



Immigration Issues

CIVIL LIBERTIES RESTORATION ACT INTRODUCED TO COUNTER POST-9/11 EROSION OF BASIC PROTECTIONS – The Civil Liberties Restoration Act (CLRA), introduced in the U.S. Senate and House of Representatives on June 16, 2004, provides for taking restrained steps to restore essential protections and basic freedoms denied to many non-U.S. citizens in the aftermath of the Sept. 11, 2001, terror attacks.

The steps proposed by the new legislation fall into two general categories: those that would restore protections to non-U.S. citizens who are having to deal with immigration authorities or the civil immigration justice system, and those that would help protect all residents of the U.S. against the further erosion of their constitutionally protected civil liberties and right to privacy.

Compelling interest required to close hearings. Under section 101 of the CLRA, in order to close all or part of a hearing before an immigration judge (IJ), the government would have to show a compelling privacy or national security interest that would justify closing the hearing. This provision is prompted by the Sept. 21, 2001, "Creppy memo," in which the chief immigration judge, whose office is part of the U.S. Dept. of Justice (DOJ), ordered IJs to close all hearings held for noncitizens detained in connection with the government's investigation of the 9/11 attacks. The government kept secret even the identities of those who were

detained; and in hundreds of the hearings for those who were charged with immigration offenses, the IJs excluded all family members, visitors, and reporters.

Time limits for charging detainees and bringing them before a judge.

Section 201 would require that the Dept. of Homeland Security (DHS) serve a Notice to Appear (NTA) on noncitizens within 48 hours of their being arrested or detained. (The NTA is the charging document that begins removal proceedings against the person on whom it is served.) Furthermore, the government would be required to bring any noncitizen held for more than 48 hours before an IJ within 72 hours of the person's arrest or detention. An exemption to this requirement would apply in the cases of persons who the attorney general certifies, based on reasonable grounds, have engaged in espionage or a terrorism offense.

This provision would overrule the interim rule the DOJ issued on Sept. 20, 2001, that extended the period within which a detainee must be charged (i.e., served an NTA) from 24 hours to 48 hours or, in "emergency or other extraordinary circumstances," for "an additional reasonable period of time." As the DOJ inspector general found in investigating the government's treatment of post-9/11 detainees, this policy resulted in their languishing in jail for weeks or even months before being charged. As a result, they did not know why they were being held, nor could they effectively challenge their detention or obtain release on bond. (For more results of the inspector general's investigation, see

IN THIS ISSUE

IMMIGRATION ISSUES

Civil Liberties Restoration Act introduced to counter post-9/11 erosion of basic protections	1
USCIS expands "E-filing" program begun last year	3
USCIS ceases asylum interview "circuit riding" to New Orleans, Harlingen, Cincinnati, and Louisville	3

LITIGATION

6th Circuit overturns denial of female genital mutilation-based asylum claim	3
9th Circuit: IJ and BIA's denial of asylum to Serbian victims of ethnic cleansing not supported by evidence ...	4
3rd Circuit: Court of appeals lacks authority to reinstate and extend voluntary departure	5

EMPLOYMENT ISSUES

9th Circuit upholds protective order limiting employers' inquiries into plaintiffs' immigration status	5
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EEOC obtains protective order limiting discovery that could adversely affect immigrant workers	6
USCIS issues guidance on employment eligibility for citizens of "freely associated states"	7
New EAD eliminates references to INS, contains new security features	7

PUBLIC BENEFITS ISSUES

Bill requiring hospitals to report undocumented persons defeated	7
GAO reports on uncompensated care to undocumented immigrants	8
USDA issues proposed rules affecting immigrants' access to food stamps	9
Connecticut restores state-funded benefits to immigrants	9

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.

"OIG Report Criticizes the Government's Treatment of 9/11 Detainees," IMMIGRANTS' RIGHTS UPDATE, July 15, 2003, p. 1.)

Bond determinations. Under section 202 of the CLRA, subject to limited exceptions, noncitizens in removal proceedings would be entitled to an individualized determination of whether or not they pose a flight risk or a danger to the community should they be released from detention. For those found not to pose such a risk, the DHS would be required to set a reasonable bond or other conditions for them that would ensure their appearance in court. IJs would have the authority to review the DHS's determination, and only an IJ could revoke or modify a bond based on changed circumstances.

