NATIONAL IMMIGRATION LAW CENTER
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Immigration Issues

ATTORNEY GENERAL DESIGNATES EL SALVADOR FOR TPS – Due to the environmental disaster and substantial disruption of living conditions in El Salvador caused by earthquakes that shook the country in January and February, Attorney General John Ashcroft has determined that El Salvador is "unable, temporarily, to handle adequately the return" of its nationals. He has therefore designated El Salvador as a country whose nationals and residents currently in the United States are eligible for temporary protected status.

TPS is granted to persons from countries that are designated by the AG as experiencing ongoing 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.

To obtain TPS, nationals of (and persons of no nationality who last habitually resided in) El Salvador who have been "continuously physically present" in the United States since Mar. 9, 2001, and have "continuously resided" in the U.S. since Feb. 13, 2001, must apply within the registration period that began on Mar. 9, 2001, and ends on Sept. 9, 2002.

To be eligible for TPS, applicants must be admissible to the U.S. (some inadmissibility grounds may be waived). Individuals who have been convicted in the U.S. of either a felony or two or more misdemeanors are not eligible. In addition, individuals subject to certain criminal or security-related bars to asylum are also ineligible.

Any Salvadoran national who has already applied for or plans to apply for another immigration benefit may also apply for TPS. A TPS application does not adversely affect any other immigration benefit.

An individual who is granted TPS during an initial period of designation may register for any future extension of the TPS program. Salvadoran nationals who do not file a TPS application during the initial registration may be eligible to register during any subsequent extension of the program if, at the time of the initial registration period, the applicant:

1. was a nonimmigrant;
2. had been granted voluntary departure status or any relief from removal;
3. had made an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal that was pending or subject to further review or appeal;
4. was a parolee or had a pending request for parole; or
5. was a spouse or child of an individual eligible to be a TPS registrant.

An applicant for late initial registration must register within 60 days of the expiration of termination of one of the conditions described in items 1–5, above.

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To register for TPS, applicants must submit:

- an application for temporary protected status, Form I-821;
- supporting evidence under 8 C.F.R. section 244.9 (describing evidence necessary to establish eligibility for TPS benefits, i.e. proof of residence, employment records, pay stubs, school records, etc.);
- an application for employment authorization, Form I-765;
- two identification photographs (1 ½" x 1 ½"); and
- for every applicant who is 14 years of age or older, a $25 fingerprint fee.

While a complete application must include the fingerprint fee for every applicant who is 14 years of age or older, applicants should not submit a completed fingerprint card with the application package. Upon receipt of the application, the INS will mail an appointment letter with instructions to appear for fingerprinting at an INS-authorized application support center (ASC).

Applicants must submit a $50 fee with the TPS application. If the applicant requests employment authorization, he or she must submit a $100 fee with Form I-765. An applicant who does not seek employment authorization need not submit the $100 fee but must still submit the I-765. A $25 fingerprint fee must also be submitted for every applicant who is 14 years of age or older. The applicant may request a fee waiver.

Completed forms and applicable fees must be submitted to the INS service center with jurisdiction over the individual's place of residence.

At least 60 days prior to the expiration of the initial period of designation on Sept. 9, 2002, the attorney general will review the conditions in El Salvador to determine whether the conditions for designation of El Salvador under the TPS program continue to be met. Notice of that determination, including the basis for the determination, will be published in the Federal Register.

66 Fed. Reg. 14,214–16 (Mar. 9, 2001).

INS ISSUES THREE MEMOS IMPLEMENTING THE LIFE ACT – The Immigration and Naturalization Service has issued three memos instructing INS field staff on how the Legal Immigration Family Equity Act of 2000 (LIFE) affects the handling of cases that arise under sections 202 and 203 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA) and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA). LIFE, which former President Bill Clinton signed on Dec. 21, 2000, amends NACARA section 202 (concerning adjustment of status for Nicaraguans and Cubans) and HRIFA (concerning adjustment for Haitians) by giving the attorney general authority to waive the grounds of inadmissibility applying to persons who have previously been ordered deported and the ground applying to those who enter the United States without inspection after having accrued a year of "unlawful presence." Immigration and Nationality Act §§ 212(a)(9)(A) and (C). The new law also provides that reinstatement of removal under INA section 241(a)(5) does not apply to immigrants who are applying for adjustment under NACARA section 202 or HRIFA, and for immigrants who are applying for suspension of deportation or special rule cancellation under NACARA section 203 (see "Congress Passes 'LIFE' Bill," IMMIGRANTS' RIGHTS UPDATE, Dec. 27, 2000, p. 1.).

