NATIONAL IMMIGRATION LAW CENTER

Immigrants' Rights Update

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Immigration

EXPANSION OF EXPEDITED REMOVAL TO AFFECT PERSONS HELD IN TEXAS PRISONS – The Immigration and Naturalization Service has issued a notice that it plans to start a pilot project to apply expedited removal procedures to certain immigrants currently being held in three Texas correctional facilities. In establishing this pilot program, the attorney general is acting under Immigration and Nationality Act section 235(b)(1)(A)(iii), which grants her sole and nonreviewable discretion to designate other individuals to whom expedited removal procedures may be applied, even if they are already present in the United States and have been for two years or less.

Currently, under INA section 235(b)(1), expedited removal is applied to individuals who are found inadmissible for attempting entry by fraud or misrepresentation, or for arriving without proper entry documents. Such persons are generally not entitled to a formal removal hearing before an immigration judge. Instead, their cases are reviewed by INS officers who are empowered to issue nonreviewable removal orders (or, in narrow circumstances, to refer the individuals to immigration judges for further proceedings), and persons so removed are barred from returning to the U.S. for five years.

The pilot project will extend the reach of expedited removal procedures to individuals who have been convicted of illegal entry under INA section 275 (if their court records establish the time, place, and manner of their entry), who have not been admitted or paroled into the U.S., and have not been physically present in the U.S. for more than two years prior to the date of determination of inadmissibility. The pilot project is limited to individuals who are currently incarcerated in the Big Spring Correction Center, Eden Detention Center, or Reeves County Bureau of Prisons Contract Facility.

Comments on the notice must be submitted on or before Nov. 22, 1999. After evaluating and addressing the comments, the INS will inform the public by notice in the Federal Register 30 days prior to the pilot program's implementation. The pilot program will be in effect for 180 days.

[64 Fed. Reg. 51,338–40 (Sept. 22, 1999).]

AG EXTENDS TPS DESIGNATION FOR NATIONALS OF SOMALIA – Attorney General Janet Reno has issued a notice extending her designation of Somalia as a country whose nationals and resi-

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dents currently in the United States are eligible for temporary protected status (TPS). The attorney general's action marks the ninth consecutive year in which TPS has been extended to people from Somalia.

TPS is granted to persons from countries that are designated by the attorney general 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. The attorney general, in consultation with the State Dept., has determined that the TPS extension for Somalia is warranted because armed conflict in that nation is ongoing and "the extraordinary and temporary conditions that provided a basis for the initial TPS designation" persist.

The extension took effect Sept. 18, 1999, and will remain in effect until Sept. 17, 2000. To obtain TPS under the extension, nationals of (and individuals of no nationality who last habitually resided in) Somalia who have been "continuously physically present" and have "continuously resided in" the U.S. since Sept. 16, 1991, must apply for the extension during the period that began on Sept. 13, 1999, and ends Oct. 13, 1999. Persons previously granted TPS under the Somalia program need only file Form I-821 *without* the fee and also submit Form I-765, Application for Employment Authorization. Those who desire work authorization under the extension must submit the $100 fee with the I-765 form. Applicants who do not seek work authorization still must file the I-765 but need not pay the fee. In addition, applicants for the extension of TPS must include two identification photographs (1½" x 1½").

Under this extension, late initial registration is also possible for individuals who did not register during the initial period of TPS for Somalia that ended on Sept. 16, 1992. To register under this provision, a person must

- be a national of Somalia (or a person having no nationality who last habitually resided in Somalia);
- have been continuously physically present in the U.S. since Sept. 16, 1991;
- have continuously resided in the U.S. since Sept. 16, 1991; and
- be admissible as an immigrant, except as otherwise provided in Immigration and Nationality Act section 244(c).

In addition, applicants must demonstrate that during the initial registration period (i.e., Sept. 16, 1991, through Sept. 16, 1992), they

- were in valid immigrant or nonimmigrant status, or had been granted voluntary departure status or any relief from removal;
- had an application for change of status, asylum, voluntary departure, or any relief from removal pending;
- were parolees or had pending requests for reparole; or
- were the spouse or child of an individual currently eligible to register for TPS.

Applicants for late initial registration must register no later than 60 days from the expiration or termination of the qualifying conditions listed above.

The attorney general estimates that there are approximately 350 nationals of Somalia who have been granted TPS and who are eligible for re-registration. At least 60 days prior to Sept. 17, 2000, the attorney general will review Somalia's TPS designation to determine whether conditions for designation continue to be met.