This provision responds to the government's post-9/11 practice of denying bond to whole classes of noncitizens, a practice that continues to this day against Haitians who arrive by sea seeking asylum in the U.S. and are imprisoned throughout their asylum proceedings. It would also invalidate the DHS's recently announced "Hartford pilot project," which requires that noncitizens who lose their cases before an IJ be detained, even when they have appealed the decision.

Section 203 would permit the Board of Immigration Appeals to stay for only a limited time period an IJ's decision to release a noncitizen, and only when the government has established it is likely to prevail on appeal and there is a risk of irreparable harm if a stay is not issued. This would overturn the DOJ's Oct. 31, 2001, rule giving itself the power to automatically stay an IJ's bond decision, which made such decisions meaningless.

Immigration courts and the Board of Immigration Appeals. In an attempt to make the immigration court system more independent, section 204 of the CLRA would create an "independent regulatory agency" within the DOJ called the Immigration Review Commission to oversee the immigration court system, and it would abolish the Executive Office for Immigration Review.

This section also would require that all cases coming before the Board of Immigration Appeals be heard by a three-member panel, as they were prior to procedural "reforms" instituted by the DOJ in 2002. Under these reforms, individual BIA members have issued thousands of decisions without written opinions, most of which have rejected the claims of noncitizen appellants. While the reforms were purportedly designed to reduce the backlog of appeals to the BIA, their effect has been to increase the number of cases appealed to the federal courts (see "BIA Backlog Merely Shifted to Federal Courts, Study Finds," IRU, Dec. 18, 2003, p. 2).

NSEERS/special registration. Section 301 of the CLRA would terminate the National Security Entry-Exit Registration System (NSEERS or "special registration") program. It would end removal proceedings against noncitizens who were in lawful status but were placed in removal proceedings solely because they failed to comply with the requirements of the NSEERS program. Under this provision, noncitizens who were not in lawful status before being placed in removal proceedings as a result of having complied with the NSEERS requirements could also have their removal proceedings terminated, but only if they are eligible for or have a current application pending for an immigration benefit for which a visa is immediately available, or if they are eligible to apply for some other form of relief, such as asylum. An exception would apply in the cases of people who are removable because

they have engaged in terrorist activity or have been convicted of certain crimes.

The NSEERS program began on Aug. 12, 2002, as a tracking scheme which requires that visitors from certain countries—and others whom an immigration inspector decides meet certain secret criteria—be fingerprinted, photographed, and interrogated when they enter the U.S. The DOJ later expanded it to a "call-in" program applied to men already in the U.S. who are from 25 predominantly Muslim or Arab countries and age 16 or older. Some of this discriminatory program's registration requirements were suspended in 2003, but many noncitizens remain caught in the web of complications it created. (For more on NSEERS/special registration, see "Some Special Registration Requirements Ended, but Program Continues," IRU, Dec. 18, 2003, p. 2.)

Positive exercise of prosecutorial discretion. Section 302 would codify an existing DHS memo about prosecutorial discretion in instituting removal proceedings against noncitizens, and it identifies positive factors the DHS should consider in exercising its discretion, such as family ties to U.S. citizens or residents, humanitarian concerns, and eligibility for immigration relief. This provision is designed to encourage the DHS to actually use its discretionary power in a positive way, especially on behalf of the thousands of people who, in good faith, complied with the special registration requirements (discussed above) but were placed in removal proceedings even though they were in the process of legalizing their status.

Change of address/registration. The CLRA's section 303 would eliminate criminal liability and deportation as penalties for failure to timely file a change-of-address form and would eliminate criminal liability for technical registration violations. Those drastic penalties would be replaced with civil fines. This provision would overrule a rule issued by the attorney general in July 2003 clarifying that a "willful" failure to register with the immigration authorities, or a failure to give written notice of a change in address, is a criminal violation. Announcement of that previously unenforced rule caused immigration offices to be flooded with change-of-address forms in quantities too great for them to handle. Many were stored unread or, in at least one case, shredded.

Accuracy of information entered into NCIC. Section 304 would require the attorney general to comply with the Privacy Act's accuracy requirements for data entered into the National Crime Information Center (NCIC) database. This would undo the Mar. 24, 2003, DOJ order exempting the NCIC from a longstanding legal requirement that information in major law enforcement databases be "accurate, relevant, timely and complete." That order was particularly significant because many notoriously inaccurate immigration records are now included in the NCIC, the nation's principal crime information database, accessed daily by hundreds of thousands of police officers around the country. (For more on this, see "Justice Dept. Order Exempts Crime Database from Accuracy Requirement," IRU, June 3, 2003, p. 6.)

