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Immigration Issues

9/11 COMMISSION IMPLEMENTATION BILL PASSED WITHOUT DRACONIAN DL PROVISIONS – After much wrangling, Congress has passed and the president signed intelligence reform legislation that contains provisions requiring the U.S. Dept. of Transportation (DOT), through a negotiated rulemaking process, to set standards regarding the acceptance of identity documents that applicants present when they apply for a driver's license or state-issued ID card, the verifiability of such documents' authenticity, fraud prevention, and security feature standards for license and ID cards. The legislation was drafted and passed to implement recommendations made by the National Commission on Terrorist Attacks upon the United States (also known as the 9/11 Commission).

However, Rep. James Sensenbrenner (R-WI), the powerful chair of the House Judiciary Committee, has vowed to introduce legislation in early January that would, in effect, replace provisions that were in the version of the intelligence reform bill that was passed by the House of Representatives but not included in the compromise bill that Congress passed and the president signed on Dec. 17. (For more on these provisions, see "Immigration Provisions a Sticking Point in Attempt to Reconcile 9/11 Commission Implementation Bills; DL Provisions Also Troublesome," IMMIGRANTS' RIGHTS UPDATE, Nov. 8, 2004, p. 1.)

After the House of Representatives and the Senate each passed an intelligence reform bill in early October, a conference committee made up of members of both chambers finally reached an agreement on a compromise bill on Nov. 20. However, the House leadership pulled the conference report from the House floor soon after Sensenbrenner and Rep. Duncan Hunter (R-CA), the chair of the House Armed Services Committee, announced their opposition to it. Though the two men eventually were persuaded to refrain from blocking a vote on the bill, Sensenbrenner has denounced the compromise bill's driver's license–related provisions as being inadequate.

The driver's license provisions that were in the bill passed by the House—and that Sensenbrenner wanted reinstated in the conference report—would have, in effect, forbidden states from issuing driver's licenses to undocumented immigrants, put restrictions on licenses granted to non–U.S. citizens other than lawful permanent residents, set strict standards for license issuance, and prevented license applicants from presenting foreign documents other than passports when applying for a license.

Though Sensenbrenner was unsuccessful in persuading the conference committee to agree to wholesale revisions in the driver's license provisions, at his insistence the committee agreed to two last-minute changes to the conference report. A provision requiring that the DOT standards protect the civil and due pro-

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cess rights of noncitizens was removed (leaving intact a provision that their privacy rights be protected); and a change was made in the reference to the "interested parties" that the DOT must consult as part of the negotiated rulemaking process. The previous version of this provision provided that "interested parties" include organizations with technological and operational expertise in document security and organizations that represent the interests of applicants for licenses. The revised version provides that "interested parties" be consulted, without specifying the particular types of parties or organizations that these include.

Still, Sensenbrenner argues that the final bill—the Intelligence Reform and Terrorism Prevention Act of 2004—lacks adequate border security, immigration, and driver's license provisions. However, the bill is replete with such provisions. They include requirements to

• establish minimum federal standards for birth certificates and driver's licenses;

• enhance the security of Social Security cards;

• establish a visa and passport security program in the U.S. State Dept.;

• require the Dept. of Homeland Security (DHS) to establish minimum ID standards for boarding commercial aircraft and to recommend ID standards for access to other federal facilities;

• test advanced technology to secure the northern border;

• require the DHS to create plans for systematic surveillance of the southwest border by remotely piloted aircraft;

• increase the number of full-time Border Patrol agents by 2,000 per year for five years;

• increase the number of full-time Immigration and Customs Enforcement investigators by 800 per year for five years;

• increase the number of detention beds available to the DHS for immigration detention and removal by 8,000 a year for five years;

• strengthen visa application requirements;

• criminalize alien smuggling;

• make receipt of military-type training from designated terrorist organizations a deportable offense;

• mandate a Government Accountability Office study on potential weaknesses in the U.S. asylum system;

• make inadmissible and deportable any alien who commits acts of torture, extrajudicial killing, or atrocities abroad;

• establish a counterterrorist travel intelligence strategy;

• establish the Human Smuggling and Trafficking Center;

• authorize funding for an immigration security initiative;

• require the DHS to develop an integrated screening system; and

• require the DHS to develop a biometric entry and exit data system.