[64 Fed. Reg. 49,511–12 (Sep. 13, 1999).]

TPS DESIGNATION FOR NATIONALS OF MONTSERRAT EXTENDED – Attorney General Janet Reno has issued a notice extending her designation of Montserrat as a country whose nationals and residents currently in the United States are eligible for temporary protected status (TPS). The extension took effect Aug. 28, 1999, and will remain in effect until Aug. 27, 2000.

TPS is granted to persons from countries that are designated by the attorney general 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. The attorney general, in consultation with the State Dept., has determined that the TPS extension for Montserrat is warranted because of the persistence of "extraordinary and temporary conditions" preventing nationals of (and individuals of no nationality who last habitually resided in) that country from returning safely.

The attorney general estimates that there are approximately 300 nationals of Montserrat who have been granted TPS and are eligible for re-registration. At least 60 days prior to Aug. 27, 2000, the attorney general will review Montserrat's TPS designation to determine whether conditions for designation continue to be met.

[64 Fed. Reg. 48,190–92 (Sep. 2, 1999).]

PRESIDENT ORDERS DED FOR LIBERIANS – President Clinton has directed the attorney general to implement deferred enforced departure (DED) for Liberians currently in the United States and to make the relief available for a one-year period commencing Sept. 29, 1999. This action comes on the heels of the attorney general's recent decision to end temporary protected status (TPS) for Liberians (see "Attorney General to Terminate TPS for Liberians," IMMIGRANTS' RIGHTS UPDATE, Aug. 30, 1999, p. 4) and extends benefits substantially similar to those provided by TPS. In addition to permission to remain in the U.S., Liberians may receive employment authorization during their year of DED.

Significantly, in order to qualify, individuals need to have been present in the U.S. only since Sept. 29, 1999. Had TPS for Liberia been extended, with few exceptions only those individuals who registered during the initial period that ended in 1991 would have qualified. The president's directive, however, excludes from DED eligibility any of the following categories of Liberian nationals:

- Those who are ineligible for TPS for reasons outlined in Immigration and Nationality Act section 244(c)(2)(B).
- Those whose removal the attorney general determines is in the U.S.'s interest.
- Those whose presence or activities in the U.S. the secretary of state has reasonable grounds for believing would have adverse consequences for U.S. foreign policy.
- Those who return or have voluntarily returned to Liberia or their country of last habitual residence outside the U.S.
- Those who were deported, excluded, or removed prior to the date of the presidential memorandum.
- Those who are subject to extradition.

Although the civil war in Liberia ended in 1996 and conditions have improved to an extent sufficient to warrant terminating the nation's TPS designation, the Sept. 27, 1999, memo in which the

president directed that DED be implemented for Liberians states that the Liberian political and economic situation remains fragile. To deport Liberians at this point, the memo concludes, would pose serious risks to stability in West Africa, most notably the possibility that such a decision would cause other West African nations to repatriate forcibly thousands of Liberian refugees.

FY '99 REFUGEE ADMISSIONS NUMBERS REVISED – President Clinton on Aug. 12, 1999, issued a presidential determination directing the secretary of state to increase to 91,000 the number of refugee admissions for fiscal year 1999. In a presidential determination dated Sep. 30, 1998, the admissions ceiling had been set at 78,000.

The move was prompted by the president's determination that "an unforeseen refugee emergency exists in Europe, and that admission to the United States of Kosovar refugees . . . is justified by grave humanitarian concerns and is in the national interest." The increase to the overall number of admissions resulted in the following revised regional allocations:

- AFRICA – 12,000
- EAST ASIA – 9,000
- EUROPE – 61,000
- LATIN AMERICA/CARIBBEAN – 3,000
- NEAR EAST/SOUTH ASIA – 4,000
- UNALLOCATED – 2,000

[64 Fed. Reg. 47,341 (Aug. 31, 1999).]

BIA CLARIFIES "AGGREGATE TERM OF IMPRISONMENT" IN CASES INVOLVING CONCURRENT SENTENCES – In the case of a legal permanent resident who received concurrent sentences for two separate felony convictions, the Board of Immigration Appeals has ruled that, for purposes of determining eligibility for withholding of removal, the "aggregate term of imprisonment" is equal to the length of the longest sentence imposed.