Right to challenge information gathered secretly. Section 401 of the CLRA provides that when information gathered under the authorization of the Foreign Intelligence Surveillance Act (FISA)—e.g., information derived from electronic surveillance, physical searches, business records, pen registers, or trap and trace devices—is introduced in a criminal case, disclosure of the surveillance application, order, or other materials relating to the

surveillance would be permitted under the procedures set forth in the Classified Information Procedures Act. This would give criminal defendants the chance to contest the introduction of this evidence, while still protecting national security.

Data-mining. Section 402 would require all federal agencies to report to Congress within 90 days and every year thereafter on data-mining programs used to find a pattern indicating terrorist or other criminal activity and on how these programs implicate the civil liberties and privacy of all Americans. The General Accounting Office recently reported that at least 52 federal agencies are using or have planned to use data mining on public and private-sector databases (see *Data Mining: Federal Efforts Cover a Wide Range of Uses*, <http://www.gao.gov/highlights/d04548high.pdf>). Despite this, little is known of the programs until they are in effect, and few privacy protections exist.

Sponsors of the CLRA in the Senate are Sens. Edward M. Kennedy (MA), Patrick Leahy (VT), Russell Feingold (WI), and Richard J. Durbin (IL); and in the House, Reps. Howard Berman (CA) and Bill Delahunt (MA)—all Democrats. The bill does not yet have any Republican cosponsors.

Even before 9/11, noncitizens did not have many of the due process and other legal protections most U.S. citizens take for granted. The terrorist attacks provided a convenient opportunity for the Bush administration to further erode those protections. But the administration has presented no evidence that lessening the rights of noncitizens has enhanced national security in any meaningful way. The introduction of the CLRA is only the first step toward undoing the damage done by post-9/11 legislation and policies.

USCIS EXPANDS "E-FILING" PROGRAM BEGUN LAST YEAR – U.S. Citizenship and Immigration Services (USCIS) recently expanded its "E-Filing" program, whereby applications and petitions for immigration benefits can be filed via the Internet. On May 26, 2004, USCIS announced that it had added six forms to the program, for a total of eight application and petition forms that now can be filed electronically.

The six latest forms to be added to the E-Filing program are the following:

1. Form I-129, Employment-based Petition for Nonimmigrant Worker. Filed by an employer to petition for a non-U.S. citizen to come to the U.S. temporarily to perform services or labor, or to receive training, as an H-1B, H-1C, H-2B, H-3, L-1, O-1, P-1, P-2, P-3, or Q-1 nonimmigrant worker. Also filed by an employer to petition for an extension of stay or change of status for a noncitizen as an E-1, E-2, R-1 or TN nonimmigrant.

2. Form I-131, Application for Travel Document. Filed by a noncitizen to apply for a reentry permit, a refugee travel document, or advance parole.

3. Form I-140, Employment-based Petition for Immigrant Worker. Filed by an employer on behalf of a noncitizen worker to petition for the worker to become a permanent resident of the U.S.

4. Form I-539, Application to Extend/Change Nonimmigrant Status. Filed by a nonimmigrant to apply for an extension of stay in the U.S. or a change from one nonimmigrant category to another nonimmigrant category.

5. Form I-821, Application for Temporary Protected Status. Filed by a noncitizen to apply for TPS.

6. Form I-907, Request for Premium Processing. Filed by employers to request faster processing of certain employment-based petitions.

The two forms that applicants and petitioners have been able to file electronically since last year are Form I-90, Application to Replace Permanent Resident Card, and Form I-765, Application for Employment Authorization.

Applicants and petitioners who file any of these eight forms online can establish an E-Filing "account" that enables them to begin filling out a form, save whatever responses they have completed, and return to the form later to finish filling it out. Online filers also will be able to pay application fees with a credit or debit card, or by having funds transferred electronically from their checking or savings account.

USCIS CEASES ASYLUM INTERVIEW "CIRCUIT RIDING" TO NEW ORLEANS, HARLINGEN, CINCINNATI, AND LOUISVILLE

– U.S. Citizenship and Immigration Services has discontinued the use of four asylum office circuit ride locations, and the agency is requiring that applicants for asylum and for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) travel to other locations for their interviews.