Two of the INS memos, both of which were issued on Feb. 14, 2001, specifically concern NACARA section 202 adjustment and HRIFA adjustment. The first memo discusses the practical effects of LIFE's provisions with respect to reinstatement of removal, as well as the availability of waivers for the grounds of inadmissibility under INA sections 212(a)(9)(A) (for having previously been removed) and (C) (for having reentered the U.S. unlawfully after previously being ordered removed or being unlawfully present for more than one year). The second memo lays out procedures for how to handle the cases of persons who have been issued orders of deportation or orders of removal. The third memo, issued February 22, 2001, concerns suspension of deportation and special rule cancellation under NACARA section 203.

Reinstatement of removal. The INA's reinstatement of removal provision provides for the reinstatement of removal orders against persons whom the attorney general finds reentered the U.S. illegally after either they were removed from the U.S. or they departed voluntarily while under an order of removal. Under the statute, the prior order of removal is reinstated from its original date and may not be reopened or reviewed. In light of LIFE's amendments affecting applicants for adjustment under NACARA section 202 and HRIFA, the first INS memo instructs field staff to review pending denials to determine whether they are based in whole or part on INA section 241(a)(5). If a pending denial is based on that section, according to the memo, "the case should be re-evaluated."

Waivers of certain grounds of inadmissibility for NACARA § 202 and HRIFA cases. Similarly, officers are also directed to review NACARA section 202 and HRIFA cases to determine whether any pending denials are based on INA section 212(a)(9)(A) or (C) grounds of inadmissibility. The memo instructs INS officers to reevaluate any such cases to determine whether a denial is still warranted in light of LIFE, which provides that waivers of an alien's inadmissibility under INA sections 212(a)(9)(A) and (C) may be granted to applicants for adjustment under NACARA section 202 and HRIFA. The standards that INS officers are to use in determining whether to grant waivers of these grounds of inadmissibility are those "utilized in granting consent to reapply under INA Sections 212(a)(9)(A)(iii) and (C)(ii)," according to the memo. The memo notes that Congress made clear that NACARA section 202 and HRIFA applicants may apply for waivers of INA sections 212(a)(9)(A) and (C) while present in the U.S.

According to the memo, the standards utilized in granting consent to reapply under INA sections 212(a)(9)(A)(iii) and (C)(ii) are generally the factors enumerated in precedent decisions such as *Matter of Tin*, 14 I. & N. Dec. 371, 373–74 (Comm. 1971), *Matter of Carbajal*, 17 I. & N. Dec. 272 (Comm. 1978), and *Matter of Lee*, 17 I. & N. Dec. 275 (Comm. 1978). Therefore, in determining whether to grant waivers of inadmissibility to NACARA section 202 and HRIFA applicants, officers should take the following factors into account (though the memo says that this list is "not all-inclusive"):

1. The length of time the individual previously resided (or has resided) in the U.S.
2. The individual's moral character.
3. The individual's responsibilities to family members residing in the U.S.
4. The likelihood that the individual will obtain lawful permanent residence in the near future.

5. Other hardships that could reasonably be foreseen.

According to the memo, "NACARA section 202 and HRIFA applicants may apply for a waiver of any ground described in INA 212(a)(9)(A) or (C) by filing a Form I-601, Application for Waiver of Ground of Excludability, with the required fee."

Motions to reopen. The memo provides that a NACARA section 202 or HRIFA applicant whose adjustment of status application has been denied and who, as a result of LIFE, is now eligible for adjustment, may file a motion to reopen the case before the INS. The memo provides that a person may file if

• the INS has not issued the person a notice to appear, a notice of referral to an immigration judge, or a notice of certification placing the individual in proceedings before the immigration judge, and

• the individual pays the filing fee for a motion to reopen or is granted a fee waiver.

The memo also states that an individual who is eligible for adjustment of status under NACARA section 202 or HRIFA but who failed to apply for such adjustment by the statutory deadline of Mar. 31, 2000, may seek to reopen removal proceedings before the immigration court or the Board of Immigration Appeals for such purposes. He or she must file a motion to reopen on or before June 19, 2001.

