



## Immigration Issues

### OIG REPORT CRITICIZES THE GOVERNMENT'S TREATMENT OF 9/11 DETAINEES

— A report prepared by the U.S. Justice Dept.'s own Office of the Inspector General (OIG) criticizes the government's treatment of non-U.S. citizens who were held on immigration charges in connection with the government's investigation of the terrorist attacks of Sept. 11, 2001. While noting that law enforcement officials were under extreme pressure after the 9/11 attacks, the report details numerous instances of abuse, includ-

ing situations where detainees were held too long without being informed of charges against them, were prevented from meeting with family and counsel, and were subjected to unduly harsh treatment. The report concludes by offering recommendations for policy changes.

The OIG conducted interviews with a sample of the 762 detainees arrested and charged in post-9/11 investigations who were held at two facilities in the New York area. The OIG also reviewed the detainees' files as well as the policies and procedures surrounding their detention. The detainees were almost exclusively

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FOUNDED IN 1979, THE NATIONAL IMMIGRATION LAW CENTER PROVIDES technical help to legal services programs, community-based non-profits, and pro bono attorneys throughout the United States. NILC also counsels impact litigation, conducts policy analysis and trainings,

and publishes legal reference materials. NILC's staff specializes in immigration law and in immigrants' employment and public benefits rights. In addition to this newsletter, NILC produces legal manuals, a referral directory, and other community education materials.

Muslim men, the majority of whom were from Pakistan.

At the time it was released (June 2, 2003), the report was widely covered in the media and was the subject of congressional hearings that included testimony by Attorney General John Ashcroft and other Justice Dept. officials. Though Ashcroft defended the government's conduct towards the detainees, Justice Dept. officials have publicly stated that they are instituting policy changes in order to rectify some of the problems discussed in the report. Some of the issues concerning abusive treatment at one of the detention facilities continue to be under investigation.

The OIG is an office within the Justice Dept. that investigates misconduct in department programs and operations. It conducted the investigation and wrote the report pursuant to section 1001 of the USA PATRIOT Act. That section directs the OIG to receive and review claims of Justice Dept. civil rights violations and to inform Congress of its results.

The report begins by providing a context for the law enforcement efforts conducted in the aftermath of the 9/11 attacks. Immediately after the attacks, the Federal Bureau of Investigation took the lead in a massive investigation that it dubbed PENTTBOM (for "Pentagon/Twin Towers bombing"). In an attempt to garner any leads related to the 9/11 attacks, the agency deployed 4,000 special agents with 3,000 support personnel to work on PENTTBOM. Early on, officials realized that because the hijackers were non-U.S. citizens, any investigation would need to include a significant immigration component. At the same time, Ashcroft directed a shift in policy from one focused on investigation and prosecution to one emphasizing prevention. The Justice Dept. policy was to use whatever legal means available to detain anyone who might be linked to terrorism. According to the policy, if law enforcement agents encountered any noncitizen while pursuing the PENTTBOM investigation, and the individual did not have legal status, the individual would be arrested, even if the person was not a subject of the investigation. Such an individual would then be placed in the category of individuals "of interest" to the FBI.

The report notes that within a week of the attacks, the FBI had received more than 96,000 tips or potential leads from the public. Many of these tips were general in nature and no more substantial than a landlord reporting on the erratic schedule of a tenant who appeared to be Arab. They also included traffic stops during which Middle Eastern-appearing tourists were found to be carrying photographs of the World Trade Center and other New York landmarks. Because of the directive to cast a wide net to prevent any future attacks and the fear that more attacks might be imminent, individuals who had overstayed their visas or had entered the country illegally were arrested and detained under the auspices of the PENTTBOM investigation.

**Classification of Detainees.** After each arrest, the FBI assessed whether the person arrested was "of interest" to its terrorism investigation. The FBI classified individuals as being "of interest," "of high interest," or "of undetermined interest." These classifications had significant ramifications for the detainees. First, the Justice Dept. instituted a policy that any detainee on the Immigration and Naturalization Service custody list had to be detained until cleared by the FBI. Though never communicated in writing, this "hold until cleared" policy was clearly understood and applied throughout the department. As a result, 9/11 detain-

ees were not allowed to be released on bond according to normal INS procedures and were not allowed to depart or be removed from the U.S. before receiving FBI clearance. Second, the classification assigned to each detainee determined where he or she would be confined and his or her conditions of confinement.

The OIG audit criticized the inconsistent manner in which these assessments were made. The report stated that the FBI should have taken more care to distinguish between individuals whom it actually suspected of being connected to terrorism and those who may have been guilty of violating an immigration law, had no connection to terrorism, and were simply encountered through a PENTTBOM lead. According to the report, these distinctions were made in different parts of the country but not in the New York area, where the majority of the 9/11 detainees were held.

**Notice of Charges.** The report found that many of the 9/11 detainees did not receive notice of the charges against them in a timely manner. Normally, after arresting a noncitizen for an immigration violation, the INS (now the Bureau of Immigration and Customs Enforcement, or BICE) would notify the arrestee of the charges against him or her. It would initiate a removal proceeding by serving a notice to appear (NTA) on the individual and the immigration court. Prior to the 9/11 attacks, the regulations (8 CFR § 287.3) required the INS to make the charge within 24 hours of the arrest. Following the attacks, the Justice Dept. changed the regulations to allow the INS 48 hours to issue the NTA. The revised regulation also included an exception to the 48-hour rule, allowing charges to be made within a reasonable period of time in the event of an emergency or other extraordinary circumstance.

The report found that the INS served 60 percent of the 9/11 detainees with NTAs within 72 hours. However, many detainees did not receive their charging documents for weeks or even months after their arrests.

**The Clearance Process.** As noted above, the FBI instituted a policy that all individuals had to be "held until cleared." This policy was based on the erroneous assumption that individuals would be cleared within a few days. However, according to the report, the average length of time that a 9/11 detainee was held before he was cleared was 80 days. More than a quarter of the clearance investigations for the 762 detainees took longer than 3 months.

**Bond and Removal Issues.** The Justice Dept. imposed a "no bond" policy for all 9/11 detainees as part of its decision to hold the detainees until the FBI could complete its clearance investigations. According to the report, INS officials told the OIG that they expected the FBI to present them with information supporting the no-bond position. But the FBI provided no such information to the INS. INS attorneys had to seek multiple continuances, even when they had no information from the FBI to support their arguments.

The report criticized the FBI's "hold until cleared" policy on a number of accounts. First, it was broadly applied to many detainees for whom there was no affirmative evidence connecting them to terrorism. Second, the FBI failed to provide adequate field office staffing to conduct the detainee clearance quickly. The result was that detainees languished in detention for weeks and months, with no investigations being conducted. The report indicated that, given the lengthy clearance process, the Justice Dept. should have reevaluated its original decision to deny bond

in all cases.

In addition to the bond issue, concerns about how long the INS could legally hold 9/11 detainees after they received final orders of removal or orders of voluntary departure also arose. Section 241(a)(1)(A) of the Immigration and Nationality Act requires that noncitizens who have violated immigration law be removed from the U.S. within 90 days of being issued removal orders. However, because the FBI insisted that individuals had to be cleared before they were allowed to be removed, detainees were held beyond the 90 days, even when they were willing to leave. The report criticized the INS and the Justice Dept. for failing to address the removal issue in a timely and considered fashion.

**Conditions of Confinement.** The OIG investigation looked at two detention facilities that serve the New York City metropolitan area: the Metropolitan Detention Center (MDC) in Brooklyn and the Passaic County Jail (Passaic) in Paterson, New Jersey. Generally, detainees deemed by the FBI to be of "high interest" to its terrorism investigation were held in high security facilities such as MDC, where detainees were held under 23-hour lockdown. Detainees deemed to be "of interest" or of "undetermined interest" were held in lower-security facilities such as Passaic.

Policies and practices employed at the higher security MDC, as well as the behavior of individual MDC staff members, generated numerous allegations of abuse, according to the OIG's report. In the heightened state of alert following the 9/11 attacks, the Bureau of Prisons imposed a total communications blackout for several weeks on the 9/11 detainees housed at MDC. After the blackout ended, MDC applied a number of policies that were inappropriate to the 9/11 detainees. For example, MDC imposed "witness security" policies on them—i.e., policies ostensibly designed to provide protection to potential witnesses. These policies interfered with attempts by detainees' families, attorneys and even law enforcement officials to locate the detainees, and they frustrated the detainees' ability to obtain counsel.

