deportation because of decreased educational opportunities in Mexico and the unavailability of quality health care. The INS

appealed this decision.

In 1993 and 1994, while the appeal was pending, Ramirez-Alejandre submitted requests to the BIA to supplement the record. This evidence showed that his citizen daughter suffered recurring bouts of ear infections that if untreated would cause severe hearing loss and developmental delay, and that her access to medical treatment in Mexico would be inadequate, if available at all. Additional supplemental evidence concerned a severe back injury that Ramirez-Alejandre suffered in 1994.

In 2000, the BIA issued a decision, finding that Ramirez-Alejandre had established that he met the physical presence and good moral character requirements for suspension of deportation, but reversing the IJ's finding that he met the extreme hardship requirement. The BIA refused to consider the supplemental evidence that Ramirez-Alejandre submitted on appeal, stating that "this Board as an appellate body does not consider evidence submitted for the first time on appeal." Ramirez-Alejandre then petitioned for review of this decision. A three-judge panel of the appellate court denied the petition, in a split decision, but the court subsequently granted Ramirez-Alejandre's request for en banc review.

In its decision, the en banc court noted that the BIA requires that suspension applications on appeal be evaluated according to the facts existing at the time the appeal is decided. Moreover, up until the BIA's promulgation of procedural changes in 2002, the BIA had full authority to make de novo factual determinations on appeal. In addition, the court also cited repeated instances in which the BIA did consider evidence submitted for the first time on appeal, directly contrary to the BIA's statement refusing to consider the supplemental evidence in this case. The court found that the BIA had no established procedure to allow supplementing the record, given the restrictions on motions to reopen in the regulations. The court also found that the BIA's refusal to consider the supplemental evidence offered by Ramirez-Alejandre may have affected the outcome and was prejudicial.

The court concluded that the circumstances in this case, including the eight-year delay between the close of the hearing and the issuance of the BIA's decision, the BIA's inconsistent practice regarding consideration of post-hearing evidence, and the prejudice to Ramirez-Alejandre, all resulted in a denial of due process to him.

Ramirez-Alejandre v. Ashcroft, 320 F.3d 858 (9th Cir. 2003).

9TH CIRCUIT REVERSES BIA DECISION UPHOLDING IJ DECISION ON ERRONEOUS GROUNDS – The U.S. Court of Appeals for the Ninth Circuit has reversed a decision of the Board of Immigration Appeals that upheld an immigration judge's denial of a waiver that the IJ in fact never denied. In overturning the ruling, the court noted that "[w]hile we recognize that the BIA is swimming in a sea of cases, barely able to keep itself afloat, there remains no excuse for the apparent failure to read the decision one is reviewing and to review the decision that was made."

The respondent in this case, Jose Arturo Murillo-Salmeron, applied for adjustment of status at his deportation hearing. In conjunction with that application, he applied for a waiver under section 212(h) of the Immigration and Nationality Act because of drunk driving offenses that he had committed in his youth. The

IJ concluded that the offenses did not render Murillo-Salmeron inadmissible and therefore did not consider the waiver application. However, the IJ denied the adjustment application in the exercise of discretion.

On appeal, the BIA issued a three-paragraph decision affirming the IJ's finding "that the respondent had not established that he merited a favorable exercise of discretion for a section 212(h) waiver of inadmissibility." The respondent then petitioned for review of this decision.

The court first rejected the government's contention that it lacked jurisdiction to consider the petition. The government contended that the BIA's decision was an exercise of discretion, which the court could not review in a petition for review because of restrictions enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The court rejected this argument because the BIA's conclusion—i.e., that Murillo-Salmeron's failure to merit a waiver meant he did not qualify for adjustment—presents a nondiscretionary legal question. The court also rejected the government's argument that the BIA decision should simply be considered as an adoption of the IJ's decision and ignored, because the cursory decision cannot be read in that manner.

On the merits, the court found that the denial of adjustment based solely on a failure to qualify for a waiver that was not needed was invalid as a matter of law. Accordingly, the court reversed the BIA's ruling and remanded the case for adjudication of the adjustment case. The court noted that "[a]lthough it seems plain enough that Murillo's twenty-five years of U.S. residence, four dependent citizen children, and entire extended family within the United States more than outweigh his stale DUI convictions, the procedural posture of this case requires us to return it to the BIA."

Murillo-Salmeron v. INS, 327 F.3d 898 (9th Cir. 2003).