Based on Immigration and Nationality Act section 241(b)(3), which renders individuals convicted of "particularly serious crimes" ineligible for withholding relief, the immigration judge had ordered the respondent removed. Under that section, aggravated felonies are considered "particularly serious" if the aggregate of the resulting term of imprisonment is at least five years. The two concurrent one- to three-year sentences imposed on the respondent amounted, the IJ held, to a six-year aggregate sentence.

Citing *Matter of Fernandez*, 14 I. & N. Dec. 24 (BIA 1972), a prior case in which it addressed the issue of aggregate sentences, the BIA disagreed and found that "where a judge in criminal proceedings imposes concurrent sentences, the defendant's 'aggregate sentence' is equal to the length of the longest concurrent sentence." Based on that method of calculation, the BIA concluded that the respondent had been sentenced to less than five years' imprisonment. Pursuant to its recent ruling in *Matter of S–S–* (holding that a felony conviction resulting in less than five years' imprisonment constitutes a "particularly serious crime" only if an individual examination of the conviction's circumstances warrants such a conclusion), the BIA remanded the matter and ordered the IJ to develop further the record and properly determine whether the respondent's offenses were particularly serious.

In re Ahmad Aldabesheh, Int. Dec. 3410 (BIA Aug. 30, 1999).

BIA: INDECENCY WITH CHILD BY EXPOSURE CONSTITUTES AGGRAVATED FELONY – The Board of Immigration Appeals has issued an *en banc* decision finding that a lawful permanent resident convicted under a Texas statute for indecency with a child by exposure committed an aggravated felony within the meaning of Immigration and Nationality Act section 101(a)(43)(A) and is therefore removable.

The immigration judge had ruled that the Immigration and Naturalization Service failed to demonstrate the respondent's removability because the crime for which he was convicted did not include physical contact with a child, which is an element contained in the federal criminal code's definition of "sexual abuse of a child." 18 U.S.C. §§ 2241–2246. The provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that added "sexual abuse of a minor" to the list of offenses that constitute aggravated felonies did not contain a definition of the term, nor did it include cross-references to other federal laws containing relevant definitions.

In reversing the IJ's ruling, the BIA majority turned to other federal statutory sources addressing child abuse, specifically, 18 U.S.C. section 3509(a), which delineates the rights of child victims and child witnesses in the context of federal proceedings. In that definition, physical contact is not included as a necessary element, and the BIA reasoned that adopting this broader definition is consistent with Congress's intent to "provide in the [INA] a comprehensive scheme to cover crimes against children." Adopting this less restrictive definition, the BIA held, will also better enable federal authorities to enforce immigration laws uniformly as they take into account the states' varying statutes addressing sexual abuse of children. The BIA vacated the IJ's ruling and remanded the matter for further proceedings consistent with its opinion. *In re Pedro Rodriguez-Rodriguez*, Int. Dec. 3411 (BIA Sep. 16, 1999).

BIA RULES TEXAS DWI CONVICTION IS AGGRAVATED FELONY – The Board of Immigration Appeals has issued a precedent decision finding that a conviction for driving while intoxicated (DWI), sentenced as a felony, constitutes an aggravated felony under the Immigration and Nationality Act. The decision upholds the BIA's prior decision in *Matter of Magallanes*, Int. Dec. 3341 (BIA 1998).

The principal issue in this case was whether the respondent's DWI conviction constitutes a "crime of violence." The Texas statute under which the respondent was convicted prohibits "operating" a vehicle under the influence—which means a person can be convicted under the statute even if he or she is not actually driving the vehicle. The respondent and several organizations that submitted amicus briefs argued that a conviction under this statute does not necessarily encompass conduct that poses a substantial risk of the use of physical force to the extent necessary to constitute a crime of violence. However, the BIA disagreed, finding that the conviction is sufficient to satisfy the INA's definition of a crime of violence because operating a motor vehicle while under the influence "may" create a substantial risk that physical force will be applied to cause injury. Accordingly,

the BIA concluded that the respondent's conviction constituted an aggravated felony.

Matter of Puente-Salazar, Int. Dec. 3412 (BIA Sep. 29, 1999).

STATE DEPT. ISSUES FINAL PUBLIC CHARGE REGULATION – The U.S. State Dept. has issued a final rule regarding public charge requirements that adopts, in its entirety, a previously published interim rule. Public Charge, Fed. Reg. 67,563 (Dec. 29, 1997) (see "State Dept. Issues New Public Charge Regulations," IMMIGRANTS' RIGHTS UPDATE, Feb. 11, 1998, p. 4).