MDC also restricted the detainees' access to telephones. They were allowed only one call per week, and calls resulting in busy signals or answered by voicemail were counted as the allotted call for the week. In addition, instead of clearly asking detainees if they wanted to make their weekly calls, MDC staff ambiguously asked detainees if "they were okay." Generally, detainees did not understand that the question was meant to be an inquiry about whether they wanted to use the phone.

MDC also kept bright lights on in detainee cells 24 hours a day for several months, even after electricians rewired the cellblocks to allow the lights to be turned off individually. Detainees complained that this practice left them sleep-deprived and depressed.

Finally, although MDC staff denied that they abused their charges, investigators reported allegations that the detainees suffered physical and verbal abuse, particularly during the first months subsequent to the attacks. Detainees alleged that they were slammed into walls, dragged by their arms, that guards would step on the chain between detainees' ankle cuffs, would twist their arms, hands, wrists and fingers, and make slurs and threats such as "you will feel pain" and "you're going to die here." Interestingly, in an effort to document abuses, MDC installed security cameras in detainee cells and required staff to videotape detainee movements outside their cells. However, staff were permitted to

destroy and reuse the tapes after 30 days. Thus, no documentation of abuses remains. The allegations of abuse at MDC continue to be pursued administratively. The systemic patterns of abuse alleged at MDC were not found in the Passaic County Jail.

The report states that the problems it describes were not merely the result of the chaos and uncertainty that emanated from the 9/11 attacks. It also states that the serious problems identified in the report should be carefully considered and addressed. These issues include ensuring timely clearance and service of charges, careful consideration of where detainees should be housed and what restrictions may be imposed, better training of staff who guard detainees, and better oversight of the conditions of confinement.

The OIG's report can be accessed at the following URL: [www.usdoj.gov/oig/special/03-06/full.pdf](http://www.usdoj.gov/oig/special/03-06/full.pdf).

#### **ACCEPTANCE OF THE *MATRÍCULA CONSULAR* IN THE U.S. IS UNDER ATTACK**

—After the U.S. Treasury Dept. issued final regulations that allow banks and other financial institutions flexibility to decide which documents they will accept as proof of a person's identity before opening a bank account for the person, House Judiciary Committee Chairman James Sensenbrenner Jr. (R-WI) pressured the Treasury Dept. to reopen the issue, which it now has done. The new regulations, which were issued on May 9, 2003, were written to implement section 326 of the USA PATRIOT Act and were regarded by immigrants' advocates as an important breakthrough for non-U.S. citizens whose only form of identification is a consular I.D. card such as the *matrícula consular* ("consular registration") issued by the Mexican government. Sensenbrenner is opposed to a policy of allowing banks to accept the *matrícula consular* as a form of I.D.

In a letter he sent at the end of May to the Homeland Security Council, Sensenbrenner expressed consternation that the regulations eliminated a proposed requirement that banks keep photocopies of I.D. documents used to open accounts and that they allow for foreign I.D. documents to be used to open accounts. He warned that he would introduce stricter legislation unless the Treasury Dept. delayed by at least six months the effective date of the regulations, which was June 9, 2003. The Treasury Dept. did not delay the regulations, but on July 1, in an extraordinary move, it asked that the public and interested parties submit additional comments on the final rule. These comments must be submitted by July 31, 2003.

The Treasury Dept. created an unusual mechanism for submitting the additional comments by allowing people to vote on the Treasury Dept. Web site whether or not they think "the terms and conditions of the final section 326 regulation relating to financial institutions' ability to rely on foreign-issued identification [should] be changed" (<http://regcomments.treasury.gov>). A "no" vote means that the commenter believes banks should be allowed to accept consular I.D. documents such as the *matrícula consular* as identification. (Commenters can also vote on whether banks should be required to keep copies of I.D. documents.) Given the voting system, numbers really count. NILC and other organizations are encouraging as many people and organizations as possible to vote on the Treasury Dept. Web site.

Web site voters must also submit comments. NILC and other

groups have made the following sample comments available on the NILC Web site to be copied and pasted into the Treasury Dept. comment page:

I am writing to oppose any change to the section 326 customer identification rules, and I support allowing financial institutions to use certain types of foreign government-issued identification, such as the *matrícula consular*, to open bank accounts for immigrants. Many banks and a number of credit unions across the nation now accept foreign government-issued identification such as the *matrícula consular* to open bank accounts and provide lower cost remittance services for immigrants. Bank accounts help consumers build assets and avoid high cost financial services, such as check cashers, payday lenders, couriers, money transmitters, and the like. This has enabled banks to develop lower-cost international money transmission methods. In addition, the competition introduced by financial institutions in the money transmission industry has forced traditional money transmission services to lower their charges.

Enabling immigrants to open bank accounts also serves law enforcement purposes. First, it helps deter robberies and assaults against law-abiding immigrants. Immigrants often become the target of robbery because they are known to carry large amounts of cash on payday. Second, the acceptance of alternative identification helps law enforcement combat money laundering and terrorism. Banks and thrifts, in comparison to other financial providers, are subject to federal regulation, routine examinations, and more extensive record-keeping and reporting requirements. This enhances the ability of federal officials to monitor international money transmissions and distinguish legitimate transfers from those conducted for money laundering or terrorist financing purposes.

Denying hardworking taxpayers access to bank accounts will not make us safer as a country. It would be a flawed and ineffective means of combating terrorism and regulating our nation's immigration policies."

Acceptance of the *matrícula consular* as identification by banks, state and local law enforcement, and state and local governments has also been the subject of recent hearings. The House Judiciary Subcommittee on Immigration, Border Security and Claims held hearings on June 19 and 26 designed to discredit the card and discourage its acceptance. The subcommittee is chaired by Rep. John N. Hostettler (R-IN).

Witnesses at the June 19 hearing who oppose acceptance of the *matrícula consular* were Colorado state senator John Andrews, Marti Dinerstein of the Center for Immigration Studies, and Craig Nelson of Friends of Immigration Law Enforcement. They argued that the *matrícula* is not a secure document, that its acceptance blurs the line between legal and illegal immigrants, and that the Mexican government is improperly lobbying state and local governments for its acceptance. They testified that they would oppose acceptance of the *matrícula consular* even if questions about its security features and reliability were resolved. Only one pro-*matrícula* witness was permitted to testify—Rep. Luis Gutierrez (D-IL). He argued that the *matrícula consular* is a secure document, its acceptance prevents exploitation of immigrants, it enhances homeland security efforts by making it easier to identify and locate people, and police departments favor its acceptance.

At the June 26 hearing, Steven McCraw of the FBI's Office of Intelligence testified that the Federal Bureau of Investigation has

concluded that the *matrícula consular* is not a reliable form of I.D., due to the nonexistence of any means of identifying the true identity of the cardholder. Significantly (and in contrast with the anti-*matrícula consular* witnesses at the previous hearing), he testified that if questions about the card's reliability were resolved, the FBI would not oppose its acceptance. Roberta S. Jackson, acting deputy assistant secretary of State for the Bureau of Western Hemisphere Affairs, reported that the State Dept. has not taken an official position regarding acceptance of foreign consular I.D. cards. She testified that foreign I.D. cards help carry out the U.S.'s obligations to notify consular officials of their nationals' arrest pursuant to the Vienna Convention on Consular Relations and that restrictions on their acceptance might cause the rejection of I.D. documents carried by U.S. citizens traveling abroad. She also made clear that the U.S. itself regularly lobbies foreign governments, implicitly rejecting the previous week's witnesses' criticism of the Mexican government for doing the same thing. C. Stewart Verdery, assistant secretary for policy and planning, Border and Transportation Security Directorate, Dept. of Homeland Security, expressed concern about possible issuance of multiple *matrícula consular* cards with different names to the same person and the need for federal policies. Finally, Elizabeth Davison, director of the Dept. of Housing and Community Affairs, Montgomery County, Maryland, testified that the county's acceptance of the *matrícula consular* as I.D. promotes public safety, public health, and education.