Sensenbrenner also has asserted that the 9/11 terrorists were able to carry out their attacks because, collectively, they were able to obtain 63 state driver's licenses. His claim has been widely circulated by anti-immigration groups such as the Federation for American Immigration Reform and in Congress. But the claim is contradicted by both a 9/11 Commission staff report and a fact sheet recently issued by the 9/11 Public Discourse Project (9/11 PDP), a nationwide public education campaign created by the ten members of the 9/11 Commission (a description of the 9/11 PDP can be found on its website: www.9-11pdp.org).

The fact sheet makes clear that the claims Sensenbrenner has made about the number of licenses the hijackers obtained before 9/11 and the conclusions he draws from their use by the hijackers are both incorrect. The fact sheet reports that, in fact, the hijackers obtained only 13 (not 63) driver's licenses, and that 2 of those were duplicates. According to the fact sheet, they also had 21 U.S.A.- or state-issued ID cards. However, the fact sheet itself is somewhat misleading in including so-called U.S.A. ID cards in this number. These are not government-issued ID cards; they are cards made by a private company that sells deceptively real–looking ID cards. So the number of government-issued ID cards was actually somewhat lower than the number cited by the commission and far lower than the number cited by Sensenbrenner.

According to the 9/11 PDP fact sheet, all the terrorists' driver's licenses were legal, although not all were legally obtained. At least five of the hijackers obtained their licenses by falsely stating that they were residents of the *state* that issued them. All the hijackers entered the U.S. with valid immigration documents, so a law preventing undocumented immigrants from obtaining licenses would have had no effect on the hijackers' ability to obtain licenses. Only two of the hijackers were out of lawful immigration status as of the day they staged their attack, Sept. 11, 2001. One of these obtained his license when he was in lawful status. The other used his passport to board the plane that he helped hijack.

In its final report, the 9/11 Commission recommended new standards to ensure the integrity of state-issued driver's licenses and ID cards and to ensure that the applicant for an identity document is actually the person the applicant claims to be, as well as improvements to the physical security (i.e., the security features) of the document. But the chairman of the commission, Thomas H. Kean, told reporters that "the commission was calling for standards such as biometrics, not a crackdown on whether licenses were being obtained by illegal immigrants," according to the Dec. 1, 2004, *Washington Times.*

The commission concluded, as the 9/11 PDP fact sheet puts it, that "stronger immigration enforcement to catch terrorists who were exploiting weaknesses in America's border security" and "greater attention to terrorist travel tactics and information sharing about such travel" are needed. According to the fact sheet, "[W]e did not make any recommendation about licenses for undocumented aliens. That issue did not arise in our investigation, as all hijackers entered the United States with documentation (often fraudulent) that appeared lawful to immigration inspectors. They were therefore 'legal immigrants' at the time they received their driver's licenses." The fact sheet notes that all of the hijackers could have obtained driver's licenses, even under the restrictive provisions pushed by Sensenbrenner, because they had valid visa documentation to show to state department of

motor vehicle officials.

Hunter, the chair of the House Armed Services Committee, had opposed the conference report because he disagreed with some of its key intelligence reform provisions. His objections were, in the end, calmed by a revision providing that the new national intelligence director's authority will not abrogate the statutory responsibility of the Dept. of Defense over intelligence issues.

The House approved the compromise bill on a vote of 336-75, and the vote in the Senate was 89-2. Sensenbrenner and his Republican supporters in the House have vowed to introduce new driver's license, asylum, and other immigration provisions in early January 2005, when the new Congress convenes. They have said they will try to attach these provisions to "must-pass" legislation such as funding for the war in Iraq. The battle to ensure that immigrants are not the scapegoats for intelligence failures will assuredly continue.

MARYLAND TASK FORCE ISSUES REPORT ON DRIVER'S LICENSES – A task force created by authorization of the Maryland legislature recently submitted a report recommending that the state Motor Vehicles Administration (MVA) revise some of its procedures and regulations, but that the Maryland General Assembly not pass new laws regarding the documentation that driver's license and ID applicants must present to the MVA. The legislature had charged the task force with the task of studying, among other things, what documents the MVA should accept as proof of license applicants' identification and the feasibility of establishing procedures for reviewing foreign documents.

Under Maryland law, immigrants who reside in the state may obtain a Maryland driver's license regardless of whether they have lawful immigration status. Existing regulations deem certain documents issued by foreign governments to be acceptable proof of identity from persons applying for a license. However, despite these regulations, after Sept. 11, 2001, the MVA stopped accepting foreign documents as proof of identity, which made it impossible for most undocumented immigrant residents of Maryland to obtain licenses.