In essence, the final rule states that a properly executed affidavit of support does not necessarily establish that an individual intending to immigrate is not inadmissible on public charge grounds. Rather, a consular officer must still be satisfied that the immigrant is not likely to become a public charge. The rule substantially traces the Immigration and Nationality Act in requiring that an affidavit be submitted on the form designated by the attorney general and in permitting joint sponsors to submit affidavits where the sponsor and immigrant do not satisfy the income and substantial assets requirement.

The rule permits the posting of a public charge bond and requires that prearranged offers of employment, other than labor certifications, be notarized. Finally, the rule provides that in those cases in which it is not required that the new affidavit be submitted, an individual relying solely on his or her income to establish admissibility, whose income level is below the poverty level, and who does not have adequate financial resources is presumed ineligible for admission—i.e., ineligible because he or she is likely to become a public charge.

[64 Fed. Reg. 50,751–53 (Sept. 20, 1999).]

NEW STUDY FINDS TODAY'S IMMIGRANTS ASSIMILATE MUCH LIKE PREDECESSORS – A new study released by the National Immigration Forum concludes that contemporary immigrants' patterns of assimilation into North American society are consistent with the experiences of previous generations of new North Americans. According to study author Gregory Rodriguez, fellow at the New America Foundation and research scholar based at Pepperdine University, "Assimilation is not about immigrants rejecting their past, but about people of different racial, religious, and cultural backgrounds coming to believe that they are part of an overarching American family."

Entitled *From Newcomers to New Americans: The Successful Integration of Immigrants into American Society,* the study focuses on citizenship, home ownership, English language acquisition, and intermarriage—four areas considered important indicators of an immigrant's commitment to U.S. society.

Interested parties may order a copy of this publication by sending a check for $10 payable to the National Immigration Forum to 220 I Street, N.E., Suite 220, Washington, D.C. 20002. Additional information regarding the study is posted on the Forum's web site at www.immigrationforum.org.

EOIR PROPOSING TO MAINTAIN RECORD OF COMPLAINTS AGAINST PRACTITIONERS – The U.S. Justice Dept. has published a notice in the Federal Register proposing to establish a new system of records in which the Executive Office for Immigration Review (EOIR) will maintain information on complaints against attorneys and authorized representatives filed with or received by the EOIR. To be called the "Practitioner/Complaint Disciplinary Files," the records will include complaints made by any party.

The information will be organized by the following categories:

- Complaints filed by any person or organization
- Records of state disciplinary authority proceedings
- Criminal conviction records
- Investigatory records, including preliminary inquiry reports
- Communications with individuals and/or outside agencies concerning disciplinary investigations and proceedings
- Interagency communications
- Copies of Notices of Intent to Discipline filed by the EOIR and/or the Immigration and Naturalization Service, with supporting documentation
- Transcripts of disciplinary proceedings
- Settlement agreements and other dispositions, including administrative disciplinary decisions

The EOIR's general counsel office will use the information in conducting disciplinary investigations and in instituting proceedings against immigration practitioners. The records will be used in and provide documentation of investigations and proceedings conducted by the EOIR, and the information may also be used to generate statistical reports and various administrative records, including docket printouts.

The Federal Register notice goes on to state that the EOIR will be permitted to disclose relevant information to a wide range of parties, from other federal agencies to members of Congress, for use in a variety of contexts such as proceedings in which the Justice Dept. is authorized to appear and meetings of state bar grievance committees.

Individuals who wish to contest or amend information maintained in the new records system may do so by making a written request to the System Manager at:

> Director, Executive Office for Immigration Review (EOIR)
> 5107 Leesburg Pike, Suite 2400
> Falls Church, VA 22041

The 30-day public comment period ended on Oct. 10, 1999.

[64 Fed. Reg. 49,237–38 (Sep. 10, 1999).]

"FIX '96" UPDATE: DESPITE FLOYD, IMMIGRANTS AND ADVOCATES DESCEND ON WASHINGTON – During the week of Sept. 13, 1999, over 250 immigrants and immigrant rights advocates from across the country descended on the nation's capital as part of "Fix '96," a campaign coordinated by national advocacy groups to rescind restrictions on immigrants' rights imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), and the Antiterrorism and Effective Death Penalty Act of 1999 (AEDPA) (see "'Fix '96' Campaign Launched; Immigrants' Advocates to Converge on D.C.," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 1999, p. 5).