Legislation introduced in Congress to prevent federal government acceptance of foreign I.D. documents has not moved (*see* "Bills to Prohibit Foreign I.D. Documents Will Undermine National Security," IMMIGRANTS' RIGHTS UPDATE, Feb. 21, 2003, p. 4). An interagency task force consisting of the departments of the Treasury, Justice, Homeland Security, and State is expected to issue a report later this year regarding the policy toward foreign I.D. documents.

#### **BIA ISSUES TWO PRECEDENT DECISIONS CONCERNING THE "PETTY OFFENSE" EXCEPTION TO INADMISSIBILITY FOR A CRIME OF MORAL TURPITUDE**

– The Board of Immigration Appeals has issued two precedent decisions that concern the "petty offense" exception to the ground of inadmissibility for commission of a crime of moral turpitude. In *Matter of Garcia-Hernandez*, 23 I. & N. Dec. 590 (BIA May 8, 2003), the BIA found that conviction for a crime of moral turpitude that meets the criteria for the petty offense exception does not render a non-U.S. citizen ineligible for non-LPR cancellation of removal. The BIA also found that a noncitizen who has committed more than one petty offense still qualifies for the "petty offense" exception if only one of the crimes involves moral turpitude. In the second case, *Matter of Deanda-Romo*, 23 I. & N. Dec. 597 (BIA May 8, 2003), the BIA found that a conviction for a crime of moral turpitude that meets the criteria of the petty offense exception does not stop the accrual of time towards continuous physical presence under the "stop-time rule."

As background, section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act provides that a noncitizen who has been convicted, or who admits the essential elements, of a crime involving moral turpitude is inadmissible. Section 212(a)(2)(A)(ii) establishes two "exceptions" to this ground (known as the "ju-

venile" exception and the "petty offense" exception), for noncitizens who "committed only one crime," where the crime meets certain defined criteria. To qualify for the "petty offense" exception, the maximum penalty possible for the crime cannot exceed imprisonment for one year, and the noncitizen must not have been sentenced to a term of imprisonment longer than 6 months. INA § 212(a)(2)(A)(ii)(II).

In *Garcia-Hernandez*, the respondent had been convicted for battery in 1994 and for corporal injury to a spouse in 1997. At his removal hearing, Garcia-Hernandez applied for non-LPR cancellation of removal and for voluntary departure in the alternative. The immigration judge determined that the respondent's conviction for spousal injury was for a crime involving moral turpitude. The IJ concluded that the respondent was not eligible for the petty offense exception, because he had not been convicted of "only one crime." The IJ also found that Garcia-Hernandez was not eligible for non-LPR cancellation because of section 240A(b)(1)(B), which, among other things, bars eligibility for individuals who have "been convicted of an offense under section 212(a)(2)" of the INA. In addition, the IJ found that the respondent could not meet the "good moral character" requirement for non-LPR cancellation because of section 101(f)(3), which provides, among other things, that an individual cannot be considered to have good moral character if, during the period for which good moral character is required, he or she is among "the class[] of persons, whether inadmissible or not, described in . . . subparagraphs (A) and (B) of section 212(a)(2)" of the INA. The IJ pretermitted the cancellation application, and Garcia-Hernandez appealed.

On appeal, the BIA agreed with the IJ that the conviction for spousal injury constitutes a crime involving moral turpitude. However, the BIA noted that "this conviction, considered alone, clearly qualifies for the 'petty offense' exception." For this reason, the BIA concluded that Garcia-Hernandez was not "convicted of an offense under section 212(a)(2)," and so he remains eligible for non-LPR cancellation. Similarly, Garcia-Hernandez is not barred from establishing good moral character, since he is not in the class of persons "described in" section 212(a)(2)(A).

The BIA also concluded that the restriction of the "petty offense" exception to persons convicted of "only one crime" applies only to other crimes involving moral turpitude. The BIA found strong support for this interpretation in the history of the petty offense exception. As it was first enacted in 1952, the one-crime limitation expressly applied to "only one such crime" of moral turpitude. Section 212 was thoroughly revised by the Immigration Act of 1990, but after reviewing these changes the BIA found "no indication" that the deletion of the word "such" was anything more than "a stylistic change." Because Garcia-Hernandez's other conviction was not for a crime of moral turpitude, he is not precluded from taking advantage of the exception.

In *Deanda-Romo*, the respondent was a lawful permanent resident who had been convicted of two crimes involving moral turpitude. The first crime was committed within seven years of his admission to the U.S., but the second crime was committed more than seven years after the admission. At his removal hearing, Deanda-Romo applied for LPR cancellation of removal under INA sec. 240A(a). This relief does not require a showing of good moral character, but it does require a showing of seven years'

continuous residence in the United States. The immigration judge concluded that Deanda-Romo could not meet the continuous residence requirement because of the "stop-time" rule of INA sec. 240A(d)(1). Under this rule, the accrual of time towards continuous residence is stopped, among other events, when a noncitizen "has committed an offense referred to in section 212(a)(2) that renders him inadmissible." The IJ rejected Deanda-Romo's contention that because his first offense was a "petty offense," it did not make him inadmissible and should not be considered to stop the accrual of continuous residence. The IJ pretermitted the cancellation application, and Deanda-Romo appealed.

On appeal, the BIA determined that the commission of the first crime did not preclude Deanda-Romo from establishing seven years' continuous residence. When the first crime was committed, he was eligible for the petty offense exception, and therefore not "inadmissible." It was only at the time of Deanda-Romo's second conviction for a crime of moral turpitude that he became ineligible for the petty offense exception, and by that time he already had accrued more than seven years' continuous presence. Accordingly, the BIA sustained the appeal and remanded the case to the IJ for further proceedings.

#### **BIA HOLDS COURT ORDER VACATING CONVICTION FOR REASONS OF REHABILITATION OR IMMIGRATION HARDSHIP DOES NOT ELIMINATE CONVICTION FOR IMMIGRATION PURPOSES**

—The Board of Immigration Appeals has ruled that the action of a criminal court in vacating a conviction did not eliminate the conviction for immigration purposes. The BIA based its ruling on its finding that the wording of the defendant's request to vacate the conviction, and the court's subsequent order quashing the conviction, indicates that the sole purpose of the action was for immigration purposes rather than any defect in the original conviction. On this basis, the BIA distinguished its ruling in *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000), where it found that an order vacating a conviction on the merits eliminates the conviction for purposes of immigration law. The latest ruling places particular importance on whether a court order vacating a conviction indicates that the order is based on the legal merits of the proceedings that led to the conviction.

The respondent in this case, Christopher Pickering, is a Canadian citizen who was convicted of unlawful possession of the drug LSD in Canada in 1980, for which he was sentenced to pay a \$300 fine. In 1993, Pickering applied for adjustment of status in the United States. After learning that his controlled substance conviction would make him ineligible for adjustment, Pickering requested that the Canadian court quash the conviction, and the court issued an order to that effect in 1997. In 1998 the Immigration and Naturalization Service denied the adjustment application and initiated removal proceedings.

At Pickering's removal hearing, the immigration judge refused to give effect to the Canadian court order quashing the conviction, and based on the conviction denied Pickering's application for adjustment and ordered him removed. Pickering then appealed to the BIA, resulting in this ruling.

In evaluating the appeal, the BIA found that this case presents an issue that was not resolved in either *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999), or *Rodriguez-Ruiz*. In *Roldan*, the

BIA held that the definition of "conviction" enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) precludes the BIA from giving immigration effect to expungements or any other state procedures that erase a defendant's record of guilt for rehabilitative purposes (Note: *Roldan* was overturned by the Ninth Circuit, which found that state expungements must be given immigration effect, where the defendant's conviction could have been expunged under the Federal First Offender Act had he or she been prosecuted federally. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000)).

In *Rodriguez-Ruiz*, the BIA found that a conviction that was vacated on the merits pursuant to a New York statute did not constitute a conviction for immigration purposes. The BIA expressly declined "to go behind the state court judgment and question whether the New York court acted in accordance with its own state law in the context of these proceedings." Instead, the BIA accorded "full faith and credit" to the state court judgment, sustained the appeal, and ordered the removal proceedings terminated.

In this case, the BIA found that "there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships." The BIA concluded that where a court vacates a conviction "for reasons unrelated to the merits of the underlying criminal proceedings," the conviction remains in effect for immigration purposes. In this case the BIA found no indication in the terms of the court order, provisions of Canadian law, or the respondent's request for post-conviction relief, that the relief was based on a defect in the conviction or the proceedings that led to it. The BIA therefore concluded that the conviction continued to exist for immigration purposes.