THE SECOND MEMO: Procedures for persons who have been issued orders of deportation or removal. Under the LIFE Act, individuals who become eligible for adjustment, suspension, or cancellation as a result of LIFE's amendments to NACARA section 202 and HRIFA are permitted to file one motion to reopen. They may do so without regard to the normal time and number limitations on such motions. The motion to reopen must be filed within 180 days of the enactment of LIFE—i.e., (as noted above) by June 19, 2001. Accordingly, the second memo provides instructions for the processing of removable individuals who, as a result of LIFE, (1) "were made eligible for adjustment of status under NACARA section 202 or HRIFA and may seek a motion to reopen their removal proceedings in order to apply for adjustment," or (2) "are eligible to apply for adjustment of status as dependent applicants under HRIFA."

Individuals under final orders who became eligible for adjustment of status under NACARA § 202 or HRIFA. The memo states that in addition to meeting the general eligibility requirements, in order to be granted a motion to reopen, individuals must demonstrate that:

1. they failed to apply for adjustment under NACARA section 202 or HRIFA because either they

• were subject to an INA section 241(a)(5) reinstatement of removal order, or

• were unable to obtain waivers of inadmissibility under INA sections 212(a)(9)(A) or (C) because of their presence in the U.S.; or

2. their application for adjustment under NACARA section 202 or HRIFA was denied on either of the above two bases.

With respect to executing final orders of deportation or removal, the memo instructs, "If an alien who is under [such an order] appears to be eligible to reopen his or her proceedings pursuant to LIFE to apply for adjustment as either a principal applicant or a dependant applicant, do not execute the deportation or removal order until June 19, 2001, or, if the alien has filed a motion to reopen, until a decision on the motion has been issued by the Executive Office of Immigration Review." If the individual is not eligible to have his or her case reopened (i.e., because he or she is not subject either to INA section 241(a)(5) or to 212(a)(9)(A) or (C)) or is not otherwise eligible for adjustment under NACARA section 202 or HRIFA, a removal or deportation order against him or her may be executed before June 19, 2001.

Individuals eligible to apply for adjustment of status as dependent applicants under HRIFA. The second memo also instructs that if an individual is eligible to apply for adjustment under HRIFA as a dependent applicant, but has not yet applied, INS officers must defer any removal action for 60 days and instruct the individual to file the application for adjustment within that period. If the individual does not apply for adjustment within 60 days of being advised, officers may initiate or resume proceedings against the individual.

Mandatory detention. Consistent with earlier guidance on NACARA and HRIFA, the memo states that Nicaraguans, Cubans, and Haitians subject to mandatory detention shall not be released from custody. The memo provides that officers may consider discretionary custody determinations for individuals who may be eligible under NACARA or HRIFA.

THE THIRD MEMO: Application of LIFE provisions to NACARA 203 suspension and cancellation beneficiaries. The third memo concerns applicants for suspension or special rule cancellation under NACARA section 203. the LIFE amendments provide that the reinstatement statute does not bar individuals from applying for this relief. The memo instructs asylum officers that they may now process NACARA section 203 applications for individuals who reentered the U.S. illegally after having received final orders of deportation, exclusion, or removal. If the applicant appears eligible for suspension or special rule cancellation, the application should be granted. If the applicant does not appear eligible for relief under NACARA, the asylum officer should refer the application to the immigration court, unless the applicant has a pending asylum application under the settlement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D.Cal. 1991) (*ABC*). The latter cases should be held in abeyance pending further guidance regarding whether reinstatement may apply to *ABC* cases.

The memo explains that immigrants who are granted suspension or cancellation under NACARA section 203 may also apply for asylum, even if they would otherwise be subject to the reinstatement statute, because of the LIFE amendments. However, it is the position of the INS that immigrants who are not granted NACARA relief who are subject to reinstatement may not apply for asylum. Thus, the memo instructs that in cases where an applicant is denied relief under NACARA section 203 and has a non-*ABC* pending asylum case, the asylum case should be administratively closed for referral to the immigration court along with the NACARA case.

INS GRANTS ASYLUM TO AUTISTIC TEN-YEAR-OLD – In a case of first impression, the Chicago Asylum Unit of the Immigration and Naturalization Service has granted asylum to a ten-year-old autistic boy from Pakistan. The boy's mother alleged that the boy had been tortured in Pakistan and would face similar treatment if

returned there.

To obtain asylum, individuals must prove that they have suffered persecution in the past or that they have a well-founded fear of persecution due to one or more of five grounds. These grounds include: race, national origin, religion, political opinion, or membership in a particular social group. The INS granted the boy asylum on the basis of his membership in a particular social group. The boy's case appears to be the first favorable asylum decision issued on the basis of a person having a disability.