New Orleans, Louisiana, and Harlingen, Texas, were circuit-ride locations for the Houston Asylum Office; Cincinnati, Ohio, and Louisville, Kentucky, were circuit-ride locations for the Chicago Asylum Office. The agency announced the changes in a Federal Register notice that explains in detail, by zip code of residence, where applicants who reside in areas previously served by the eliminated locations must now travel for their interviews.

In general, the change means applicants will need to travel further for interviews—e.g., applicants residing in the state of Louisiana must now travel to the Houston Asylum Office. The change took effect on May 3, 2004.

69 Fed. Reg. 17437–38 (Apr. 2, 2004).

Litigation

6TH CIRCUIT OVERTURNS DENIAL OF FEMALE GENITAL MUTILATION-BASED ASYLUM CLAIM

– The U.S. Court of Appeals for the Sixth Circuit has overturned a decision of the Board of Immigration Appeals, which had upheld an immigration judge's order denying the asylum and withholding claims of an Ethiopian mother and daughter based on their fear that the daughter would be subjected to female genital mutilation (FGM) were she returned to Ethiopia. The decision comes on petition for review of the BIA order, which affirmed the IJ decision using the "affirmance without opinion" procedure.

In this case, the mother respondent, Abay, and the daughter, Amare, both came to the United States in 1993 as visitors. They applied for asylum from the Immigration and Naturalization Service, were denied, and subsequently were placed in deportation proceedings, where they applied for asylum, withholding, and voluntary departure in the alternative.

At the merits hearing in 1997, Abay testified that she is married and has four daughters, of whom Amare is the youngest. Abay was subjected to FGM (referred to as "circumcision" by all parties at the hearing) by her mother when she was nine years old. Abay testified that she and her husband opposed the practice of

FGM and refused to subject their daughters to it. Abay's mother attempted to circumcise the three older daughters, but Abay intervened to stop her. After Abay left Ethiopia with her youngest daughter in 1993, her husband fled the country, leaving the three older daughters with Abay's mother. Abay testified that her mother still wants all of the girls to be circumcised and that she would not be able to prevent the forced circumcision of any of her daughters by their future husbands or in-laws. Amare, who was nine years old at the time of the hearing, also testified, using a sign language interpreter due to her serious hearing impairment. She testified that she knows about the practice of female circumcision and does not want to be subjected to it.

The IJ concluded that Amare had no "imminent fear" of FGM, but only "rather a general ambiguous fear," and he found it unlikely that she would be circumcised in Ethiopia since the older daughters had avoided being circumcised. He concluded that there was no basis for an asylum claim by either the daughter or the mother. The BIA affirmed the ruling without issuing an opinion, and the respondents sought review by the court of appeals.

On petition for review, the court found that the IJ, in concluding that Amare's fear was only "general," failed to properly assess her testimony under the INS's *Guidelines for Children's Asylum Claims*. Under these guidelines, "children under the age of 16 may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors." In this case the U.S. State Dept.'s country report for Ethiopia, which was part of the record, showed that FGM in Ethiopia was "nearly universal," and that approximately 90 percent of all females were subjected to the practice. Assessing the child's testimony in light of this objective evidence and giving her the "benefit of the doubt" as the guidelines direct, the court concluded that she expressed and established fear of persecution and is eligible for asylum.

The court also concluded that Abay established eligibility for asylum based on her fear that her daughter would be subjected to FGM were they deported to Ethiopia. "[W]e conclude that a rational factfinder would be compelled to find that Abay's fear of taking her daughter into the lion's den of female genital mutilation in Ethiopia and being forced to witness the pain and suffering of her daughter is well-founded."

The court therefore remanded the case to the BIA to determine whether asylum should be granted in the exercise of discretion. The court also remanded the respondents' request for withholding for further consideration, since the IJ had denied this relief based on his erroneous finding that the respondents had failed to establish eligibility for asylum.

Abay and Amare v. Ashcroft, 2004 U.S. App. LEXIS 9708, No. 02-3795 (6th Cir. May 19, 2004).