In addition to paying numerous visits to members of Congress on September 16, campaign participants spoke two days later at a press conference organized by the National Immigration Forum about the impact the restrictions have had on the lives of some of society's most vulnerable members. A rally scheduled to follow the press event proved to be the only casualty of Hur-

ricane Floyd's harrowing trek up the eastern seaboard—contingents of participants traveling to Washington, D.C., from Florida, New York, and Boston were forced to stay home due to cancellations in flights and bus service.

Although the hurricane also prompted the House of Representatives to recess, some members of Congress were available to speak at the press conference. Rep. Barney Frank (D-MA), who has introduced a bill that would provide deportation relief to some legal permanent residents with criminal records, spoke about the 1996 laws' unfairness. House colleagues Charles Rangel (D-NY) and Sheila Lee (D-TX), ranking minority member of the House Immigration Subcommittee, also addressed the gathering.

Advocates and immigrants whose flights and bus rides were cancelled promptly rescheduled their visits. The contingent from Boston paid its rescheduled visit on September 29, and a group from New York is set to journey to Washington, D.C., on October 14, the date on which, campaign planners hope, other corrective legislation currently being drafted will be formally introduced.

Litigation

11TH CIRCUIT TO REHEAR CASE ADDRESSING DEPORTABILITY BASED ON PRE-ADAA FELONY CONVICTION – The Eleventh Circuit Court of Appeals recently granted a petition to rehear a case in which it had ruled that an aggravated felon is not deportable based on a conviction that occurred prior to the effective date of the Anti-Drug Abuse Act of 1988 (ADAA) (see "11th Circuit Holds That Aggravated Felon Is Not Deportable Based on a PRE-ADAA Conviction," IMMIGRANTS' RIGHTS UPDATE, Apr. 30, 1999, pp. 6–7; "Correction to Article on Case Holding Aggravated Felon Not Deportable for Pre-ADAA Conviction," IMMIGRANTS' RIGHTS UPDATE, May 28, 1999, p. 15).

In granting the petition for rehearing *Lettman v. Reno*, 168 F.3d 463 (11th Cir. 1999), the court vacated its initial decision except for its holding that the court has jurisdiction over the matter.

Lettman v. Reno, No. 98-5283ORD (11th Cir. Aug. 25, 1999).

9TH CIRCUIT: DIFFERENT STANDARDS FOR CITIZENSHIP CONFERRAL BY FATHERS, MOTHERS UNCONSTITUTIONAL – The Ninth Circuit Court of Appeals has held that 8 U.S.C. sections 1409(a)(3) and (a)(4), which govern the conferral of United States citizenship to children born abroad and out of wedlock to a U.S. citizen father and noncitizen mother, are unconstitutional. In such cases, those provisions require that to establish citizenship, it must be shown that the putative father agreed to provide financial support to the child (§ 1409(a)(3)) and has acknowledged paternity, or that paternity has been legally declared (§ 1409(a)(4)). There are no such requirements where the child is born to a U.S. citizen mother and noncitizen father. The court struck down the relevant provisions of the statute on the basis that they violate the father's equal protection rights.

The petitioner, Ricardo Ahumada-Aguilar, was born abroad out of wedlock in Mexico to a U.S. citizen father and a noncitizen mother. Ahumada-Aguilar's father died, apparently, without providing financial support to him or acknowledging paternity. Several years after moving to the U.S., Ahumada-Aguilar was convicted of felony possession of cocaine and deported. He reentered without inspection and was again deported only to reenter the U.S. without permission. As a result of the reentries, he was convicted on two counts of illegal reentry to the U.S. by an alien with a prior felony conviction.

In his appeal, Ahumada-Aguilar argued that he could not be convicted for illegal reentry as an alien because he is a U.S. citizen. He also argued that 8 U.S.C. sections 1409(a)(3) and (a)(4) unconstitutionally violated his father's equal protection rights by compelling his father to meet more requirements to confer citizenship on his child than are required of U.S. citizen mothers to do the same.

Throughout the case, Ahumada-Aguilar asserted his deceased father's equal protection rights, and the court concluded that he had third-party standing to do so since his father was deceased.

The Ninth Circuit found that the relevant sections rely on "outdated stereotypes" and generalize that "mothers are more likely to have close ties and care for their children than are fathers." Accordingly, the court struck them down, holding that they violate equal protection. The court concluded that the petitioner is a U.S. citizen because he meets the statute's remaining requirements under which a U.S. citizen father confers U.S. citizenship to his child born abroad out of wedlock.