*In re Pickering*, 23 I. & N. Dec. 621, Int. Dec. 3493 (BIA June 11, 2003).

**DHS SECRETARY EXTENDS TPS FOR NATIONALS OF MONTSERRAT ANOTHER 12 MONTHS**—The secretary of Homeland Security has published a notice in the Federal Register extending the designation of Montserrat as a country whose nationals and residents currently in the United States qualify for temporary protected status (TPS). The designation, which had been due to expire on Aug. 27, 2003, will be in effect until Aug. 27, 2004. A 60-day reregistration period began July 1, 2003, and will remain in effect until Sept. 2, 2003.

TPS is granted to persons in the U.S. from countries that are designated because they are experiencing armed conflict, environmental disaster, or certain other conditions that prevent the return of their nationals. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. The attorney general first designated TPS for Montserrat in Aug. 1997, due to volcanic eruptions affecting the entire island. The authority to make TPS designations was transferred to the secretary of Homeland Security as part of the legislation creating that department, and the secretary has now decided to extend the designation for Montserrat for a further twelve months. The notice explains that current conditions in the country justify the continuing designation of Montserrat.

To register for the extension, nationals of Montserrat (and individuals of no nationality who last habitually resided in the country) previously granted TPS must apply for it during the registration period that began on July 1, 2003, and ends on Sept. 2, 2003. Such persons need only file Form I-821, Application for Temporary Protected Status (without the filing fee), Form I-765, Application for Employment Authorization, and two identification photographs (1½" x 1½"). The applications must be submitted to the Bureau of Citizenship and Immigration Services (BCIS) district office having jurisdiction over the applicant's place of residence. Applicants who seek work authorization under the extension must submit the \$120 filing fee or a fee waiver request with the Form I-765; those who do not need work authorization must still submit Form I-765, but without the fee. Applicants who previously registered for TPS and were fingerprinted do not need to be refingerprinted and do not need to submit the \$50 fingerprinting fee. Prior registrants who were not previously fingerprinted because they were under 14 years of age but who now must be fingerprinted also must pay this fee.

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

- be a national of Montserrat (or a person with no nationality who last habitually resided in the country);
- have been continuously physically present in the U.S. since Aug. 28, 1997;
- have continuously resided in the U.S. since Aug. 22, 1997; 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 Aug. 28, 1997, and ending Aug. 27, 1998, he or she:

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

68 Fed. Reg. 39,106–09 (July 1, 2003).

**DHS TO EXTEND TPS DESIGNATION FOR EL SALVADOR**—The Bureau of Citizenship and Immigration Services (BCIS) of the Dept. of Homeland Security (DHS) has announced that the agency will extend the designation of El Salvador as a country whose nationals and residents currently in the United States qualify for temporary protected status (TPS). The extension will take effect on Sept. 9, 2003—when the current designation would otherwise expire—and the new designation will last for a period of 18 months, until Mar. 9, 2005. Eligible individuals will need to reregister, but may not do so until the registration period officially begins. The announcement was made in a press release issued by BCIS shortly before this issue of IMMIGRANTS' RIGHTS UPDATE went to press. In the next issue we will provide further information regarding the extension and the procedures for reregistration.

**OVER 117 DRIVER'S LICENSE BILLS INTRODUCED IN STATE LEGISLATURES; 17 HAVE BECOME LAW** – During the 2003 state legislative sessions, approximately 117 bills were introduced that address immigrants' ability to obtain a driver's license. Approximately 37 of the proposals sought to expand immigrants' access to driver's licenses, and 65 bills sought to restrict access. In addition, 14 bills that affect immigrants—but that don't directly expand or restrict their access to driver's licenses—were introduced. As of July 2003, 17 of these driver's license-related bills have been enacted into law.

The bills that seek to remove restrictions do so by, for example, removing Social Security number (SSN), lawful presence, or documentation requirements, which prevent many non-U.S. citizens from obtaining driver's licenses and automobile insurance. Other proposals include allowing documents, such as the individual taxpayer identification number (ITIN) and consular identification cards, to be accepted as forms of identification. Thus far, Georgia, Hawaii, Kansas, Louisiana, and New Mexico have passed such legislation. Georgia and Hawaii now allow applicants who are not eligible for an SSN to submit documentation from the Social Security Administration stating that they are ineligible to obtain an SSN; Kansas and New Mexico allow applicants to use an ITIN if they are ineligible for an SSN; and Louisiana created a temporary license for immigrants who are employed in the agricultural industry.

The bills that seek to impose new restrictions include requirements to make the license expire with the immigration document presented as evidence of eligibility; submission of fingerprints with the application; elimination of foreign identity cards as a form of identification; and the placement of marks on immigrants' licenses to distinguish them from others. Thus far, Colorado, Nevada, New Jersey, Virginia, and West Virginia have passed such laws. Colorado prohibits driver's license applicants from using a foreign document as a form of ID; Nevada requires fingerprints for commercial driver's licenses; New Jersey and West Virginia require driver's licenses to be linked to the period that the applicant is authorized to be in the U.S.; and Virginia codifies an already existing lawful presence requirement.

Seven of the driver's license-related bills signed into law during the 2003 legislative sessions are what could be called "neutral." Arizona, Iowa, Kansas, Kentucky, and New Mexico now require driver's license applicants to consent to be registered with the Selective Service Agency. Maryland created a task force to study driver's license documentation and license-related fraud, developments related to the terrorist watch list, developments in the field of biometric technology, and data about uninsured and unlicensed drivers.

For a complete list of all state proposals and their status, go to the NILC Web site at <http://www.nilc.org/immspbs/DLs/index.htm>.

## Litigation

**9TH CIRCUIT STRIKES DOWN BIA'S STRICT INTERPRETATION OF ACQUIESCENCE UNDER THE CONVENTION AGAINST TORTURE** – In an important decision that affects how the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or De-

grading Treatment or Punishment (CAT) is to be applied, the Ninth Circuit Court of Appeals has ruled that, under the CAT, for a petitioner to show government acquiescence to torture, the petitioner need not demonstrate that government officials are "willfully accepting" of their country's citizens being tortured at the hands of a third party. Applying clearly expressed congressional intent, the court reversed and remanded the Board of Immigration Appeals and ruled that in order for the petitioner to qualify for relief under the CAT, government officials need only be "aware" that it is likely that a third party is torturing citizens of their country.

The case before the Ninth Circuit was that of Li Chen Zheng, a 16-year-old Chinese national who was brought to Guam by smugglers. Both of Zheng's parents had fled to the United States from China; his father was in New York and his mother resided in Guam. While attempting to enter the U.S., Zheng was apprehended by U.S. authorities and subsequently became a material witness in a criminal prosecution against the smugglers.

At his removal hearing before an immigration judge, Zheng claimed that because he had testified against the smugglers, provided all of their names to U.S. authorities, and reported that they had tortured him and others, the smugglers would torture and kill him if he were returned to China. Zheng also testified that Chinese government officials would not protect him from the smugglers because the smugglers had connections to public officials.

Zheng himself testified, and he also presented declarations by two other Chinese nationals who had been smuggled into Guam with him. He also relied on the congressional findings in the Trafficking Victims Protection Act to show that trafficking is often aided by official corruption in countries of origin and that traffickers often resort to violence and torture, or threats of torture, to keep their victims in line. In addition, Zheng provided evidence of the smugglers' collusion with government officials and recounted how, after he had testified in the smugglers' trial, one of the smugglers threatened him with death. Based on these facts, the immigration judge granted Zheng's request for protection under the CAT. The Immigration and Naturalization Service appealed to the BIA.

Under the CAT, the U.S. will not "effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture," if the torture is "inflicted by or at the instigation of or with the consent or *acquiescence* of a public official" (emphasis added). On appeal, the INS argued that the Chinese government's turning a blind eye to the fact that its citizens were being smuggled out of the country was not tantamount to acquiescing to the torture that smugglers sometimes engage in.