9TH CIRCUIT: IJ AND BIA'S DENIAL OF ASYLUM TO SERBIAN VICTIMS OF ETHNIC CLEANSING NOT SUPPORTED BY EVIDENCE—

The U.S. Court of Appeals for the Ninth Circuit recently found an immigration judge's decision that two elderly Serbian applicants for asylum had failed to establish that they had suffered past persecution or that they had a well-founded fear of future persecution to be unsupported by substantial evidence. The court also found that though the Serbian couple possibly could relocate safely in their country of citizenship, Bosnia-Herzegovina, somewhere other

than their hometown, it would not only be unreasonable, but "exceptionally harsh," to require them to do so, given their advanced age and the facts that they lost all their possessions when they fled their home, that they would have no means of supporting themselves, and that no other members of their family now reside in Bosnia-Herzegovina.

The couple, Damjan and Danica Knezevic (approximately ages 75 and 66, respectively), appealed to the Ninth Circuit after the Board of Immigration Appeals summarily affirmed, without issuing an opinion, the immigration judge's denial of their joint application for asylum and withholding of deportation.

Fearing for their lives, the Knezevics fled their hometown of Drvar in 1995 when the advancing Croat army began to shell it, because within the region it was common knowledge that the Croats intended to "ethnically cleanse" the areas that came under their control. They ran away on foot, taking with them only whatever personal things they managed to pack in ten minutes into two bags each. The Croats' shelling and bombing destroyed the Knezevics' restaurant and their house; and the occupiers stole whatever the couple left behind that was salvageable. Having fled Drvar, the couple feared that if they returned to the Croatia and Muslim Federation-controlled city, they would be persecuted or even killed. They also were afraid to relocate to a Serbian-held part of Bosnia-Herzegovina, Mr. Knezevic testified, because they were convinced that there would be no reliable protection for them there, either; plus they lacked the resources to do so.

The Knezevics entered the U.S. on visitor visas on July 6, 1996, and shortly thereafter applied affirmatively for asylum, claiming that they had suffered past persecution on account of their Serbian ethnicity and that they feared, should they be forced to return to Bosnia-Herzegovina, future persecution by Croats, also on account of their ethnicity. In Jan. 1997 the Immigration and Naturalization Service issued the couple an Order to Show Cause, charging them with being deportable for overstaying their visitor visas. The immigration judge found them deportable and denied their application for asylum and withholding of deportation at a hearing on Nov. 19, 1997. The government did not rebut any of the testimony or evidence the Knezevics presented, and neither the IJ nor the BIA found Mr. Knezevic's testimony to be not credible. The BIA summarily affirmed the IJ's decision on June 28, 2002.

In rejecting the couple's application, the IJ found that they were "displaced persons" and not "refugees," because they presented no evidence that they had been singled out for persecution or that their family had been specifically threatened on account of any of the legal grounds for being granted asylum—persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In finding the IJ's decision deficient, the Ninth Circuit pointed out that the judge was mistaken in requiring the Knezevics to prove that the persecution they experienced in the past was "particularized," since this is not a requirement of the law.

According to the court's decision:

Further, the IJ's reasoning misses the critical distinction between persons displaced by the inevitable ravages of war (e.g., the bombing of London by the German Luftwaffe

during World War II), and those fleeing from hostile forces motivated by a desire to kill each and every member of the group (e.g., the destruction of the Jewish neighborhoods on the Eastern front of Europe by the Einsatzgruppen, who followed the German Wehrmacht in WWII). In the first example, although the German armed forces intended to conquer and occupy London, they did not intend to kill every Londoner. In the latter example, the Nazi detachments did intend to kill every Jew, which made the persecution individual to each Jewish resident of an area invaded by the Nazis. The latter is persecution "on account of" a protected status, while the former is not. The record before us compels the conclusion that the town of Drvar was specifically targeted for bombing, invasion, occupation, and ethnic cleansing of Serbs by Croats.

The fact that the Knezevics hometown was targeted for ethnic cleansing strengthens their claim that they suffered persecution, the court found.

Furthermore, the court found the Knezevics claim that they feared future persecution should they be forced to return to Drvar to be "objectively well-founded," based on the evidence they presented and Mr. Knezevic's testimony. The couple did not need to prove that they would be singled out for persecution should they return to Drvar, "because they proved a practice of persecution against Serbs in the region" of Drvar, the court said. Because they are Serbs who would be returning to a Croat-dominated area, the Knezevics "need not prove they will be individually targeted" for persecution, since their situation then would be comparable to that of "the Jews in Nazi-occupied lands" during World War II.