In reaching its decision, the Ninth Circuit distinguished *Miller v. Albright*, 118 S.Ct. 1428 (1998), from Ahumada-Aguilar's case. In *Miller*, the Supreme Court upheld 8 U.S.C. section 1409(a)(4) after a child, whose U.S. citizen father was alive, challenged the provision on equal protection grounds on behalf of the father. The Ninth Circuit reasoned that *Miller* turned on a finding by two Justices that the claimant lacked standing to vindicate the rights of the claimant's father while the father lived. Otherwise, a majority of the Supreme Court would have found that section 1409(a)(4) violates the father's right to equal protection. In the present case, the Ninth Circuit reasoned that Ahumada-Aguilar had standing because his father was dead and that had the facts in *Miller* been similar to those in Ahumada-Aguilar's case, a majority of the Supreme Court would have found section 1409(a)(4) constitutionally invalid. Accordingly, the Ninth Circuit ruled that section 1409(a)(4) is unconstitutional.

The appeals court noted that there remained a question whether *Miller* also compelled it to conclude that 8 U.S.C. section 1409(a)(3) is unconstitutional. The petitioner in *Miller* had challenged the constitutionality of section 1409(a)(3), but the Supreme Court Justices disagreed about whether they were required to review it as well as section 1409(a)(4), and the matter was not clearly resolved. The Ninth Circuit concluded that in this case there was no need to distinguish between the provisions, since both rely on outdated stereotypes. It therefore also found section 1409(a)(3) unconstitutional.

The court reversed Ahumada-Aguilar's conviction and remanded with instructions to vacate it.

USA v. Ahumada Aguilar, No. 9630065 (9th Cir. Sept. 2, 1999).

10TH CIRCUIT FINDS AEDPA ELIMINATED 212(c) RELIEF FOR PERSONS CONVICTED PRIOR TO AEDPA'S ENACTMENT – The U.S. Court of Appeals for the Tenth Circuit has issued a decision consolidating appeals of four district court rulings in habeas actions that were filed on behalf of lawful permanent residents seeking waivers of deportation under former section 212(c) of the Immigration and

Nationality Act. In finding that habeas corpus jurisdiction to review deportation orders still exists under the federal habeas statute (28 U.S.C. § 2241), despite the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the decision is consistent with the large majority of opinions rendered by circuit courts that have considered this issue. However, the Tenth Circuit also decided on the merits that applying the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA's) restriction of 212(c) relief to immigrants who were convicted of crimes prior to the AEDPA's enactment does not constitute an unlawfully retroactive application of the law.

In all four cases, the petitioners were lawful permanent residents who were convicted of crimes that made them deportable and whose convictions occurred prior to the Apr. 24, 1996, enactment of the AEDPA. Likewise, in all four cases the Immigration and Naturalization Service had commenced deportation proceedings against the petitioners after the AEDPA's enactment. The petitioners sought to apply for a waiver of deportation under INA section 212(c) but were denied first by the immigration judge and then by the Board of Immigration Appeals because of AEDPA section 440(d). Section 440(d) amended the INA to make waivers unavailable to individuals who are deportable because of a wide variety of criminal convictions. The petitioners then filed habeas petitions in federal district court. The district court judges dealt with the cases in different ways, and all four cases were appealed, resulting in this consolidated opinion.

The first issue before the appellate court was whether AEDPA sections 401(e) and 440(a), as well as similar provisions enacted as part of the IIRIRA, eliminated jurisdiction to review deportation orders by means of the federal habeas corpus statute. AEDPA section 401(e) eliminated the provision of the INA that specifically authorized habeas actions to review deportation orders, while section 440(a) bars review of deportation orders issued against individuals convicted of specified offenses. However, because neither provision referenced the federal habeas statute, the court therefore concluded that they did not eliminate habeas jurisdiction. As noted above, most other circuits that considered this issue have reached the same conclusion. See *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 119 S.Ct. 1140 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1141 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Selgeka v. Carroll*, 184 F.3d 337 (4th Cir. 1999) (finding habeas jurisdiction available after enactment of the IIRIRA); *Shaw v. Reno*, 184 F.3d 719 (8th Cir. 1999); and *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). The issue is currently pending in the Ninth Circuit, in a case in which the court previously ruled that the IIRIRA eliminated habeas jurisdiction but that such restriction violates the Constitution if it is applied to individuals who do not have access to any other avenue of judicial review. *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998), *cert. granted & judgment vacated*, 119 S.Ct. 1137 (1999). The Seventh Circuit has held that the AEDPA and the IIRIRA eliminated district court habeas jurisdiction. *LaGuerre v. Reno*, 164 F.3d 1040 (7th Cir. 1998).