The boy wears a helmet and mittens in order to protect himself from hurting himself. His behavior is a manifestation of his autism. In the asylum application she filed on the boy's behalf, his mother claims that his autism is so misunderstood that the boy will be persecuted if he returns to Pakistan. The boy's relatives believe that the boy is possessed by evil spirits and cursed by Allah. In order to cure him, his relatives compelled him to drink dirty water and forced him to undergo dangerous and degrading treatments. According to his mother, if the boy is sent back to Pakistan, he will be locked up in a cage.

Asylum cases such as this one, which are granted by an INS asylum unit, are not published and are not precedent setting.

Litigation

9TH CIRCUIT OVERTURNS PREMATURE APPLICATION OF "STOP-TIME RULE" – An immigration judge who applied the "stop-time rule" contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) four days before the rule took effect on Apr. 1, 1997, misapplied the law, the Ninth Circuit Court of Appeals has ruled. In a hearing held on Mar. 28, 1997, the IJ denied the applications for suspension of deportation of a Mexican national and her two daughters, ruling that they had failed to satisfy the IIRIRA's new continuous physical presence requirement (the stop-time rule). The Ninth Circuit held that the since the IJ misapplied the law, the Board of Immigration Appeals erred by not reversing the IJ's decision.

Prior to the IIRIRA, individuals were eligible for suspension of deportation, a form of relief from deportation, if they could show (1) that they had seven years of continuous physical presence in the United States, (2) that they were of good moral character, and (3) that their deportation would result in extreme hardship either to them or to an immediate family member who was a U.S. citizen or lawful permanent resident. The IIRIRA eliminated suspension of deportation and replaced it with a form of relief called cancellation of removal. The eligibility requirements for cancellation of removal are more onerous than those for suspension of deportation.

The IIRIRA's modification of the continuous physical presence requirement—via the stop-time rule—is one way in which it has become harder to qualify for relief from deportation. Prior to the IIRIRA, individuals could accrue time towards the seven-year requirement until they applied for suspension of deportation; commencement of deportation proceedings had no effect on their ability to accrue continuous physical presence. Under the IIRIRA's stop-time rule, however, accrual of continuous physical presence ceases when deportation proceedings begin.

The petitioners in this case, all of whom entered the U.S. without inspection on Dec. 9, 1989, were served with Orders to Show Cause and placed in deportation proceedings on Oct. 17, 1996. They appeared before an immigration judge on Dec. 20, 1996, at which time they declared their intent to file for suspension of deportation. Their hearing was held on Mar. 28, 1997. When the BIA summarily affirmed the IJ's denial of suspension to the petitioners, they appealed to the Ninth Circuit.

On appeal, the government argued that even if the IJ misapplied the stop-time rule, the error was harmless because the INS would have appealed any decision granting suspension to the petitioners and any decision made on appeal would have been subject to the stop-time rule.

The Ninth Circuit held, however, that it was impossible to know whether the INS would have appealed the case, and it dismissed the government's argument as conjecture. Relying on *Astrero v. INS*, 104 F.3d 264 (9th Cir. 1996), the court held that the stop-time rule could not be applied before its effective date. It also noted that adopting the government's argument would leave the petitioners without a remedy for the IJ's error. Individuals must receive a hearing under the law that applied to them at the time that their original hearings were held, the court said. To do otherwise would be inconsistent with the due process guarantees afforded aliens in deportation proceedings.

Cruz v. INS, No. 99-70754 (9th Cir. Feb. 27, 2001).

9TH CIRCUIT OVERTURNS ASYLUM DENIAL BASED ON LACK OF AUTHENTICATED DOCUMENTS – In a per curiam decision, the Ninth Circuit Court of Appeals has reversed and remanded an asylum denial that was based on the fact that the government documents the asylum applicant presented as evidence that he had been persecuted were not authenticated by an officer of the United States Foreign Service. The court ruled that because consular certification is not the sole means of authenticating documents that are offered as corroborating evidence in an immigration proceeding, the immigration judge and the Board of Immigration Appeals erred when they excluded from evidence official records that lacked such certification.