To clarify the MVA's authority to prohibit undocumented immigrants from obtaining licenses, a Maryland legislator asked the state's attorney general for an opinion. The attorney general issued an opinion in 2003 which clarified that the MVA could not deny applicants licenses based on their immigration status. In response, in Feb. 2004 the MVA implemented an "exceptions process" whereby foreign documents are acceptable if they are reviewed by a senior document examiner and are found to be on the list of documents the regulations say are acceptable. However, this policy has not been widely publicized.

In 2003, a bill was introduced in the legislature whose intent was to clarify that undocumented residents of Maryland are eligible for driver's licenses, but the bill was amended to create a task force instead. The task force was charged with studying driver's license documentation, fraud, terrorist watch list developments and possible use, biometric developments and possible use, and uninsured and unlicensed driver's data. The task force was comprised of representatives of the MVA, the state police, the state Dept. of Homeland Security, and others appointed by the governor.

While the task force voted to recommend against legislative changes, the task force's majority report, which actually was written by the MVA and submitted to the legislature on Dec. 1, 2004, has been criticized by some task force members as being misleading, inaccurate, and the result of a flawed and biased process. These members issued a minority report, which recommends that the MVA follow its current regulations as written and also recommends against legislative changes. Immigrants' rights advocates charge that the MVA report ignored important testimony and evidence that was presented to the task force.

The majority report recommends that the MVA accept only identity documents that have been "validated" by a federal, state, or local government, although it also recommends that certified school records be accepted. In addition, it recommends that certain types of expired identity documents be accepted, such as expired U.S. immigration documents. The task force specifically rejected placing a limit on when otherwise acceptable identity documents can be accepted as proof of an applicant's identity. In addition, the majority report recommends a multi-layered appeals process, including judicial review, that would allow the consideration of other identity documents. This presumably would give an undocumented immigrant the opportunity to establish that foreign identity documents he or she wants to present are reliable.

It is expected that the MVA will now seek to amend its regulations in accordance with the recommendations of the majority report and will use that report as justification for the amendments.

TPS FOR HONDURANS AND NICARAGUANS EXTENDED – 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 Jan. 5, 2005, will be in effect until July 5, 2006. The notices also automatically extend the validity of employment authorization documents (EADs) issued under the Honduran and Nicaraguan TPS programs until July 5, 2005.

To continue receiving the benefits of TPS—i.e., permission to remain temporarily in the United States and authorization to be employed in the U.S.—nationals of Honduras and Nicaragua (or individuals of no nationality who last habitually resided in either country) who have already been granted the status *must* reregister during the 60-day reregistration period that began on Nov. 3, 2004, and ends on Jan. 3, 2005.

TPS is granted to persons from countries that are designated by the secretary of Homeland Security as experiencing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning. The authority to make this designation was transferred from the U.S. attorney general to the

secretary of the Dept. of Homeland Security as part of the 2002 legislation creating that department. The attorney general first made the TPS designations for Honduras and Nicaragua in Jan. 1999, in the wake of the devastation caused by Hurricane Mitch; and, prior to the current extension, they each had been extended four times, the latest extension notice having been published in the Federal Register on May 5, 2003. The DHS secretary now has decided to extend the designations for Honduras and Nicaragua for a further eighteen months. The current notices regarding the extension state that, "Due to continued reconstruction of infrastructure damaged by Hurricane Mitch, the Secretary of DHS has determined that an . . . extension is warranted because [Nicaragua and Honduras remain] unable, temporarily, to handle adequately the return of [their] nationals."

To reregister under the extension, nationals of Honduras and Nicaragua (and individuals of no nationality who last habitually resided in those countries) previously granted TPS must file the following: (1) Form I-821, Application for Temporary Protected Status; (2) Form I-765, Application for Employment Authorization; and (3) a "biometric services fee" of $70 if the applicant is age 14 or older. Applicants who seek work authorization under the extension must submit the $175 filing fee or a "properly documented" 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.

Reregistrations for TPS under the current extension must be submitted on I-821 forms whose "Revision Date" is "7/30/04." Submissions on older versions of the form will be rejected.

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 of 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 reparole 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 Jan. 5, 2005, 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 July 5, 2005. However, the individuals who benefit from this extension still must reregister for TPS by Jan. 3, 2005, in order to have employment authorization throughout the extended TPS period.

When completing the I-9 employment eligibility verification (or reverification) process, employers must accept the above-described EADs of Honduran or Nicaraguan TPS beneficiaries as proof that they are employment-authorized. Employers who have questions may call the U.S. Citizenship and Immigration Services Office of Business Liaison employer hotline at 1-800-357-2099; or they may call the employer hotline of the U.S. Justice Dept.'s Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) at 1-800-255-8155 or (TDD) 1-800-362-2735. Employees or job applicants may call the OSC worker hotline at 1-800-255-7688 or (TDD) 1-800-237-2515. Information is also available on the OSC's website: www.usdoj.gov/crt/osc/.