Citing *Matter of SV-*, Int. Dec. 3439 (BIA 2000), the BIA sustained the INS's appeal. The BIA interpreted the term "acquiescence" to require that a government official be "willfully accepting of" a third party's torturous activities. The BIA vacated the IJ's withholding of removal, finding that even if Chinese government officials acquiesced in the smuggling operations, Zheng had failed to show that they would willfully accept torturous activities. Zheng appealed the BIA's decision to the Ninth Circuit.

On appeal, the INS argued that the BIA was owed deference in determining the meaning of "acquiescence," but the Ninth Cir-

cuit criticized the BIA's interpretation of the term as ignoring clear congressional intent. The court held that Congress clearly intended that neither actual knowledge nor willful acceptance is necessary for a government to acquiesce in the torture of its citizens. Tracing the legislative history of the Senate's consent to the CAT, the court showed how the Senate replaced the word "knowledge" with "awareness" in the definition of acquiescence. It did so in order to clarify that both actual knowledge and willful blindness fall within the definition. Acquiescence was defined as awareness on the part of public officials, prior to the activity constituting torture, of such activity and their subsequent breach of their legal duty to intervene to prevent such activity.

Because the BIA's requirement of "willful acceptance" misinterpreted the term "acquiescence" and created a standard more stringent than what Congress clearly intended, the court expressed disapproval of prior BIA decisions that had required actual knowledge and willful acceptance instead of awareness. The court thus remanded the case to the BIA to give the BIA an opportunity to apply the correct standard for "acquiescence."

*Zheng v. Ashcroft*, No. 02-70193 (9th Cir. June 18, 2003).

#### **9TH CIRCUIT FINDS CRIMINAL BAR TO APPELLATE JURISDICTION APPLIES ONLY WHERE REMOVAL ORDER IS BASED ON CRIMINAL GROUND**

– The U.S. Court of Appeals for the Ninth Circuit has issued a published decision addressing the scope of section 242(a)(2)(C) of the Immigration and Nationality Act. Section 242(a)(2)(C) deprives the court of jurisdiction over a petition for review of a removal order issued against a non-U.S. citizen "who is removable by reason of having committed a criminal offense" listed in INA sec. 212(a)(2) (the criminal grounds of inadmissibility) or in specified criminal grounds of removability. The court found that this bar to jurisdiction applies only where there is an administrative finding that the noncitizen is deportable based on one of the specified criminal grounds.

The petitioner in this case, Ricardo Alvarez-Santos, is a Guatemalan national who entered the U.S. without inspection in 1990. In 1997 he was charged with spouse abuse under California Penal Code sec. 273.5. He initially pled guilty, but was permitted to withdraw the plea and participate in a "batterer's reeducation program," and after he successfully completed the diversion program the charge was dismissed.

Subsequently, the Immigration and Naturalization Service commenced removal proceedings, charging Alvarez-Santos with being removable on two grounds: entry without inspection and conviction of a crime of moral turpitude. At his removal hearing, Alvarez-Santos conceded being removable on the first ground, but contested the second ground. He also applied for asylum and withholding, and in the alternative for voluntary departure.

The immigration judge found that because Alvarez-Santos had completed the diversion program, he had not been convicted of a crime of moral turpitude and was not removable on that ground. The IJ denied the applications for asylum and withholding but found that Alvarez-Santos had good moral character and granted him voluntary departure. Alvarez-Santos appealed the denial of asylum and withholding, and the INS appealed the grant of voluntary departure, contending that the petitioner did not merit discretionary relief. The INS did not appeal the IJ's finding that

Alvarez-Santos was not removable for conviction of a crime of moral turpitude.

On appeal, the Board of Immigration Appeals upheld the denials of asylum and withholding. The BIA reversed the grant of voluntary departure, on a basis that the INS had not raised. The BIA found that Alvarez-Santos was ineligible for voluntary departure because he had admitted committing the essential elements of a crime of moral turpitude. Alvarez-Santos then filed a petition for review of the BIA's decision.

In ruling on the petition for review, the court rejected the INS's argument that INA sec. 242(a)(2)(C) deprived the court of jurisdiction. The court found that the statute's phrase "removable by reason of having committed" an offense refers to an administrative determination of the basis for a noncitizen's removal. Thus, the statute "precludes judicial review only when an alien is actually determined to be removable and ordered removed on the basis of a covered criminal act."

The court found that it does not have jurisdiction to review the BIA's denial of voluntary departure because of INA sec. 240B(f), which provides that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure . . . ." The court concluded that the language of this provision precludes review of denials of voluntary departure, whether the denial is based on an eligibility determination or a discretionary determination. The court expressly did not reach the question of whether habeas corpus is available to review such determinations, and the court's description of the denial suggests that it would be: "As we have noted, the BIA denied voluntary departure on a ground not argued by the INS and in apparent violation of its own precedent decisions."

On the merits, the court upheld the BIA's decisions to deny asylum and withholding, finding that they were supported by substantial evidence.

*Alvarez-Santos v. INS*, No. 01-71478 (9th Cir. June 20, 2003).

#### **DC CIRCUIT RULES GOVERNMENT PROPERLY WITHHELD NAMES AND INFORMATION CONCERNING POST-9/11 DETAINEES**

– Ruling on an appeal of an action brought by public interest organizations under the Freedom of Information Act (FOIA), the U.S. Court of Appeals for the District of Columbia Circuit has ruled that the government properly withheld the names and other information concerning persons detained in the wake of the Sept. 11, 2001, attacks. The ruling interprets a provision of the FOIA that exempts from disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production" of them "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

The district court had ruled that this exemption covered the other information sought by the plaintiffs, but did not apply to the names of detainees and those of their attorneys. On appeal, the court of appeals found that those names as well are covered by the exemption. Circuit Judge Tatel filed a strong dissent, asserting that the majority opinion's "uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the prin-

ciples of openness in government that FOIA embodies.”

*Center for National Security Studies v. U.S. Department of Justice*, Nos. 02-5254 and 02-5300 (D.C. Cir. June 17, 2003).

**9TH CIRCUIT FINDS FILING NATURALIZATION APPLICATION DOES NOT ESTABLISH ACQUISITION OF U.S. NATIONALITY** – The U.S. Court of Appeals for the Ninth Circuit has ruled that a lawful permanent resident who applied for naturalization and indicated his allegiance to the United States on the application did not thereby gain status as a U.S. national. The decision issued on petition for review of a removal order.

Section 101(a)(22) of the Immigration and Nationality Act defines a U.S. national as an individual who “owes permanent allegiance to the United States.” All U.S. citizens are also nationals of the United States. In addition, Congress by statute has conferred U.S. nationality upon individuals born in certain U.S. territories. INA § 308. Under this statute, individuals born in American Samoa are U.S. nationals, even though they are not U.S. citizens.

In *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001), the Ninth Circuit had suggested that a lawful permanent resident may also qualify for status as a U.S. national by applying for naturalization, and at least two courts have so found. *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996); *Lee v. Ashcroft*, 216 F.Supp.2d 51 (E.D.N.Y. 2002). However, the Board of Immigration Appeals recently rejected this concept. *In re Navas-Acosta*, 23 I. & N. Dec. 586, Int. Dec. 3489 (BIA Apr. 29, 2003). With this latest decision, the Ninth Circuit has now also rejected the concept. The court found most persuasive the fact that a naturalization application can be withdrawn or denied after it is filed. The court concluded that only completion of the naturalization process can result in a grant of U.S. nationality.

*Perdomo-Padilla v. Ashcroft*, No. 01-71454 (9th Cir. June 23, 2003).

**9TH CIRCUIT OVERTURNS BIA DENIAL OF MOTION TO REOPEN IN ABSENTIA ORDER BASED ON NOTICE MAILED TO WRONG ZIP CODE** – The U.S. Court of Appeals for the Ninth Circuit has ruled that the Board of Immigration Appeals erred by refusing to grant a motion to reopen an in absentia order. In denying the motion to reopen, the BIA relied on the presumption that mail that was properly addressed reached its destination. The court found that this presumption does not apply if the mail was addressed to the proper street address but the zip code was incorrect.

The respondents in this case had provided both a post office address and a street address to the Immigration and Naturalization Service when they applied for asylum. The INS subsequently denied the asylum applications and initiated removal proceedings. Notice of the removal hearing was mailed to the street address that the respondents had provided, but with an incorrect zip code. Subsequently, the respondents failed to appear for their hearing and were ordered removed in absentia. They later filed a motion to reopen the in absentia hearing based on lack of notice of the hearing. The immigration judge denied the motion, and the BIA upheld the denial, relying on the rebuttable presumption that mail that was properly addressed reached its des-

tinuation. The petitioners then filed a petition for review of the BIA's ruling.