The petitioner in the case, a national of Bangladesh named Duke Khan, claims that he was persecuted in his home country on account of his political opinion. According to Khan, he was arrested four times, the first arrest leading to a seven-month confinement, during which he was severely beaten. At his hearing, Khan attempted to introduce official records documenting his arrest and detention. However, the IJ refused to admit them because they had not been properly authenticated pursuant to 8 C.F.R. section 287.6(b). That regulation requires that a U.S. Foreign Service officer have certified as authentic a foreign official record that is offered as corroborating evidence in an immigration proceeding. Having excluded from evidence the documents Khan offered, the IJ denied Khan's asylum application, based in part on a lack of corroborating evidence in support of his claims. In denying Khan's appeal, the BIA adopted the IJ's reasoning, whereupon Khan appealed to the Ninth Circuit.

Relying on case precedent, the Ninth Circuit held that while 8 C.F.R. section 287.6(b) provides for one method of authenticating documents, documents may be authenticated by any "recognized procedure," including any of those provided for in the Federal

Rules of Civil Procedure. According to the court, "The procedure specified in '8 C.F.R. § 287.6 provides one, but not the exclusive, method' for authenticating documents. *Iran v. INS*, 656 F.2d 469, 472 n.8 (9th Cir. 1981); *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978)." Since the excluded records would have corroborated Khan's testimony and the denial of his application was based in part on a lack of corroborating evidence, the appellate court reversed the denial and remanded the case.

Khan v. INS, No. 99-71062 (9th Cir. Jan. 26, 2001).

5TH CIRCUIT HOLDS THAT TEXAS FELONY DWI IS NOT A CRIME OF VIOLENCE – In an important victory for immigrants, their advocates, and for public defenders, the Fifth Circuit Court of Appeals has held that violating the Texas felony driving while intoxicated (DWI) statute is not a crime of violence. Hence, a felony DWI in Texas is not an "aggravated felony," which can trigger a substantial increase in the prison sentence of a person who is convicted of being in the United States unlawfully after having been removed from the U.S.

The case, *U.S. v. Chapa-Garza*, consolidates the cases of five defendants who violated the Texas felony DWI statute. The statute provides that if a person has been convicted of two Class B misdemeanor DWIs, any conviction for a subsequent DWI is a third degree felony. All the defendants also pled guilty to being in the U.S. unlawfully after having been removed from the U.S. A person convicted of this offense is sentenced under United States Sentencing Guideline (U.S.S.G.) section 2L1.2, which provides that this violation carries a base offense level of 8, with an increase of 16 offense levels if the person's removal from the U.S. was preceded by a conviction for an aggravated felony.

Under 8 U.S.C. section 1101(a)(43), an "aggravated felony" is a crime of violence for which the term of imprisonment is at least one year. If Texas felony DWI were held to be a crime of violence, conviction of it would be conviction of an aggravated felony, thus triggering the enhanced sentence under the U.S.S.G. In the case of each of the five appellants, the district courts had applied guideline 2L1.2's 16-level increase, finding that Texas felony DWI was a crime of violence as defined in 18 U.S.C. section 16(b). This section provides that a crime of violence is "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." In their appeals, the appellants argued that Texas felony DWI does not fit this definition.

The government urged the Fifth Circuit to interpret 18 U.S.C. section 16(b) the same way that the Seventh Circuit Court of Appeals interpreted U.S.S.G. section 4B1.2(a)(2) in *U.S. v. Rutherford*, 54 F.3d 370 (7th Cir. 1995). Under section 4B1.2(a)(2), a crime of violence is any crime that involves "'pure recklessness,' i.e. a conscious disregard of a substantial risk of injury to others." Comparing the language in 18 U.S.C. section 16(b) and guideline 4B1.2(a)(2), the Fifth Circuit found that the language of guideline 4B1.2(a)(2) is broader than that of section 16(b).

The court noted that, effective Nov. 1, 1989, the definition of "crime of violence" in guideline 4B1.2(a)(2) "was changed from a reference to section 16(b)" to the definition that now appears in the guideline. According to the court, "This change counsels against interpreting section 16(b) and guideline 4B1.2(a)(2) the same way."

Furthermore, the court held, the "substantial risk that physical force . . . may be used" language of section 16(b) "refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ physical force. The criterion that the defendant use physical force against the person or property of another is most reasonably read to refer to intentional conduct, not an accidental, unintended event." The court found further support for this distinction in *United States v. Parson*, 955 F.2d 858 (3d Cir. 1992).