Employment Issues

BCIS CLARIFIES THAT ASYLEES AND REFUGEES ARE EMPLOYMENT-AUTHORIZED WHETHER OR NOT THEY HAVE AN EAD – The Bureau of Citizenship and Immigration Services has issued guidance to clarify that immigrants who have been granted asylum or who are refugees are authorized to work in the United States incident to their status, whether or not they have obtained an employment authorization document (EAD, Form I-766 or I-688B). The guidance was issued in the form of a memorandum from William Yates, BCIS acting associate director for Operations, to all regional directors.

The memo explains that some confusion has resulted from ambiguous language in the regulations, which provide that asylees are employment authorized incident to their status "for the period of time in that status, as evidenced by an employment authorization document issued by the Service." 8 C.F.R. § 274a.12(a)(5). Confusion has also resulted from a statement in the introductory paragraph to this provision that an individual to whom this provision applies "who seeks to be employed in the United States must apply to the Service for a document evidencing such employment." The guidance explains that these references concern the procedures by which an asylee may obtain evidence of em-

ployment authorization, rather than imposing any requirement that the asylee apply for an EAD in order to have employment authorization. The same conclusion applies to refugees.

The guidance notes that an EAD is a useful form of evidence of employment authorization, because it also serves as evidence of identity and thus is a single document that satisfies all employment eligibility verification requirements. However, "failure to obtain an EAD does not result in a lack of employment authorization." The guidance instructs the field that "[t]he date employment authorization begins for asylees and refugees is the date on which they attained their asylee or refugee status irrespective of the issuance of an EAD, and continues for so long as they are in that status. Upon adjustment to lawful permanent resident status, their work authorization further continues."

"The Meaning of 8 CFR 274a12(a) as it Relates to Refugees and Asylee Authorization for Employment," HQADJ 70/21.1.13 (Mar. 10, 2003), reprinted at 80 *Interpreter Releases* 520–22 (Apr. 7, 2003).

COURT ALLOWS UNDOCUMENTED PLAINTIFF TO PURSUE NEGLIGENCE ACTION

– A judge in a New York court has rejected Con Edison's attempt to have a negligence lawsuit brought against it by an undocumented worker dismissed. The company had asked the court to dismiss the lawsuit on the basis that the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB* precludes any award to the plaintiff because he lacks work authorization. (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10).

The worker, Wilbert Cano, was injured when an electric meter owned by Con Edison exploded, causing him third degree burns and to lose time from work. Cano, who did not work for Con Edison, received worker's compensation from his employer and sued Con Edison for negligence.

The court rejected Con Edison's argument, holding that "[i]t is contrary to the public policy of New York State that a person who claims to be injured as a result of tortious conduct may be barred from pursuing that claim in the courts of this State based upon the resident status of the claimant." The court noted that every case citing *Hoffman* has either distinguished itself from that case or has read the decision very narrowly. The court further held that the defendant could not, when addressing the issue of the plaintiff's pain and suffering, raise the fact before the jury that Cano is undocumented. Unfortunately, however, the court ruled that the defendant *could* present evidence of the plaintiff's immigration status when addressing his claim for lost wages.

This case again stresses the importance of educating workers about their rights under the Fifth Amendment, and particularly their right not to respond to questions concerning their immigration status. If they know that a plaintiff is undocumented, defendants in cases such as this regularly use this knowledge to attempt to deprive the plaintiff of a monetary remedy and to prejudice the jury against the plaintiff. In several post-*Hoffman* cases, advocates have convinced courts to limit discovery into plaintiffs' immigration status, and that logic should apply equally to tort cases. (For a discussion of some of these cases, see "Lower

Courts Limit Impact of High Court's Decision Barring Undocumented Worker from Receiving Back Pay," IRU, May 30, 2002, p. 8, and "Courts Continue Rejecting Defendants' Post-*Hoffman* Inquiries into Plaintiffs' Immigration Status," IRU, Oct. 21, 2002, p. 10.) In this case, for example, the court noted that the plaintiff "concedes that he is not a citizen and that he cannot produce a resident alien identification card (green card)." Absent that admission, the jury likely would not hear any evidence of the plaintiff's immigration status.

Cano v. Mallory Management, 2003 N.Y. Misc. LEXIS 562 (April 10, 2003).