Turning to the merits, the court noted that the retroactivity issue in this consolidated appeal is different from that presented in the above-cited cases. In *Goncalves*, *Henderson*, *Sandoval*, *Shaw*, and *Mayers*, the courts found that the government erred in applying AEDPA section 440(d) to deportation cases that were pending at the time the statute was enacted. In this case, on the other hand, the petitioners' proceedings were not commenced until after the enactment of the AEDPA. However, the court also rejected the analyses underlying the other circuit courts' decisions, concluding that the language of the AEDPA is ambiguous as to whether Congress intended the statute to apply to pending cases. And, the three-judge panel ruled, the presumption against retroactivity does not apply in the appeal before it because section 440(d)'s restriction on the availability of waivers is "akin to a change in prospective relief." Judge Lucero filed a concurring opinion, agreeing with the majority that applying section 440(d) to individuals who were not in proceedings when AEDPA was enacted is not impermissibly retroactive, but contending that applying the provision to individuals who did have proceedings pending on the date of the statute's enactment would violate Congress's intent.

While this is the first appellate decision to rule on the issue of whether section 440(d) can be applied to pre-AEDPA convictions, there have been two district court rulings finding such application to be impermissibly retroactive. *See Maria v. McElroy*, 1999 U.S. Dist. LEXIS 13502 (E.D.N.Y. Aug. 27, 1999), and *Pottinger v. Reno*, 51 F.Supp.2d 349 (E.D.N.Y. 1999).

Jurado-Gutierrez v. Greene, __ F.3d __, 1999 U.S. App. LEXIS 19706 (Aug. 19, 1999).

Employment

OSC ANNOUNCES ANTIDISCRIMINATION GRANTS – In its latest round of grant-making, the Office of Special Counsel for Immigration Related Unfair Employment Practices has awarded grants totaling nearly $750,000 to 13 nonprofit entities. The recipients are to use the funds to educate workers and employers so as to reduce citizenship-, national origin–, and document-based discrimination arising out of the legal requirement that all employers in the United States verify their employees' employment eligibility.

In announcing the grants, Special Counsel for Immigration Related Unfair Employment Practices John Trasviña noted that issues concerning immigrant civil rights are no longer limited to border states. "These grants will respond to the needs of emerging immigrant communities," he said.

The OSC awarded grants to the following organizations: Asian Pacific American Legal Center (Los Angeles, CA), in partnership with the Asian Law Caucus (San Francisco, CA); Catholic Charities of Dallas (Dallas, TX); Catholic Charities of Houston (Houston, TX); Coalition for Humane Immigrant Rights of Los Angeles (Los Angeles, CA); Erie Neighborhood House, working with Illinois Coalition for Immigrant and Refugee Rights, Chinese American Service League, Instituto del Progreso Latino, and Centro Romero (all located in Chicago, IL); Greater Miami Chamber of Commerce (Miami, FL); Korean American Coalition of Los Angeles (Los Angeles, CA), working with its chapters in Chicago, IL, New York, NY, San Francisco, CA, Seattle, WA, and Washington,

D.C.; Massachusetts Immigrant & Refugee Advocacy Coalition (Boston, MA); National Immigration Law Center (Los Angeles, CA); Nebraska Appleseed Center for Law in the Public Interest of Lincoln (Lincoln, NE); North Carolina Justice and Community Development Center (Raleigh, North Carolina); Union of Needletrades, Industrial and Textile Employees (New York, NY); and Victim Services of New York (New York, NY).

EOIR PROMULGATES FINAL RULES OF PROCEDURE FOR OCAHO PROCEEDINGS – The Executive Office for Immigration Review (EOIR) has issued final regulations establishing procedural rules governing the processing of cases before the Office of Chief Administrative Hearing Officer (OCAHO). The OCAHO is the agency within the EOIR that is responsible for adjudicating charges under Immigration and Nationality Act sections 274A (employer sanctions cases), 274B (immigration discrimination cases), and 274C (document fraud cases). Except for a few clerical and technical corrections, the final rule adopts interim rules that were issued on Feb. 12, 1999. 64 Fed. Reg. 7,066. One new provision allows administrative law judges to deny the right to appear in proceedings to individuals whom the ALJ finds do not possess the requisite qualifications or lack character or integrity. The final rule is effective as of Sep. 14, 1999.