The *Parson* court contrasted section 16(b) with guideline 4B1.2(a)(2) and found that whereas section 16(b) covers felonies that, by their nature, involve a substantial risk that force may be used, the post–Nov. 1, 1989, sentencing guideline more broadly covers conduct that poses a serious risk of injury. The court found significant the difference in phrasing of the two different provisions. The definition in the sentencing guideline could include unintentional reckless behavior, while the definition in section 16(b) requires intentional acts of physical force.

Consistent with this reading of the statute, the Fifth Circuit also found that section 16(b) requires that, for an offense to be a crime of violence, physical force must have been applied in the course of committing the offense. It distinguished this requirement from that in guideline 4B1.2(a)(2), which simply requires that the offender's action result in physical injury to another party. Though a collision caused by an intoxicated driver may result in injury to a victim, the court reasoned, generally such a driver has not intentionally used force against the victim. Intoxicated drivers almost never intentionally use force against their victims; rather, a person commits Texas felony DWI when, after having been convicted twice previously of driving while intoxicated, he or she begins operating a vehicle while intoxicated. Since the elements of Texas felony DWI do not match those of "a crime of violence" under section 16(b), the Fifth Circuit held that Texas felony DWI is not a crime of violence.

U.S. v. Chapa-Garza, No. 99-51199 (5th Cir. Mar. 1, 2001).

SETTLEMENT OF CHALLENGE TO INS CIVIL DOCUMENT FRAUD PROCEDURES GIVEN FINAL APPROVAL – The U.S. District Court for the Western District of Washington has granted final approval of the settlement in *Walters v. Reno*, a class action lawsuit that challenged the forms and procedures used by the Immigration and Naturalization Service to implement the civil document fraud provisions of section 274C of the Immigration and Nationality Act. The approval means that the settlement is now in effect (for details, *see* "Settlement Reached in Civil Document Fraud Litigation," IMMIGRANTS' RIGHTS UPDATE, Dec. 27, 2000, p. 8).

Under the settlement, the INS can use revised and improved forms and procedures to bring civil document fraud charges. The INS must vacate the civil document fraud final orders that were issued against class members—who are noncitizens who waived or did not timely request a hearing during the 1990s. The agency has until Aug. 21, 2001, to complete the vacating of those orders. The settlement provides that the INS will not recharge class members for the conduct that was the basis for the original document fraud charges.

Once the INS certifies that it has completed vacating the document fraud final orders of class members, class members will have a two-year period to request that the INS join in motions to reopen or remand any deportation proceedings that were affected, in whole or part, by the fact that the class member had been issued a document fraud final order. The INS must join in such motions, as long as the class member is now eligible for some relief, or is seeking to contest deportability.

Copies of the complete settlement, and further information about the case, may be obtained from NILC and are also available at NILC's website (www.nilc.org).

Walters v. Reno, No. C94-1204C (W.D.Wash. Feb. 22, 2001).

DISTRICT COURT PERMANENTLY ENJOINS INS ADMINISTRATIVE DENATURALIZATION – The U.S. District Court for the Western District of Washington has issued a nationwide permanent injunction of the regulations of the Immigration and Naturalization Service that purport to authorize the agency to reopen naturalization cases and revoke citizenship. The ruling follows last year's ruling of the U.S. Court of Appeals for the Ninth Circuit, which upheld the district court's preliminary injunction in this case, finding that the INS has no authority to denaturalize. *Gorbach v. Reno,* 219 F.3d 1087 (9th Cir. 2000) (*en banc*) (*see* "9th Circuit Upholds Challenge to INS Administrative Denaturalization Procedure," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2000, p. 9). The Ninth Circuit's decision establishes that, once citizenship has been conferred through naturalization, it may be revoked by the government only by means of a formal proceeding in federal court.

The district court's permanent injunction requires the INS to reinstate and return certificates of citizenship to the naturalized citizens who lost their citizenship as a result of the administrative denaturalization procedure before it was preliminarily enjoined by the district court in 1998. The injunction also requires the INS to send notice of the permanent injunction of administrative denaturalization to the several thousand naturalized citizens who previously were served with notices of intent to revoke citizenship.

Counsel for the plaintiffs include the law firm of Hogan and Hartson, Washington, DC; the law firm of Perkins Coie, Seattle, WA; attorney Robert Gibbs, Seattle, WA; attorney Daniel Levy, Los Angeles, CA, and NILC. Also of counsel are the Immigrant Legal Resource Center and One-Stop Immigration and Education Center, Inc. *Gorbach, et al. v. Reno, et al.*, No. C98-0278R (W.D.Wash. Feb. 14, 2001).