The court found that the presumption is not applicable if the mailed notice was addressed to an incorrect zip code. Rather, the presumption applies only where the government provides proof that notice “(1) was properly addressed; (2) had sufficient postage; and (3) was properly deposited in the mails.” Accordingly, the court granted the petition for review.

*Busquets-Ivars v. Ashcroft*, No. 02-70643 (9th Cir. June 24, 2003).

**9TH CIRCUIT FINDS 1990 ACT'S BAR TO 212(c) RELIEF FOR CERTAIN AGGRAVATED FELONS NOT APPLICABLE TO THOSE WHO PLED GUILTY BEFORE THE BAR'S ENACTMENT** – The U.S. Court of Appeals for the Ninth Circuit has ruled that a provision of the Immigration Act of 1990 that eliminated the availability of 212(c) waivers for immigrants who were convicted of an aggravated felony and served a term of imprisonment of at least five years does not apply to persons whose conviction was the result of a guilty plea prior to the enactment of the restriction. The ruling finds that the court's earlier decision to the contrary, in *Samaniego-Meraz v. INS*, 53 F.3d 254 (9th Cir. 1995), has effectively been overruled by the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001).

Former section 212(c) of the Immigration and Nationality Act provided a waiver of certain grounds of inadmissibility or deportability for lawful permanent residents who had accrued at least seven years of lawful unrelinquished domicile in the United States. The 1990 act amended the section to bar relief for individuals who had been convicted of an aggravated felony and who were incarcerated as a result for a period of at least five years. Subsequently, the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) further limited 212(c) relief by barring it to individuals convicted of a wide range of offenses, and then the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) eliminated section 212(c) altogether. However, in *St. Cyr* the Supreme Court found that 212(c) relief remains available to immigrants who pled guilty prior to the IIRIRA's enactment and who would have been eligible for the relief had the law not been subsequently changed. In reaching this conclusion, the Court found that eliminating 212(c) relief for immigrants who would have been eligible for the relief at the time they pled guilty has an impermissibly retroactive effect. While *St. Cyr* did not address the retroactivity of the 1990 act's restriction on 212(c) relief, the Ninth Circuit has now found that the Supreme Court's decision compels it to overrule *Samaniego*.

In *Samaniego*, the Ninth Circuit examined the 1990 act and found that the statute did not clearly provide whether the bar to relief for aggravated felons who were incarcerated for over five years applied to pre-act convictions. However, the court also concluded that applying the bar to aggravated felons convicted prior to 1990 did not create an impermissibly retroactive effect. The Ninth Circuit has now found that this latter conclusion cannot be reconciled with *St. Cyr*. Accordingly, the court ruled that immigrants “who pleaded guilty prior to the enactment of IMMACT [i.e., the 1990 act] and who otherwise would have been eligible for § 212(c) relief but for the aggravated felon bar, may still apply for § 212(c) relief.”

*Toia v. Fasano*, No. 02-55436 (9th Cir. June 30, 2003).

**AUGUST DEADLINE APPROACHING FOR MOTIONS TO REOPEN UNDER WALTERS SETTLEMENT** – Aug. 21, 2003, is the deadline for class members in *Walters v. Reno* who have final orders of deportation to request that the Bureau of Immigration and Customs Enforcement (BICE) join in motions to reopen their deportation cases.

*Walters* is a class action challenge to the procedures used by the Immigration and Naturalization Service to initiate civil document fraud proceedings under section 274C of the Immigration and Nationality Act. In 2001, the court gave final approval to a settlement of the litigation, and under the settlement the INS vacated the 274C final orders of document fraud that were issued against non-U.S. citizens who either waived or failed to request a document fraud hearing. The settlement provides for a two-year period, which will end Aug. 21, in which class members who have final deportation orders, but who are now eligible for some form of relief from deportation or are no longer deportable, may make a written request that the INS (now BICE) join in a motion to reopen the deportation case. During this period, class members who paid a fine pursuant to a 274C final order that has been vacated may also request a refund from the agency. A copy of the *Walters* settlement, and further information about it, may be obtained at the NILC website, [www.nilc.org](http://www.nilc.org), under "Immigration Law and Policy."

## Employment Issues

**NLRB REVERSES ALJ WHO FOUND WORKER NOT CREDIBLE BECAUSE HE TESTIFIED TO USING A FALSE SSN TO OBTAIN EMPLOYMENT** – The National Labor Relations Board (NLRB) has decided that an administrative law judge's decision to discredit a worker's testimony solely because he testified to presenting a false Social Security number (SSN) to obtain employment was erroneous, and it has remanded the case for reconsideration of that particular issue. The NLRB found that the ALJ's decision amounted to a sanction against the employee for his conduct and was not a proper credibility determination. The NLRB noted that if this type of sanction were allowed, it would essentially deny the protections of the National Labor Relations Act (NLRA) to anyone who had made false statements regarding his SSN or immigration status, and that this result would be inconsistent with the NLRA's coverage of undocumented workers.

This case originated in 2001 when the general counsel of the iron workers union in Miami, Florida, charged that Double D Construction violated the NLRA by, among other things, discharging Tomas Sanchez and making a threatening statement to him two days before an election was held to decide whether Double D's workers would join the union.

The uncontested evidence showed that a supervisor "pointed and shook his index finger at Mr. Sanchez and repeated three times, 'Remember your bills.'" Sanchez testified that he understood this message to mean that if he voted for the union, he would be fired and be unable to pay his bills. The ALJ found that this testimony lacked credibility and held that the statement "was merely a reference to a legitimate election campaign theme of the [employer], which emphasized the Union's wasteful expenditure of employees' dues money"—even though he also found that

the employer had threatened to close the company if the union won the election. The ALJ questioned the credibility of Sanchez's testimony concerning his discharge and instead credited a supervisor who testified that Sanchez had simply stopped showing up for work.

The ALJ discounted the credibility of Sanchez's testimony in its entirety because Sanchez "admitted [on the stand] that when he applied for work with [the employer], he used a false Social Security number." It appears that Sanchez later acquired a valid SSN, which he provided to his employer.

The NLRB noted that, rather than disqualifying Sanchez as a credible witness solely on this issue, the ALJ should have made a "true credibility determination" by considering Sanchez's testimony along with other factors, such as "his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." The NLRB also cited to a history of prior decisions in which it had credited witnesses who made false statements on employment applications or unemployment claims, if their testimony could otherwise be judged reliable.

In addition, the NLRB rejected the dissent's opinion finding that the ALJ had properly exercised judicial discretion and that judicial restraint counseled against the NLRB's reconsideration of his determination. Unlike the dissent's, the majority's reading of the Immigration Reform and Control Act of 1986 (IRCA) is that a person who has violated a provision of the IRCA, such as by providing a false SSN on an employment application or on an I-9 employment eligibility verification form, is not disqualified from serving as a witness in federal legal proceedings, which in essence would be the result of the ALJ's underlying decision.

The majority also clarified that this decision should not be read as holding that an employee's use of a false SSN can never be taken into account, but that a careful analysis into all the factors that bear on the witness's credibility "*at the time of his testimony*" is required (emphasis in original). The NLRB found unacceptable the ALJ's inference that because Sanchez had once used a false SSN, he was giving false testimony once again. The NLRB distinguished the two situations, stating that "[w]ith respect to the incentives for truth-telling, filling out a government immigration form in the workplace—even one that recites the criminal penalties for false statements in the event the signer's false statement is detected and leads to a conviction—is not the same as testifying under oath in a legal proceeding. This may be particularly true with respect to immigrants who face compelling pressure to find work and earn a livelihood."

Finally, in his concurring opinion, recently appointed NLRB member Alex Acosta reiterated the NLRB's commitment to enforce the NLRA on behalf of undocumented workers since the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, stating that "this requires an understanding of the workplace and the realities faced by these individuals."

*Double D Construction Group, Inc.*, 339 NLRB No.8, 2003 N.L.R.B. LEXIS 318 (June 17, 2003).