[64 Fed. Reg. 49,659–60 (Sep. 14, 1999).]

OCAHO: EXCEPTION TO SOVEREIGN IMMUNITY APPLIES IN DISCRIMINATION SUIT AGAINST STATE UNIVERSITY – An administrative law judge in the Office of the Chief Administrative Hearing Officer (OCAHO) has ruled that a complainant who alleged he was discriminated against by San Francisco State University (SFSU) on the basis of his citizenship status may amend his complaint to include as respondents four individuals not named in his original complaint. Previously, the ALJ had ruled that the complainant's case, brought under Immigration and Nationality Act section 274B, could not proceed because as an "arm of the state" SFSU is shielded from private citizens' federal law–based suits by the Eleventh Amendment's sovereign immunity clause (see "State University Is Shielded by Sovereign Immunity, but Exception May Apply," IMMIGRANTS' RIGHTS UPDATE, Sep. 16, 1998, pp. 6–7).

In reaching that finding, however, the ALJ also acknowledged that a narrow exception to the sovereign immunity clause, articulated in the U.S. Supreme Court decision *Ex Parte Young*, 209 U.S. 123 (1908), may be available to the complainant as a means to seek some redress. Under the *Ex parte Young* doctrine, the Eleventh Amendment does not bar an individual from filing suits in federal court for prospective injunctive relief against state officials for actions undertaken in their official capacities. Accordingly, the ALJ found that the four employees of SFSU whom the complainant had sought to add as respondents could be required to reconsider his job application in a nonprejudicial manner. The ALJ ordered the complainant to submit a memorandum and exhibits to show that the *Ex parte Young* doctrine does apply to his case and to specify the kinds of actions committed by the SFSU employees that qualify his claim for the sovereign immunity exception.

After considering the additional evidence submitted by the complainant, the ALJ affirmed the OCAHO's jurisdiction under *Ex parte Young* over the complainant's prospective injunctive relief claim and granted him leave to amend his complaint to add the four SFSU employees whose actions precipitated his lawsuit. The ALJ's order also set forth instructions concerning the scheduling of pre-evidentiary hearing matters and the date by which the complainant must file his amended complaint.

McNeir v. San Francisco State University,
8 OCAHO 1030 (July 14, 1999).

Immigrants & Welfare Update

7TH CIRCUIT: PRWORA RESTRICTIONS ON ELIGIBILITY FOR BENEFITS CONSTITUTIONAL – The Seventh Circuit Court of Appeals has found that provisions in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) that limit immigrant eligibility for food stamps, Supplemental Security Income (SSI), and other welfare benefits do not violate the equal protection component of the Fifth Amendment's Due Process Clause.

The City of Chicago and several city officials brought suit against the secretary of the U.S. Dept. of Health and Human Services and other federal officers on behalf of immigrants whose access to public benefits was restricted by the PRWORA. Subsequently, a number of legal permanent residents (LPRs) and an organization of ethnic associations with LPR members intervened and sought class certification.

Ultimately, in addition to the original plaintiffs, two classes of plaintiffs were certified. The first included Illinois residents who are LPRs and who had their SSI benefits terminated or a claim for SSI benefits denied after Aug. 22, 1996. The second consisted of Illinois residents who are LPRs and who, after Aug. 22, 1996, received, applied for, or will apply for food stamps, Temporary Assistance to Needy Families, Medicaid, or Social Services Block Grants, and who have had or will have their benefits terminated or their applications denied.

In response to the plaintiffs' allegations that the provisions of the PRWORA disqualifying legal immigrants from receiving federal welfare benefits violate the Fifth Amendment's Due Process Clause, the defendants filed motions to dismiss their complaints. After the district court granted the defendants' motions, the plaintiffs appealed.

In affirming the lower court's ruling, the Seventh Circuit declined to provide heightened scrutiny to the PRWORA provisions contested by the plaintiffs' equal protection claim. Instead, the court adopted the deferential "rational basis" standard, under which a statute is considered constitutional if it is rationally related to a legitimate governmental purpose. The court concluded that because the PRWORA provisions at issue have a legitimate purpose—encouraging immigrants' self-sufficiency—and are reasonably related to that purpose, the statute is constitutional.

City of Chicago, et al. v. Shalala et al.,No. 982382
1999 U.S.App. LEXIS 20885 (7th Cir. Aug. 31, 1999).

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