Employment Issues

VIRGINIA COURT RULES UNDOCUMENTED WORKER NOT ELIGIBLE FOR WORKERS' COMP – The Virginia Court of Appeals has held that a worker who was undocumented when he was injured on the job in August 1998 was not an "employee" as defined by Virginia's Workers' Compensation Act and therefore is ineligible for workers' compensation benefits. In reaching its decision, the court followed the Virginia Supreme Court's decision in *Granados v. Windson Dev. Corp.*, 257 Va. 103, 509 S.E.2d 290 (1999). That decision held that an undocumented worker is not an employee for purposes of the state's workers' compensation act because "under the Immigration Reform and Control Act of 1986, an illegal alien cannot be employed lawfully in the United States." Therefore, according to the *Granados* decision, the "purported contract of hire" of any alien unlawfully employed in the U.S. is "void and unenforceable."

Subsequent to the *Granados* decision, the Virginia legislature amended the workers' compensation act to clarify that "employee" means "every person, including aliens and minors, in the service of another under any contract of hire . . . whether lawfully or unlawfully employed." This amendment was effective Apr. 19, 2000. The court in *Rios* held that the *Granados* decision was controlling since the petitioner, Mr. Rios, was injured before the amendment took effect. Furthermore, the court stated that it could not give the amendment retroactive effect unless the Virginia Supreme Court declared that the amendment was intended as a legislative interpretation of the original act.

The court rejected Rios's argument that his employment at the time of his injury was lawful because he was either a U.S. citizen or a lawful permanent resident by virtue of his marriage to a U.S. citizen. The court found that Rios continued to be undocumented until the Immigration and Naturalization Service approved an immigration petition filed by his wife on his behalf. The court also rebuffed Rios's argument that the denial to him of workers' compensation benefits violated his constitutional right to equal protection under the law. The benefits were denied, the court held, because Rios failed to meet his burden of establishing that he met the law's definition of "employee."

Rios v. Ryan Inc. Central and Reliance National Indemnity Company, 2001 Va. App. LEXIS 99 (March 6, 2001).

107TH CONGRESS VOTES TO KILL ERGONOMICS STANDARD FOR WORKERS – Despite over ten years of studies and reports on the need for strong workplace ergonomics standards that would help prevent the crippling effects of repetitive stress injuries, Congress has voted down the ergonomics regulations that were issued under the Clinton administration late last year. The U.S. House of Representatives voted 223-206 to repeal the regulations, while the vote in the Senate was 56-44.

The Occupational Safety and Health Administration's final rule on ergonomics, 29 C.F.R. section 1910.900, was published on Nov. 14, 2000; Congress repealed the rule on Mar. 7, 2001. Repetitive stress injuries often result in life-long disabilities, and they occur especially in industries whose workers are disproportionately immigrants—workplaces such as garment shops, and meatpacking and poultry plants.

FEDERAL GUIDANCE SHOULD ASSIST WORKERS WITH DISABILITIES – The Equal Employment Opportunity Commission (EEOC) has published guidelines setting forth the responsibilities temporary employment agencies have under the Americans with Disabilities Act of 1990 (ADA) when they place a worker who is disabled with another employer. As the number of individuals obtaining work through temporary employment agencies or other staffing firms increases, the EEOC wants to clarify that these agencies can also be liable under the ADA.

The document, entitled "Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms," can be found on the EEOC's web site at www.eeeoc.gov/docs/guidance-contingent.html.

IMMIGRANTS' AND WORKERS' RIGHTS TRAININGS SLATED – In the coming months, the National Immigration Law Center will be conducting a series of trainings on the rights of immigrant workers. Topics to be covered include:

- Discrimination in the workplace
- Workplace protections: wage and hour, health and safety
- Immigration and Naturalization Service worksite enforcement issues
- Document fraud
- Social Security Administration "no match" letters
- New "T" and "U" visas
- Workplace problems faced by low-wage immigrant and refugee workers

Training sessions are scheduled for Los Angeles (April 27), Chicago (May 11), New York (May 18), and Miami (June 14 and 15). Individuals interested in attending these trainings should contact Mike Muñoz, NILC trainings coordinator, at 213-639-3900, ext. 110.