**OCAHO DISMISSES CITIZEN WORKER'S CLAIM ALLEGING EMPLOYER PREFERRED HIRING UNDOCUMENTED WORKERS** – The Office of the Chief Administrative Hearing Officer (OCAHO) has dismissed a naturalized U.S. citizen's complaint that he was intentionally not

hired because of his citizenship, holding that because there was no evidence that the employer knew of the complainant's citizenship status, there was no discrimination.

The administrative law judge also denied the complainant's claim regarding the employer's hiring of undocumented workers and failing to verify that its workers are authorized to work, finding that Congress did not create a "private cause of action or third party mechanism" in the employer sanctions provision of the Immigration and Nationality Act (8 U.S.C. § 1324a). The ALJ distinguished this from the private right of action expressly contained in the antidiscrimination provisions of the INA (8 U.S.C. § 1324b), such as the right to file a claim alleging citizenship status discrimination.

The complainant, Juan Manuel Alamprese, claimed that Del Taco #171 intentionally chose to employ undocumented workers and that he was intentionally not hired because he was a naturalized U.S. citizen. Both U.S. Ninth Circuit Court of Appeals and OCAHO case law require that for an employer to be found liable under the antidiscrimination provisions, the employer must have known about the characteristic that was the alleged basis for the discrimination. The ALJ found that there was no evidence that Del Taco knew or had reason to know whether or not Alamprese was a U.S. citizen and that therefore it could not have intentionally discriminated against him on that basis. Alamprese had spoken only Spanish when dealing with Del Taco management and had not mentioned his citizenship status on his application or to anyone at Del Taco, and no one at Del Taco had asked him about his citizenship status.

Although Del Taco insisted that it had never been notified of any problem with its workers' employment authorization, Alamprese claimed that there were discrepancies between Del Taco's employment eligibility verification forms and the documents that workers had submitted to establish their employment eligibility. He submitted Social Security Administration "no-match" letters that the SSA had sent Del Taco regarding certain of its employees. (The SSA sends no-match letters to employers to alert them to employee name and Social Security number discrepancies that result in workers not receiving proper credit for their earnings.) However, the ALJ said that the immigration status of Del Taco's workers was in any case irrelevant to Alamprese's discrimination claim, since he was unable to show that Del Taco had known of his citizenship status or had discriminated against him on the basis of it. Because individuals are not authorized to file complaints with the OCAHO regarding employer violations of the INA's employment eligibility verification requirements, the ALJ also dismissed Alamprese's claim that he should be paid damages for each unauthorized worker whom Del Taco employed.

*Alamprese v. Minsh, Inc. d/b/a/ Del Taco #171,*  
9 OCAHO No. 1094 (Mar. 20, 2003).

#### **EVALUATION OF ELIGIBILITY VERIFICATION BASIC PILOT RAISES CONCERNS**

—The two private contractors hired by the U.S. Bureau of Citizenship and Immigration Services (BCIS) (formerly the Immigration and Naturalization Service) to conduct an independent evaluation of the BCIS's Basic Pilot employment eligibility verification program recently released their overdue report on their evaluation of the program. The report raises serious concerns about whether the program should be made mandatory or ex-

panded, as originally planned. Among the many problems found in the evaluation, which was conducted jointly by Westat and Temple University Institute for Survey Research, was a failure by the INS/BCIS to provide timely data, which has delayed the confirmation of workers' employment eligibility in one-third of the cases handled under the Basic Pilot program.

The evaluation was mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which provided for the creation of three employment eligibility verification pilot programs. The Basic Pilot operates in California, Florida, Illinois, Nebraska, New York, and Texas. The other two pilot programs are the Citizenship Attestation Verification Pilot, which operates in Arizona, Maryland, Massachusetts, Michigan, and Virginia, and the Machine Readable Document Pilot, which currently operates only in Iowa. These computerized pilot programs were set up to test whether the Form I-9 employment eligibility verification process could be simplified to reduce the burden on employers, and to reduce illegal discrimination and violations of workers' civil liberties and privacy rights, as well as incidents of false claims to U.S. citizenship and document-related fraud.

The report confirms the concerns many immigrants' rights advocates have had—i.e., that many employers are using the pilot programs improperly, to the detriment of immigrant workers. Among advocates' main concerns have been (1) the incentive the pilot programs provide for employers to misuse the government databases to which the programs give them access, to prescreen job applicants on the discriminatory basis of national origin or citizenship; (2) the programs' reliance on INS and Social Security Administration databases that are notoriously inaccurate; (3) the insufficient time provided to workers to correct or update their records with the SSA or the INS when their employment eligibility is not initially confirmed; and (4) privacy-related concerns about how much access employers have to information about workers, as well as about the potential for employers to abuse that access.

The Basic Pilot evaluation report says that some employers surveyed are not following the federally mandated memorandum of understanding they signed as a condition of participating in the program. The report cites evidence that some employer participants are engaging in prohibited practices, such as prescreening job applicants and taking adverse action against workers who receive a tentative nonconfirmation in the first phase of the Basic Pilot's eligibility verification procedure. While the evaluation found no documented case of a specific privacy violation, some employers also failed to safeguard access to the pilot program's computer—e.g., they left passwords and instructions for accessing the program's system in plain view. Finally, the report says that some employers missed deadlines required by the pilot and failed to inform workers of their rights when the system was unable to confirm their employment eligibility. Despite these egregious violations, the report recommends continuing the Basic Pilot program, with some improvements.

Apparently the report was completed in Jan. 2002 but was made public only earlier this year (2003). According to a cover letter from the INS released with the report, it was provided to Congress in Dec. 2002. Well before that time, in Jan. 2002, Congress quietly extended the pilot programs for an additional two years. At the time of this extension, the Basic Pilot was due to

have expired in Nov. 2001. Because of the extension, it is now scheduled to sunset in Nov. 2003, and in the meanwhile it will be critical for advocates to document cases of employer misuse and abuse of the program.

A summary of the evaluation report can be found at [www.immigration.gov/graphics/aboutus/repstudies/piloteval/INSBASIC\\_summ.pdf](http://www.immigration.gov/graphics/aboutus/repstudies/piloteval/INSBASIC_summ.pdf). The full evaluation report can be found at [www.immigration.gov/graphics/aboutus/repstudies/piloteval/PilotEvalComplete.htm](http://www.immigration.gov/graphics/aboutus/repstudies/piloteval/PilotEvalComplete.htm).

**N.Y. COURT RULES THAT UNDOCUMENTED WORKERS ARE ENTITLED TO DAMAGES FOR LOST WAGES IN STATE TORT ACTIONS** – A New York State trial court has determined that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), does not prevent the state of New York from awarding damages, including lost wages, to an individual who is not lawfully in the United States. (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10.)

After Gorgonio Balbuena was injured at a construction site where he was working, he filed a worker's compensation claim and sued a number of entities, alleging that they had been negligent and had violated various New York labor laws. Citing *Hoffman*, one of the defendants, Taman Management Corporation, moved to have Balbuena's claim for lost earnings dismissed on the ground that Balbuena is unauthorized to work in the U.S. The court rejected that motion and found that "[n]othing in the Supreme Court's decision states, or even implies, that its holding would be applicable to tort actions brought under state common law." It concluded that "in this state tort matter, [the state court] is not bound by *Hoffman*" and that nothing in *Hoffman* "would preclude the recovery of lost wages which the undocumented worker might have legally earned in another country."

Nevertheless, the court allowed the defendant to inquire into Balbuena's immigration status. The defendant sought "documentation that Balbuena was authorized to be employed in the United States at the time of the accident." In a pleading filed with the court, the plaintiff's attorney had stated that his client "is not a documented worker." Despite denying the defendant's motion for partial summary judgment, the court ordered Balbuena to respond to the defendant's request for documentation, citing New York State cases that hold that a plaintiff's immigration status is relevant to claims for lost earnings.

Advocates should be vigilant in protecting workers from having to answer questions about their immigration status. Several federal courts have refused to allow employers to inquire into litigants' immigration status, even when that information might be relevant. (For a discussion of those cases, see "*Hoffman*: Lower Courts Limit Impact of High Court's Decision Barring Undocumented Workers from Receiving Back Pay," IRU, May 30, 2002, and "Courts Continue Rejecting Defendants' Post-*Hoffman* Inquiries into Plaintiffs' Immigration Status," IRU, Oct. 21, 2002.) Courts have recognized the chilling effect that such inquiries have on workers' ability to vindicate their rights.