The court also found that, given the Knezevics' advanced age and other factors, it would be unreasonable to return them to someplace in Bosnia-Herzegovina other than their hometown. The court took note of Mr. Knezevic's testimony that during World War II his family provided significant help to British and American military personnel by providing them shelter in their home when the Allies were helping Marshal Tito's forces resist the Nazis and Nazi-aligned Croat forces. Their family's history of having assisted in the earlier resistance to Croat aggression could possibly make the Knezevics even more vulnerable than other Serbs to persecution should they be returned to their home country, the court found.

The court remanded the Knezevics case to the BIA with the expectation that the BIA will reconsider their application for asylum and withholding of deportation, and make a determination about the reasonableness of requiring them to return to some part of Bosnia-Herzegovina other than their hometown.

Knezevic v. Ashcroft, 2004 U.S.App. LEXIS 10162, No. 02-72384 (9th Cir. May 24, 2004).

3RD CIRCUIT: COURT OF APPEALS LACKS AUTHORITY TO REINSTATE AND EXTEND VOLUNTARY DEPARTURE – The U.S. Court of Appeals for the Third Circuit has found that it does not have the authority to reinstate and extend a grant of voluntary departure. The court so ruled on a petition for review, in a case where the Board of Immigration Appeals had granted the petitioner voluntary departure, which had expired while the petition for review was under

consideration. The opinion does not address whether the court can stay the period of voluntary departure if a stay is requested before its expiration, as the Ninth Circuit has found (*see* "9th Circuit: Motion for Stay of Removal Treated as Motion for Stay of Voluntary Departure," IMMIGRANTS' RIGHTS UPDATE, May 20, 2004, p. 9).

In this case the petitioner, Demetrio Reynoso-Lopez, had filed a petition for review of the BIA's decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT), and in the alternative requested that the court reinstate the 30-day voluntary departure order granted by the BIA that expired while the petition was pending. The court upheld the denials of asylum, withholding, and CAT on the merits, finding that they were supported by substantial evidence.

Regarding Reynoso's voluntary departure claim, the court found that the Immigration and Nationality Act gives the power to grant or reinstate voluntary departure solely to the attorney general and his delegates in the executive branch of government. The court rejected Reynoso's argument that as a matter of due process the court should have this power in order to allow him to pursue his right to appeal his other claims. The court noted that Reynoso could have requested that the agency extend his period of voluntary departure and also that under the statute Reynoso could proceed with his petition for review of a removal order while outside the U.S.

Reynoso-Lopez v. Ashcroft, No. 02-3278 (3d Cir. May 25, 2004).

Employment Issues

9TH CIRCUIT UPHOLDS PROTECTIVE ORDER LIMITING EMPLOYERS' INQUIRIES INTO PLAINTIFFS' IMMIGRATION STATUS – In the first appellate court decision interpreting *Hoffman Plastic Compounds v. NLRB*, the U.S. Court of Appeals for the Ninth Circuit held that *Hoffman* does not make immigration status relevant for determining whether an employer is liable for a violation of Title VII of the Civil Rights Act (Title VII). It found that the protective order granted by the lower court was justified because of the grave "chilling effect that the disclosure of plaintiffs' immigration status could have on their ability to effectuate their rights."

Recognizing the harm that such a disclosure would have on undocumented workers in general, the court noted, "[W]hile documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution."

This is an important legal victory for all workers at the two-year anniversary of the *Hoffman* decision, particularly because of the court's understanding of that decision's impact on both documented and undocumented workers. (For more on the Supreme Court's decision in *Hoffman*, 122 S.Ct. 1275 (2002), see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10.) The Ninth Circuit concluded that "even documented workers may be chilled" by this type of discovery because they "may fear that their immigration status would be

changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.”

In *Rivera et al. v. Nibco, Inc.*, Magistrate Judge Snyder of the Eastern District of California’s federal court in Fresno granted a protective order to 23 Latina and Southeast Asian plaintiffs who had filed a national origin discrimination claim under Title VII alleging language discrimination (see “Court Grants Immigrant Workers Protective Order Regarding Immigration Status,” IMMIGRANTS’ RIGHTS UPDATE, Aug. 31, 2001, p. 14). The protective order prohibited the defendant, Nibco, from asking questions about the plaintiffs’ immigration status or other related questions, including their place of birth.