Immigrants & Welfare Update

"HEALTHY SOLUTIONS" INITIATIVE LAUNCHED, BIPARTISAN PROPOSALS TO RESTORE BENEFITS INTRODUCED – Marking the launch of "Healthy Solutions for America's Hardworking Families," a bipartisan group of lawmakers recently introduced a slate of bills intended to continue the restoration of benefits cut off from immigrants by the 1996 welfare law. The initiative encompasses three legislative proposals that address access to health care, nutrition, and domestic violence victims' access to crucial safety net programs. Immigrants' rights advocates believe that grouping the bills under a single banner will focus attention on immigrants as new Americans who contribute greatly to the nation's prosperity and who therefore deserve the same basic health and nutrition services as others.

"Healthy Solutions for America's Hardworking Families" addresses some of the most egregious barriers to immigrants' access to the safety net: those that deny federal health care to certain lawfully present children and pregnant women; those that deny food stamps to many qualified immigrant families; and those that deny the services that domestic violence victims need to recover from the abuse they have suffered.

The package of bills will include the following:

Immigrant Children's Health Improvement Act of 2001. If passed, the Immigrant Children's Health Improvement Act would allow states the option of extending health care coverage to pregnant women and children under Medicaid and/or the State Children's Health Insurance Program (SCHIP). The Senate bill, S. 582, is sponsored by Senators Bob Graham (D-FL) and John McCain (R-AZ). Senators Lincoln Chafee (R-RI), Sue Collins (R-ME), James Jeffords (R-VT), Paul Wellstone (D-MN), Dianne Feinstein (D-CA), Edward Kennedy (D-MA), and Patty Murray (D-WA) have signed on as original cosponsors. The identical House bill, H.R. 1143, has been introduced by Reps. Lincoln Diaz-Balart (R-FL) and Henry Waxman (D-CA). The bill is cosponsored by Reps. Mark Foley (R-FL), Ben Gillman (R-NY), Gene Green (D-TX), Luis Gutierrez (D-IL), Peter King (R-NY), Sander Levin (D-MI), Robert Menendez (D-NJ), Connie Morella (R-MD), Ciro Rodriguez (D-TX), Ileana Ros-Lehtinen (R-FL), and Lucille Roybal-Allard (D-CA).

Nutrition Assistance for Working Families and Seniors Act. The Nutrition Assistance for Working Families and Seniors Act would restore food stamp eligibility to all lawfully present immigrants and make a number of other improvements in the Food Stamp Program. The Senate bill, S. 583, has been introduced by Senators Kennedy, Jeffords, and Chafee. A companion House bill is also in the works and should be introduced shortly.

Women Immigrants' Safe Harbor Act (WISH). WISH would eliminate barriers restricting lawfully present immigrant women who are victims of domestic violence from participating in crucial safety net programs, including Medicaid, food stamps, Temporary Assistance for Needy Families, and Supplemental Security Income. Although the details are still being worked out, Reps. Sandy Levin (D-MI) and Connie Morella (R-MD) are planning to introduce this legislation in the very near future.

The proposed changes do not fully address the problems brought about by the restrictions on immigrants' access to safety net services, but they do move the nation closer to fairness and a sensible policy.

Immigrants' rights advocates from key states are planning a number of events in the coming days and weeks to highlight the introduction of these important bills. In addition, the rollout of the legislation coincided with the release of a report on immigrants' wellbeing from the Urban Institute, a Washington, D.C.–based policy research institute. The report contains findings that children in immigrant families are less able to meet basic needs such as food, housing, and health care than their counterparts in native-born households. The study verifies what immigrants' rights advocates have been contending for years: that the 1996 legislation has had a profoundly negative impact on the health of immigrants and their families.

In addition, a recent report by the Kaiser Commission rebuts the assertion made by some anti-immigration groups that immigration is responsible for the rise in the rate of the uninsured in recent years. In fact, the report finds that the exact opposite is true: although immigrants are more likely to be uninsured than the general population, the largest growth in the uninsured in recent years has occurred among native-born citizens.

Hopes for passage of benefits restoration legislation this year have been buoyed by recent expressions of renewed support from the National Conference of State Legislatures (NCSL) and new support from the National Governor's Association (NGA). The NGA voted to incorporate a provision giving states the option to provide Medicaid and SCHIP to all lawfully present immigrants and pregnant women in their winter policy statement. The vote represents the first instance in four years that the NGA has officially supported benefits restoration for immigrants. The NCSL has included immigrant benefits restoration among its FY 2002 budget priorities.

The National Immigration Law Center . . .

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