69 FR 64084–88 (Nov. 3, 2004) (Honduras);
69 FR 64088–91 (Nov. 3, 2004) (Nicaragua).

Immigration Litigation

9TH CIRCUIT RULES REINSTATEMENT REGULATIONS VIOLATE THE INA BY AUTHORIZING REMOVAL WITHOUT A HEARING BEFORE AN IJ – The U.S. Court of Appeals for the Ninth Circuit has ruled that the attorney general's regulations authorizing immigration officers to issue reinstatement orders that result in the removal of non–U.S. citizens from the United States without a hearing conflict with statutory requirements of the Immigration and Nationality Act. The reinstatement statute—section 241(a)(5) of the Immigration and Nationality Act—provides that "if the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order is reinstated," and may not be reopened or reviewed. The court concluded, on petition for review of a reinstated removal order, that only immigration judges have the authority to determine that a noncitizen is subject to the reinstatement of removal procedure.

The ruling is based on section 240(a) of the INA, a general provision providing authority for removal proceedings. This statute requires that immigration judges "conduct all proceedings for deciding the inadmissibility or deportability of an alien" and provides that, "Unless otherwise specified in this chapter [of the INA], a proceeding under this section shall be the sole and exclu-

sive procedure for determining whether an alien may be . . . removed from the United States." The statute excepts the procedures for entering administrative removal orders based on criminal convictions of section 238 of the INA, and another provision of the INA specifically provides for use of the "expedited removal" procedure that results in removal without a hearing. However, the reinstatement statute—section 241(a)(5)—does not specify that reinstatement occur without a hearing before an IJ, nor does it exempt reinstatement from this requirement of section 240(a).

The procedure under which immigration officers order reinstatement without a hearing before an IJ is purely the product of regulation. 8 C.F.R. sec. 241.8. As the court noted, prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the INA contained a provision for reinstatement—former INA sec. 242(f)—which allowed for reinstatement in more limited circumstances than the current sec. 241(a)(5). Neither former sec. 242(f) nor current sec. 241(a)(5) expressly addressed whether reinstatement could be ordered without an IJ hearing. The regulations implementing sec. 242(f) provided for reinstatement decisions to be within the province of IJs, but in implementing the current statute the attorney general expressly provided by regulation for removal without a hearing. The court concluded that, since the statute provides no authorization for reinstatement orders to issue without an IJ hearing, the regulations conflict with the statute.

Morales-Izquierdo v. Ashcroft, 388 F.3d 1299 (9th Cir. 2004).

Employment Issues

FEDERAL COURT IN NEW YORK UPHOLDS PROTECTIVE ORDER AGAINST DISCOVERY OF PLAINTIFFS' IMMIGRATION STATUS – A recent decision by the Federal District Court for the Eastern District of New York upheld a protective order that prohibited the discovery of the immigration status and tax return information of workers who were suing their former employer for discrimination and retaliation (see "EEOC Obtains Protective Order Limiting Discovery That Could Adversely Affect Immigrant Workers," IMMIGRANTS' RIGHTS UPDATE, June 18, 2004, p. 6).

In *EEOC v. First Wireless Group, Inc.,* the charging parties are former Latino employees of First Wireless who the Equal Employment Opportunity Commission (EEOC) claims were paid less than similarly situated Asian employees and who allegedly were retaliated against when they complained of the wage disparity. The EEOC filed a suit on behalf of the workers and sought a protective order against discovery of their immigration status and tax returns. The court noted that the magistrate judge relied on *Rivera et al. v. Nibco,* 364 F.3d 1057 (9th Cir. 2004), and *Flores v. Amigon d/b/a La Flor Bakery,* 02 CV 838 (SJ) (E.D.N.Y. Sept. 19, 2002), in granting the EEOC's request that discovery of a plaintiff's immigration status be prohibited because it "would constitute [an] unacceptable burden on public interest due to [a] chilling effect" and that the prejudice to workers "outweighs any potential relevance this information may have to the defense." (For more on *Rivera,* see "9th Circuit Upholds Protective Order Limiting Employers' Inquiries into Plaintiffs' Immigration Status," IRU, June 18, 2004, p. 5. For more on *Flores,* see "Courts Continue Rejecting Defendants' Post-*Hoffman* Inquiries into Plaintiffs' Immigration Status," IRU, Oct. 21, 2002, p. 10.)