9TH CIRCUIT VACATES AND REMANDS PRELIMINARY INJUNCTION OF AIRPORT SCREENER CITIZENSHIP REQUIREMENT – The Ninth Circuit Court of Appeals has vacated and remanded the preliminary injunction issued by Judge Tagasuki in Nov. 2002, which forbids the U.S. government from enforcing the citizenship requirements in the Aviation and Security Transportation Act. (For an explanation of the injunction, see "Federal Judge Denies Government's Motion to Dismiss Airport Screeners' Suit, Issues Preliminary Injunction," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 2002.)

The plaintiffs in this case are nine airport baggage screeners who did not meet the citizenship requirements of that act. In remanding the case to the district court, the Ninth Circuit instructed the lower court to consider the Homeland Security Act, which amends the Aviation and Security Transportation Act and permits U.S. nationals as well as U.S. citizens to be employed as baggage screeners. (For an explanation of the lawsuit, see "Lawsuit Challenges New Citizenship Requirement for Airport Screeners," IRU, Feb. 28, 2002.) U.S. nationals include all U.S. citizens, as well as individuals who, though not citizens of the U.S., owe permanent allegiance to the U.S.

Gebin v. Mineta, No. 02-57033 (9th Cir. May 20, 2003).

Immigrants & Welfare Update

HOUSE PASSES WORKFORCE INVESTMENT ACT REAUTHORIZATION BILL; INCLUDES SOME IMPROVEMENTS FOR LIMITED ENGLISH-PROFICIENT PERSONS – The House of Representatives has passed legislation reauthorizing the Workforce Investment Act (WIA). The Workforce Reinvestment and Adult Education Act (HR 1261) was passed on May 8, 2003, by a largely party-line vote, with only seven Democrats casting yeas. While HR 1261 falls short of addressing the needs of limited English-proficient (LEP) job seekers in a meaningful way, the bill does include a number of proposals that represent a step in the right direction. One provision of concern is a proposal to block grant adult, dislocated, and Wagner-Peyser funding streams, which would ultimately limit services for all job seekers. On the floor of the House, Texas Democratic Reps. Green, Hinojosa, and Reyes each spoke in opposition to HR 1261 and expressed concern that the bill does not address the needs of immigrants.

Background. The WIA, which replaced the Job Training Partnership Act (JTPA) in 1998, is scheduled to be reauthorized by Sept. 30, 2003. The WIA is the major source of federal funding for

most workforce development programs, including job training, adult basic education, and ESL (English as a second language) classes. Unlike the JTPA, the WIA does not have any criteria that require funds to be directed at low-income individuals. Rather, the WIA was conceived as a "one-stop delivery system" where all workers can seek employment, education, and training services at local and regional "one-stop centers." Most one-stop centers have interpreted the WIA as requiring them to place a "work-first" emphasis in the way they deliver services.

Although the WIA's goal is to "improve the quality of the workforce," the law has been ineffective in serving immigrants and LEP persons. Most job seekers have been prevented from participating in training programs under the WIA because of the "work-first" mentality. For immigrants, this inability to receive training is significant. Immigrants who are fluent in English earn approximately 24 percent more than those who lack fluency, regardless of their qualifications. Even when immigrants are given the opportunity to enroll in training programs, there is a dearth of programs that meet their training needs. Most training programs, for example, require an eighth grade English reading level. Extensive research demonstrates that programs that integrate skills training and education with English proficiency are more effective than those providing skills training or education alone.

Overview of HR 1261 Provisions Helpful to Low-Income Immigrants. Provisions in HR 1261 that assist low-income immigrants include the following:

1. *Improved access to training services.* Training services are currently viewed as a last resort in many states, making it difficult for persons in greatest need of job training to obtain them. HR 1261 includes language about developing strategies for effectively serving "hard-to-serve" populations. The bill also attempts to address the "work first" nature of the WIA by allowing job seekers to directly enroll in training programs if they are "unlikely or unable" to obtain employment through core services. While this language is a good start, the Senate should clarify that "hard to serve" populations include persons who are LEP. Additionally, job seekers should be allowed to enroll in services that best meet their needs and not have to demonstrate that they are "unlikely or unable" to obtain a job without training.

2. *Adjusted performance measures that take into consideration low levels of English proficiency.* States are currently assessed on their effectiveness in delivering WIA services through a performance accountability system that allows for adjusted levels of performance. Adjusted levels of performance are currently negotiated between each governor and the U.S. Dept. of Labor (DOL), taking into account economic conditions and the characteristics of the population. HR 1261 defines those characteristics to include, among other indicators, low levels of English proficiency.