Because in this case there appeared to be no evidence—other than the lawyer's admission that Balbuena is undocumented—

that Balbuena lacked work authorization, this case serves as a reminder of the importance of guarding against defendants' engaging in fishing expeditions concerning plaintiffs' immigration status.

*Balbuena v. IDR Realty, LLC, et al.*,  
Case No. 110868/2000 (N.Y. Sup. Ct. 2003).

**MINNESOTA SUPREME COURT REFUSES TO LIMIT WORKERS' COMP RECOVERY IN CASES INVOLVING UNDOCUMENTED WORKERS** – The

Minnesota Supreme Court has held that undocumented workers are entitled to all benefits under that state's workers' compensation law, including wage benefits that are conditioned on an injured worker's ability to conduct a diligent job search.

The plaintiff, Fernando Correa, was hired in 1999 by Waymouth Farms, which is a producer and packager of meat products and gifts. Correa's job required him to lift boxes weighing up to 50 pounds. He injured his back in March 2000 and underwent back surgery as a result. He filed a workers' compensation claim and received wage loss and medical benefits, as well as rehabilitation services. He returned to work part-time in December of that year, and was placed on light duty.

Less than two months later, Waymouth Farms notified Correa that the Immigration and Naturalization Service had "discovered" that the alien registration number he had provided did not exist, that the Social Security number he provided did not match his name, and that there was no alien registration number that corresponded with Correa's name and birth date. The employer then suspended Correa and gave him 48 hours to provide documentation of his eligibility to be employed in the United States. Correa was fired after he told the employer that he could not provide the requested documentation.

He immediately began a job search. He testified that he located several potential jobs but was not offered employment because of his back injury and resulting work restrictions.

Two weeks after it fired Correa, the employer sought to terminate his benefits on the grounds that his wage loss was due to his status as an unauthorized worker, not his injury. The employer argued that, because Correa could not lawfully work in the U.S., he could not conduct a "diligent job search," as required by the Minnesota workers' compensation law. The compensation judge rejected that claim, and the Workers' Compensation Court of Appeals affirmed, holding that "Correa's unauthorized status did not, as a matter of law, prevent him from conducting a reasonable and diligent job search." The employer appealed, and the state's supreme court affirmed.

The court reasoned that "IRCA [the Immigration Reform and Control Act of 1986, which provides for sanctions against employers that knowingly hire unauthorized workers] is not aimed at impairing existing state labor protections" and that "IRCA was not intended to preclude the authority of states to award workers' compensation benefits to unauthorized aliens." Accordingly, the court looked only at the state's workers' compensation statute and determined that the statute applies to "aliens, whether authorized or unauthorized." Correa, therefore, was entitled to all benefits, as long as he conducted a "diligent job search," which, he had done. The court also ruled that "immigration status is only one of the many facts and circumstances to be considered" when determining whether an injured worker has conducted a

“diligent job search.”

Because Correa's right to receive benefits under state law was clear, the court refused to address the employer's argument that the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2001), prohibits an award of benefits. Nevertheless, it noted “that to the extent that denying unauthorized aliens benefits predicated on a diligent job search gives employers incentive to hire unauthorized aliens in expectation of lowering their workers' compensation costs, the purposes underlying the IRCA are not served.” (For a summary of the *Hoffman* decision, see “Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing,” IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10).

This is the first post-*Hoffman* decision to award full workers' compensation benefits to an undocumented worker. Two other states, Michigan and Pennsylvania, have limited the awards to medical benefits. (For a discussion of the Michigan decision, see “*Sanchez et al. v. Eagle Alloy, Inc.*: Michigan Court of Appeals Limits Workers' Compensation Recovery in Cases Involving Undocumented Workers,” IRU, Feb. 21, 2003.)

*Correa v. Waymouth Farms, Inc., et al.*, 2003 Minn. LEXIS 394 (Minn. July 3, 2003).

## Immigrants & Welfare Update

**CONGRESS EXTENDS TANF THROUGH SEPT. 2003** – On June 27, the U.S. Senate passed H.R. 2350, extending the Temporary Assistance for Needy Families (TANF) program until Sept. 30, 2003. The House of Representatives approved the same measure on June 11.

The TANF program, which replaced Aid to Families with Dependent Children (AFDC) in 1996, was scheduled to expire last Sept., unless Congress reauthorized the program. Due to a combination of factors, including the mid-term election and a number of competing priorities, Congress adjourned last year without reauthorizing the program. Instead, Congress passed a number of extensions. The most recent extension expired on June 30, 2003.

The House already passed its version of the welfare reauthorization bill (H.R. 4). H.R. 4, which is very similar to the bill passed by the House last year and the president's proposal, does not restore any benefits for immigrants. Senate Finance Committee Chair Charles Grassley (R-IA), whose committee has jurisdiction over welfare, released his TANF reauthorization proposal earlier this week. Grassley's proposal did not include any restorations of benefits for immigrants. However, advocates expect that the Senate Finance Committee members will offer amendments restoring health and TANF benefits to lawfully present immigrants when the committee considers TANF reauthorization during the week of July 21.

**SENATE REJECTS EFFORT TO REVOKE THE IMMIGRANT CHILDREN'S HEALTH IMPROVEMENT ACT** – Advocates won a key victory when the U.S. Senate rejected an amendment by Senator Jeff Sessions (R-AL) that would have stripped the restoration of health care to lawfully present pregnant women and children from the Medicare

Prescription Drug bill (S. 1). The amendment failed by a vote of 65 to 33. All of the Democrats except Senator Robert Byrd (D-WV) voted against the amendment; they were joined by 19 Republicans.

The Medicare bill, which incorporates the provisions of the Immigrant Children's Health Improvement Act (ICHIA), passed the Senate by an overwhelming margin (76 to 21). The ICHIA gives states the option to provide basic health coverage to lawfully present pregnant women and children in their Medicaid and State Children's Health Insurance Programs (SCHIP). Senator Sessions' amendment would have deleted the ICHIA and substituted a nonbinding “sense of the Senate” that the Finance Committee should hold hearings on this issue.

The House of Representatives also passed a Medicare bill by a margin of one vote (216 to 215). The House bill does not include the immigrant provisions.

A conference committee is expected to reconcile the differences between the House and Senate versions of the bill in the next few weeks. The Senate conferees are Charles Grassley (R-IA), Orrin Hatch (R-UT), Don Nickles (R-OK), Jon Kyl (R-AZ), Bill Frist (R-TN), Max Baucus (D-MT), John Rockefeller (D-WV), Thomas Daschle (D-SD), and John Breaux (D-LA). The House conferees will be named soon.

President Bush has indicated that he wants to sign a Medicare bill into law prior to Congress's month-long August recess. It is unlikely, however, that the two houses will be able to overcome the significant differences between the two bills in such a short period of time.

The ICHIA provision has overcome several hurdles already. The provision survived an attempt by Sen. Don Nickles (R-OK) to strip it during consideration of the Medicare bill by the Senate Finance committee. The victory in committee was weakened by the Bush administration when, in a letter outlining its position on the Finance Committee's Medicare bill, the administration explicitly opposed the inclusion of the restoration. The strong bipartisan vote in the Senate combined with sustained efforts from advocates to increase support from House Republicans could provide the final push to ensure that the ICHIA remains in the final Medicare bill.

## Miscellaneous

**WORKERS' RIGHTS AND PUBLIC BENEFITS TRAININGS PLANNED FOR THIS SUMMER AND FALL** – Upcoming NILC trainings with definite dates include sessions on **public benefits** issues to be held in **Nashville**, Tennessee (July 28, 2003), and **Oakland**, California (Oct. 7, 2003). Another training on public benefits is tentatively planned for **southern California** sometime in October.

In addition, NILC is planning to hold **immigrant workers' rights** trainings in the following cities this fall (these plans are not yet final, however): **Chicago**, Illinois; **Houston**, Texas; **Los Angeles**, California; **Miami**, Florida; **New York**, New York; **Phoenix**, Arizona; **Portland**, Oregon; and **Salt Lake City**, Utah.

Dates and locations for these trainings, and information about how to register, will be posted on the NILC Web site: [www.nilc.org/trainings/index.htm](http://www.nilc.org/trainings/index.htm).

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