First Wireless appealed the magistrate judge's ruling, asserting that it is entitled to the discovery of all relevant nonprivileged information. Its second claim was that the information related to the workers' immigration status is relevant to their credibility and to their claim for damages.

As to the first claim, the court upheld the magistrate's ruling that although tax returns are not privileged, First Wireless failed to satisfy the two-pronged test in order to obtain disclosure: first, that the returns are relevant to the subject matter of the action; and, second, that there is a compelling need for the returns to be disclosed because the information they contain is not otherwise readily obtainable.

The court also rejected First Wireless's claim that Rule 608(b) of the Federal Rules of Evidence compels discovery into the workers' immigration status for the purposes of determining their credibility. The court upheld the magistrate's holding that Rule 608(b) generally bars the introduction of extrinsic evidence to impeach a witness's credibility and that admissibility of such information at trial is not a standard governing discovery. Therefore, the court found that the magistrate properly dismissed the argument put forth by First Wireless that Rule 608(b) required that the workers disclose information regarding their immigration status.

In its decision the court forcefully affirmed the magistrate judge's ruling, based largely on the *Rivera* decision, that permitting discovery into the immigration status of workers who complain of employment discrimination would have an "in terrorem"—i.e., an intimidating—effect. It also relied on *Rivera* to reject a double standard for employers, holding that it is proper to preclude First Wireless from discovery of the plaintiffs' immigration status because the company may not "ignore immigration laws at the time of hiring but insist upon their enforcement when [its] employees complain."

EEOC v. First Wireless Group, Inc., 2004 U.S. Dist. LEXIS 24089 (E.D.N.Y. Nov. 19, 2004).

NEW YORK COURT REJECTS DISCOVERY OF WORKERS' IMMIGRATION STATUS IN WORKERS' COMPENSATION CLAIM – A New York supreme court held recently that an injured worker's immigration status is irrelevant to his workers' compensation claim and thus denied the employer's request that the worker disclose information relating to his immigration status and authorization to work in the United States.

The plaintiff, AssifAsgar-Ali, was injured while working as a steamfitter in the basement of the New York Hilton Hotel. Asgar-Ali filed for workers' compensation and claimed lost earnings

under New York's workers' compensation statute in the amount of $35,000. Hilton claimed that Asgar-Ali's immigration status was relevant to his claim for lost earnings, and therefore it sought discovery regarding his immigration status and requested documentation regarding his employment authorization. Hilton asked the court to dismiss Asgar-Ali's claim for lost earnings if he did not comply with its discovery request. In response, Asgar-Ali asserted that he had provided the appropriate documentation to Hilton at the time of his hire, as required by the employment eligibility verification provisions of the Immigration and Nationality Act.

Hilton relied on *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002), in asserting that Asgar-Ali's immigration status was relevant his claim for lost earnings. (For a summary of the U.S. Supreme Court's decision in *Hoffman Plastic,* see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10.) Hilton also cited a decision reached by another New York court (in *Majlinger v. Casino Contracting, et al.,* 2003 N.Y. Misc. LEXIS 1248 (Oct. 1, 2003)), which dismissed a worker's claim for lost wages on the basis that he could not prove that he was eligible to work in the U.S. (For a summary of the *Majlinger* decision, see "N.Y. Court, Relying on *Hoffman,* Denies Worker's Lost Earnings Award," IRU, Nov. 24, 2003, p. 9).

Importantly, the court distinguished Asgar-Ali's case from the *Hoffman Plastic* decision and squarely rejected the decision reached in *Majlinger*. The court found that *Hoffman* does not prevent states such as New York from awarding common law remedies such as lost earnings to undocumented workers. It went on to explicitly criticize the *Majlinger* decision, quoting a *New York Law Journal* article that characterized the opinion as "fl[ying] in the face of every other decision rendered subsequent to *Hoffman* in that it shifts the burden of proof to plaintiff" to prove that the plaintiff was employment- authorized.

The court recognized, however, that other New York courts have found immigration status to be relevant in assessing lost earning claims. It noted that one such seminal case, *Klapa v. O & Y Liberty Plaza Co*., 168 Misc. 2d 911, 912 (N.Y. Sup. Ct. 1996), established that a worker's status "in and of itself, cannot be used to rebut a claim for future lost earnings." Instead, the holding in *Klapa* that other courts have followed is that "in order to rebut [lost earnings claims] defendants must be prepared to demonstrate something more than just the mere fact that the plaintiff resided in the United States illegally." The court went on to explain that generally this has been recognized to mean that the defendant must prove that the worker was being deported or that the worker was subject to an imminent deportation hearing.