Since there was no dispute that these workers were members of a protected class under Title VII, the lower court found their birthplaces to be irrelevant to the case. The order did allow for questions regarding their place of marriage, educational and employment background, date of birth, and criminal convictions. However, the magistrate limited disclosure of any of the information obtained through these questions to the attorneys and parties only, meaning it could not be revealed to third parties such as governmental agencies. Nibco filed a motion for reconsideration, which was denied by Judge Ishii of the district court, although he certified the defendant’s interlocutory appeal to the Ninth Circuit, which held that the protective order was neither erroneous nor contrary to law.

The appellate court also rejected the defendant’s principal argument that *Hoffman* prohibits any award of back pay to undocumented workers, and therefore that knowing who is undocumented among the plaintiffs is critical to its defense. The Ninth Circuit questioned whether *Hoffman* even extends to Title VII cases as the defendant asserts, given the differences between the National Labor Relations Act (NLRA)—the statute that was at issue in the *Hoffman* decision—and Title VII.

First, the court pointed out that unlike the NLRA, which is enforced primarily by the National Relations Board (NLRB), Title VII relies for its enforcement principally on private actions (complaints and lawsuits) filed by workers. Second, unlike under the NLRA, Title VII plaintiffs are entitled to a broad range of remedies designed to make the plaintiff whole as well as to punish the employer and deter future discriminatory acts. The remedies under Title VII include traditional ones such as reinstatement, back pay, and front pay, as well as full compensatory and punitive damages that are not available under the NLRA. Third, under the NLRA it is the federal agency charged with enforcing the law—the NLRB—that awards back pay to a worker if the employer is found liable. In the Title VII context, it is the federal court system that awards remedies after liability is found. The Equal Employment Opportunity Commission (EEOC) also has broad authority. The Ninth Circuit found this to be a significant factor in distinguishing *Hoffman*’s impact on Title VII cases, since the Supreme Court specifically questioned the NLRB’s authority to award remedies that might conflict with the Immigration and Nationality Act. While the NLRB is limited to awarding remedies under its

statute, federal courts do have the authority to interpret two different statutes and to award remedies that are consistent with two different statutes such as the INA and Title VII.

The Ninth Circuit also rejected Nibco’s argument that under the “after-acquired evidence” doctrine the court was required to facilitate its discovery into any evidence that could limit the remedies available to these plaintiffs if it found that they were indeed undocumented. The court clarified that the “after-acquired evidence” doctrine precludes or limits the remedies a plaintiff may receive if the employer later discovers that the worker engaged in misconduct, but only if the employer can prove that it would have fired the employee for that misconduct had the employer learned of it while she was still working. In the landmark decision developing this doctrine, *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), the Supreme Court concluded that, “as a general rule in cases involving after-acquired evidence of wrongdoing, neither reinstatement nor front pay is an appropriate remedy,” and that back pay should be awarded only from the date of the employer’s unlawful conduct until the date the information of the worker’s misconduct is “discovered.” The Ninth Circuit concluded that “*McKennon* did not hold that depositions could be conducted for the purpose of uncovering illegal actions” by the workers.

While the *Rivera* court did not reach the decision of whether *Hoffman* applies to Title VII cases, the court held that it is clear that *Hoffman* does not make immigration status relevant to a finding that an employer engaged in national origin discrimination under Title VII, and therefore it does not require a court to allow discovery into plaintiffs’ immigration status.

Copies of the underlying protective order and briefs can be obtained by contacting Marielena Hincapié at hincapie@nilc.org.

Rivera et al., v. Nibco, Inc., 364 F.3d 1057 (9th Cir. 2004).

EEOC OBTAINS PROTECTIVE ORDER LIMITING DISCOVERY THAT COULD ADVERSELY AFFECT IMMIGRANT WORKERS – In the first decision to rely on *Rivera et al., v. Nibco, Inc.*, 364 F.3d 1057 (9th Cir. 2004), the Equal Employment Opportunity Commission (EEOC) has obtained a similar protective order from the Federal District Court for the Eastern District of New York in a case in which the defendant sought to inquire into workers’ immigration status and income tax returns.

Agreeing with the EEOC’s argument that allowing such discovery into the immigration status of the workers would have an *in terrorem* effect, the court in *EEOC v. First Wireless Group, Inc.* concurred with the decision of the Ninth Circuit in *Rivera*, as well as the decision in *Flores v. Amigon*, 02 CV 838 (SJ) (E.D.N.Y. Sept. 19, 2002), which held that even if immigration status were relevant, the prejudice to the workers outweighs the probative value of such information. (For more on *Rivera*, see “9th Circuit Upholds Protective Order Limiting Employers’ Inquiries into Plaintiffs’ Immigration Status,” p. 5 of this issue; for more on *Flores*, see “Courts Continue Rejecting Defendants’ Post-*Hoffman* Inquiries into Plaintiffs’ Immigration Status,” IMMIGRANTS’ RIGHTS UPDATE, Oct. 21, 2002, p. 10.)