3. *Incentives to serve "special populations."* Under current law, bonus grants are awarded only to states that exceed their performance measures. HR 1261 would also award grants based on the performance of the state in serving "special populations," including the level of services provided. The Senate should clarify that special populations include LEP persons.

4. *Revision of the purpose of the Adult Basic Skills Education Act.* Current law does not include immigrants or learning English in the purpose of Title II (Adult Basic Education/ESL) of

the act. HR 1261 includes “assisting immigrants who are not proficient in English” in the purpose of the title.

5. *Technical assistance to English language acquisition programs in state leadership activities.* Leadership activities are funded by the DOL to “enhance the quality of adult education and literacy programs nationwide.” Current law does not include English language acquisition programs as eligible activities.

6. *Improved access to Adult Basic Education (ABE) funding for community-based organizations.* Current law requires that all eligible providers have “direct and equitable” access to funding under Title II, which funds ABE (including ESL). HR 1261 requires states to include a description in their state plan of how they will ensure direct and equitable access, including how the capacity of community-based organizations will be built. The bill also requires the state, in awarding grants or contracts, to consider the degree to which the provider will serve those “most in need,” including individuals who are LEP.

Additional Provisions the Senate Should Include. The following describes additional provisions that should be included in the Senate bill:

1. *Require states to describe how they will serve LEP populations in the state plan.* Current law requires states to describe how they will serve the employment and training needs of dislocated workers, low-income individuals, homeless individuals, ex-offenders, individuals training for nontraditional employment, and other individuals with multiple barriers to employment (including older individuals), but not persons who are LEP.

2. *Require all job seekers to be assessed.* Many LEP job seekers do not receive the services they need because their English proficiency is not assessed. To successfully place individuals in appropriate training and education services that will also meet employer demand, it is necessary to require the one-stop delivery system to make accurate assessments.

3. *Include programs that serve LEP persons as projects that are eligible for demonstration, pilot, and research funding.* Current law does not include programs that serve LEP persons as eligible for this funding. It is critical for programs that integrate language acquisition and job training to be eligible for inclusion in these projects, and to be researched for their effectiveness.

4. *Amend the Adult Basic Education (ABE) funding formula.* Under current law, LEP persons with a high school degree are not considered in the distribution of ABE funds—even though they are enrolled in ABE programs, such as ESL. In order to meet the demand for ESL, the ABE funding formula should be amended to include the actual number and percentage growth of state LEP populations with a high school degree.

5. *Require data collection on 16–18-year-old students.* Advocates are concerned that youth are being steered to adult education rather than high school due to the increased demands for better student performance that the “No Child Left Behind Act” has placed on high schools. In order to assess whether these concerns are justified and, if so, the impact of this trend on 16–18-year-old students, the WIA should be amended to require certain data collection and reporting to the U.S. Dept. of Education, and to Congress.

6. *Provide better access for community-based organizations (CBOs) to receive Adult Basic Education (ABE) Funding.* CBOs often are excluded from ABE funding, which includes ESL, because these funds are funneled directly to the community colleges and K–12 system. ESL classes provided by CBOs generally are funded outside of the ABE system. Many immigrants are more likely to seek services from CBOs that have cultural and linguistic competence, have built trust in the community, and are situated where immigrants live and work. Expanding the funding that is accessible to eligible CBOs providing adult literacy services will improve and expand the services available to persons who are LEP.

Outlook. The Senate Employment, Safety and Training subcommittee in the Senate Health, Education, Labor and Pensions (HELP) Committee is currently developing its proposal for WIA reauthorization. Chairman Enzi (R-WY) has scheduled a hearing for June 18, and the proposal will likely be released this summer. In the meantime, advocates should educate their Senators about the need to improve the WIA to better meet the needs of immigrants and LEP persons. To find out what can be done or for more information on the WIA and immigrants, contact Tyler Moran at moran@nilc.org.

Miscellaneous

WORKERS' RIGHTS AND PUBLIC BENEFITS TRAININGS PLANNED FOR THIS SUMMER AND FALL – NILC trainings being planned for this summer and fall will include sessions on public benefits issues to be held in **Nashville**, Tennessee, and **Minneapolis**, Minnesota. In addition, NILC is planning to hold immigrant workers' rights trainings in **northern California**; **Portland**, Oregon; **Phoenix**, Arizona; **Salt Lake City**, Utah; **New York**, New York; **Chicago**, Illinois; and **Houston**, Texas. Dates and locations for these trainings, and information about how to register, will be posted on the NILC Web site: www.nilc.org/trainings/index.htm.

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