In Asgar-Ali's case, the court found that Hilton did not establish that he was subject to an imminent deportation or deportation hearing, nor that his immigration status was relevant for any other reason. It therefore held that Asgar-Ali did not have to disclose any information related to his immigration status. According to the court's decision, "Hilton's interest in plaintiff's alien status can only be construed as an attempt to deny plaintiff access to the courts through intimidation; this is intolerable to this Court."

Assif Asgar-Ali v. Hilton Hotel Corp., 2004 Slip Op. 51061U (N.Y. Sup. Ct. Aug. 6, 2004).

SSA INFORMS RE: PLANS FOR VERIFYING SOCIAL SECURITY NUMBERS IN 2005 – The Social Security Administration (SSA) has completed the process of sending out its "no-match letters" for 2004, i.e., the notices it sends to inform employers and employees when employee names or Social Security numbers (SSNs) listed on an employer's W-2 report (Wage and Tax Statement) do not match SSA records. The SSA has determined that there will not be any changes to the text of the letter in 2005.

According to SSA officials, as of Dec. 10, 2004, the agency had sent no-match letters to 121,577 employers regarding 7,284,885 W-2s containing employee names or SSNs that do not match SSA records. In addition, the SSA had sent approximately 9.1 million letters requesting information regarding specific employees based on the data provided by their employers on W-2 forms. The SSA sent 7,605,907 of the letters directly to workers at their home addresses, but it sent an additional 1,510,086 letters to workers' employers because either the SSA had no addresses for the workers or the addresses the agency had were incorrect.

In 2005, the SSA plans to send a similar number of no-match letters based on the same criteria used in 2004. That is, employers will receive a letter if the W-2s they file result in a "no-match" for at least 10 employees, or if at least one-half of one percent of the total number of names and SSNs they report on W-2 forms for tax year 2004 do not match SSA records. The 2005 letters will be mailed out in late February or early March.

While the SSA will not be making any changes to its no-match letter program, it is moving forward with its plans to expand employers' access to the Social Security Number Verification System (SSNVS). In a notice published in the Federal Register on Dec. 10, 2004 (69 FR 71865), the SSA announced its plans to provide employers nationwide with the ability to verify SSNs via the Internet through the SSNVS. The stated purpose of the verification system is "to help ensure that employers provide accurate name and SSN information," given that the correcting of mismatches "is a labor-intensive and time-consuming process for both SSA and the employer."

Currently, the SSNVS is still in the pilot stage, with approximately 80 employers participating. The SSA plans to make the SSNVS available to all employers across the country in the late spring or early summer, 2005. The notice states, "SSA will respond to the employer informing them only of matches and mismatches of submitted information." However, when the SSNVS was first proposed, immigrants' rights advocates expressed concerns regarding the codes the SSA would provide employers explaining the reason an SSN did not match the agency's records, thus providing the employer with more information than is currently allowed under the SSA's own guidelines (for more on this,

see comments regarding the SSNVS submitted to the SSA in July 2002, available at www.nilc.org/immsemplymnt/comment_ltrs/NILC_SSA_Comment_Ltr.pdf). In addition, advocates allege that certain local SSA offices have violated the rules laid out in the agency's Program Operations Manual System (POMS) by providing employers to whom they have sent no-match letters more information than a simple notice of the names and SSNs reported on W-2 forms that do not match SSA records.

Finally, advocates should be aware that the National Intelligence Reform Act of 2004, which President Bush signed into law on Dec. 17, 2004, includes a provision that affects the SSNVS. Specifically, section 7213 provides that within 18 months of the enactment of the bill, the SSA is required to add death, fraud, and work authorization indicators to the SSNVS.

The developments regarding employers' ability to verify the SSNs of workers clearly comprises an area that advocates for immigrant workers will need to monitor carefully, as it will complicate efforts to advocate on behalf of undocumented workers seeking to assert their workplace rights.

NILC will be submitting comments to the SSA in response to the Federal Register notice regarding the agency's plans to provide employers nationwide with the ability to verify SSNs via the Internet through the SSNVS, and we urge other advocates to do the same. Comments are due Feb. 8, 2005.

"BASIC PILOT" EMPLOYMENT ELIGIBILITY VERIFICATION PROGRAM EXPANDED NATIONWIDE – As of Dec. 1, 2004, the automated employment eligibility verification program known as the Basic Pilot has been expanded to allow employers in all 50 states to access its system. This change is a result of the Basic Pilot Program Extension and Expansion Act, which was enacted on Dec. 3, 2003.

In addition to providing that the Basic Pilot program be expanded to all states, the 2003 act also required the Dept. of Homeland Security (DHS) to submit a report by June 2004 to the Committees on the Judiciary of the U.S. House of Representatives and the Senate. This report should have evaluated whether the problems identified by the independent evaluation of the Basic Pilot had been substantially resolved, and it should have outlined what steps the DHS was taking to resolve any outstanding problems before undertaking the expansion of the Basic Pilot program to all 50 states.

While the DHS did submit a report to Congress, it failed to adequately address the concerns laid out in the independent evaluation conducted by Temple University and Westat, which was published in January 2002 (a copy of the report can be found at http://uscis.gov/graphics/aboutus/repsstudies/piloteval/BasicFINAL0704.pdf). Most importantly, the evaluation explicitly recommends against expanding the Basic Pilot program into a large-scale national program until the DHS and the Social Security Administration (SSA) address the inaccuracies in their databases that prevent those agencies from confirming the work authorization of many workers. (For more on this, see "Evaluation of Eligibility Verification Basic Pilot Raises Concerns," IMMIGRANTS' RIGHTS UPDATE, July 15, 2003, p. 11.)

The Basic Pilot was created, along with two other pilot programs, under section 401(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The two other programs—the Citizenship Attestation Pilot and the Machine-Readable Document Pilot—were suspended in 2003. Under the IIRIRA, the Basic Pilot was to operate in the states of California, Florida, Illinois, New York, and Texas. In 1999, it was extended to cover employers in Nebraska.

According to information provided by the DHS at a meeting with immigrants' rights advocates on Sept. 9, 2004, currently 4,200 employers voluntarily use the Basic Pilot employment eligibility verification system. Though many of these employers are headquartered in one of the six states in which the Basic Pilot was available before Dec. 1, they have multiple sites at which they employ workers, so that approximately 15,000 work sites use the Basic Pilot system. With the expansion to all 50 states, the DHS estimates an increase of approximately 25 percent in the number of employers that will voluntarily sign up for the Basic Pilot program. This will also increase the number of immigrant workers who will face difficulties becoming employed because of the inaccuracies in the government databases and delays in entering information regarding new immigrants.

More information on how the Basic Pilot program operates is available from a "Basic Information Brief: DHS Basic Pilot Program," available at www.nilc.org/immsemplymnt/IWR_Material/Attorney/BIB_Pilot_Programs.pdf. For assistance with specific cases where workers are being adversely affected as a result of the Basic Pilot, contact Marielena Hincapié at hincapie@nilc.org.

Public Benefits Issues

COURT TEMPORARILY HALTS ARIZONA INITIATIVE'S REPORTING REQUIREMENTS FOR BENEFIT APPLICANTS – On Nov. 30, 2004, a federal district court issued a temporary restraining order, barring implementation of Arizona's Proposition 200 until Dec. 22, 2004, when another hearing is scheduled. Also known as "PAN" (Protect Arizona Now), the initiative would require state and local government employees to verify the identity and immigration status of benefits applicants and to report any "discovered" immigration law violations to federal immigration authorities. The measure makes failure to file such a report, or for a supervisor to direct that such a report be filed, a criminal offense. It also mandates that persons registering to vote provide specific documents to establish that they are U.S. citizens.

The plaintiffs—a nonprofit organization, individual state and local employees, and Arizona residents (U.S. citizens and immigrants)—challenged the measure on constitutional and federal statutory grounds, and declared that they or the communities they serve would suffer serious harm if it were implemented. Represented by the Mexican American Legal Defense and Educational Fund (MALDEF) and Arizona-based attorneys Daniel

Ortega and Michael Sillyman, the plaintiffs allege that Proposition 200 violates the Supremacy and Due Process Clauses of the U.S. Constitution, as well as the 1965 Voting Rights Act.

The plaintiffs assert that the Constitution grants the federal government exclusive power over immigration and foreign affairs, and that Congress has enacted comprehensive laws on immigration enforcement, verification of eligibility for public benefits, and voter registration. As in the successful challenge to California's Proposition 187, the plaintiffs argue that states do not have the constitutional authority to establish their own immigration enforcement schemes, such as the system created by Proposition 200. The complaint also alleges that the vaguely worded initiative, which applies to "state and local public benefits that are not federally mandated," does not provide government employees sufficient notice regarding which benefit programs are implicated, what constitutes a "violation of federal immigration law" for this purpose, or when such a violation has been "discovered."

On Nov. 12, 2004, Arizona Attorney General Terry Goddard issued an opinion finding that the benefits provisions in the measure, which amend only Title 46 of the state code, apply only to the public benefits found within that code and only to those that do not fall within one of the federal welfare law's exemptions. In the attorney general's opinion, for example, the initiative does not apply to health care services or other programs governed under other titles of the Arizona code. However, another lawsuit filed by the Federation for American Immigration Reform (FAIR) and the "Yes on Proposition 200" Committee argues that the initiative's requirements should apply more broadly.

Arizona voters passed the initiative on Nov. 2. Under the Arizona Constitution, the initiative cannot become law until the governor issues a proclamation, which had been scheduled for Dec. 1, 2004. In issuing the temporary restraining order, the court held that the plaintiffs had raised "serious questions" regarding whether the measure is constitutional and that the balance of harm fell "sharply" in their favor. The court found that if Proposition 200 were to become law, it would have a "dramatic chilling effect" upon immigrants seeking services for which they are eligible. Implementation of the initiative was enjoined until Dec. 22, 2004, when the court will consider the plaintiffs' motion for a preliminary injunction—to prevent implementation until the case has been resolved.

On Dec. 7, the court revised its original order and allowed the governor to issue a proclamation declaring that the initiative's voting provisions have become law. The injunction halting the public benefits provisions remains intact. The new requirements for Arizona voters cannot go into effect immediately, however. Because of its past voting practices, Arizona is required under Section 5 of the Voting Rights Act to seek approval from the U.S. Dept. of Justice (DOJ) before implementing any changes in voting procedures. The modified order allows the state to submit its proposed changes in voting procedures to the DOJ. The voting provisions remain a subject of this litigation.

Friendly House, et al. v. Janet Napolitano et al., CV 04-649 TUC DCB (filed Nov. 30, 2004).

Miscellaneous

TSA INSTRUCTS RE: REMOVING NAMES FROM WATCH LISTS – The Transportation Security Administration has announced a new set of steps air passengers can take if, when checking in for flights, they repeatedly are mistaken for persons listed on watch lists as a threat to civil aviation or national security. The undated notice instructs how to contact the TSA to report such incidents, but it does not explain the actual procedure for how to have one's name removed from the watch lists.

The notice instructs affected persons to contact the TSA toll-free at 1-866-289-9673, or by email at TSA-ContactCenter@dhs.gov, or by clicking on the "Contact Us" button at www.tsa.gov.

According to the notice, a representative at the TSA Contact Center will explain to persons who contact the center the actual procedure they must follow to have their names removed from watch lists. The notice says that the process takes up to 45 days to complete. The TSA requests that the affected person provide his or her full name, date of birth, telephone number, and mailing and email addresses when contacting the agency.

TSA ORDERS AIRLINES TO PROVIDE DATA TO BE USED IN TESTING "SECURE FLIGHT" PASSENGER PRESCREENING PROGRAM – The Transportation Security Administration published a final order in the Nov. 15 Federal Register requiring air carriers to provide historical passenger name record (PNR) information to the TSA for domestic flight segments flown between June 1, 2004, and June 30, 2004. The data will be used to test the TSA's new passenger prescreening program, called Secure Flight, which is a successor to the disallowed CAPPS II (Consumer Assisted Passenger Pre-Screening) program. Airlines had until Nov. 23, 2004, to turn over the data.

According to the TSA, the agency will compare PNR information against records contained in the consolidated Terrorist Screening Center Database to prevent terrorists and others who pose a threat from boarding aircraft. According to the TSA, a "limited test" with commercial data will be conducted to determine if passenger information is incorrect and to help resolve false positive matches.

The TSA must first submit a congressionally mandated report of "performance measures" to determine the impact of such a test on aviation security. Under the 2005 Homeland Security spending law (PL 108-334), the TSA cannot spend money on tests that use commercial databases until the Government Accountability Office reviews the performance measures.

The TSA has not yet decided which commercial data aggregators will be involved in the test, nor what data will be included, but the agency claims that it will not use credit card information. The use of commercial databases worries privacy advocates, who say that the TSA has not explained why it needs commercial data, how commercial data will protect security, and how people will correct inaccurate, irrelevant, untimely and incomplete information. (For more on these issues, see the Nov. 5, 2004, issue of the Electronic Privacy Information Center's *Epic Alert* online newsletter, at www.epic.org/alert/EPIC_Alert_11.21.html.)

69 FR 65619–27 (Nov. 15, 2004).

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