The defendant also sought information regarding the workers’ income tax returns, arguing that a false statement on the tax returns or failure to file taxes is important to a determination of the workers’ credibility. The court explained that, “because of the

recognized confidential nature of tax returns," the employer would have to meet the two-prong test of showing that (1) the tax returns are relevant to the subject matter of the case, and (2) the defendant has a compelling need to review them because the information they contain is not available anywhere else. The court found that the defendant's discovery request did not pass this test and that if the court were to allow the disclosure of tax returns on the "mere belief that they may contain impeachment material, the protections afforded such returns would be nonexistent." While the court did not allow the defendant access to the income tax returns, it did allow the defendant to ask the workers directly whether they had ever filed tax returns and whether they had made any false statements.

This is an important decision showing the steps the EEOC is taking to protect all individuals, regardless of immigration status, under the statutes it enforces. Advocates will need to remain vigilant about the outcome of such cases and encourage other federal and state administrative agencies to properly enforce their statutes on behalf of all workers. However, it is important to note that this is a partial victory, since the court allowed inquiries into the filing of tax returns and false statements for credibility purposes, which will often present problems for immigrant claimants.

A copy of the decision can be obtained by contacting NILC's Marielena Hincapié at hincapie@nilc.org.

Equal Employment Opportunity Commission v. First Wireless Group, Inc., CV 03-4990 (JS) (ARL) (E.D.N.Y. June 15, 2004).

USCIS ISSUES GUIDANCE ON EMPLOYMENT ELIGIBILITY FOR CITIZENS OF "FREELY ASSOCIATED STATES" – U.S. Citizenship and Immigration Services has issued guidance for employers concerning the employment eligibility of citizens of the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau.

Prior to 1986 these three Pacific Island nations were territories administered by the United States, and relations between them and the U.S. are governed by treaties that are called "Compacts of Free Association." The three countries are often referred to collectively as the "Freely Associated States." Under the compacts, citizens of the FAS have the right to travel to and work in the U.S. The compacts with RMI and FSM were recently amended, and the new guidance explains some of the changes made by these amendments. The amended compact with the RMI took effect on May 1, 2004; that with the FSM has not yet been implemented, but this is expected to take place later this year. The amended compact with Palau has yet to be negotiated. Thus, the new guidance is effective for now only with respect to citizens of the RMI.

The guidance explains that the amended compact provides that citizens of the RMI are no longer exempt from passport requirements for admission to the U.S. However, they continue to be allowed to enter the U.S. without visas and to work in the U.S. Moreover, they no longer need to obtain an employment authorization document (EAD) in order to work in the U.S. They may use a passport showing RMI citizenship, together with an unexpired admission document showing admission under the compact (Form I-94) to establish both identity and employment eligibility.

The guidance notes that an I-94 showing admission in a spe-

cific nonimmigrant status, such as "B1/B2 visitor" is not acceptable, since some RMI citizens are not compact entrants. The I-94 for a compact entrant may indicate "CFA/MIS" or may have another annotation indicating compact admission. The I-94 may indicate "D/S" (indicating admission for duration of status rather than a specific period), or may otherwise lack a specific expiration date.

The guidance also cautions employers that they should not request employees to show specific documentation and should accept documentation that appears to be genuine and to relate to the individual. Citizens of the RMI who have EADs may continue to use them, although they are no longer required to have a valid EAD.

USCIS, Office of Business Liason, "U.S. Employment of Citizens of the Republic of the Marshall Islands and the Other Freely Associated States," Employer Information Bulletin 106 (May 1, 2004), published at 81 *Interpreter Releases* 644 (May 10, 2004).

NEW EAD ELIMINATES REFERENCES TO INS, CONTAINS NEW SECURITY FEATURES – U.S. Citizenship and Immigration Services announced recently that the employment authorization documents (EADs) it is now issuing contain enhanced security features, which include a magnetic strip, a two-dimensional barcode, and other elements "that can be used in forensic examination to determine the card's authenticity." The new card's markings identify it as a document issued by the Dept. of Homeland Security and USCIS—i.e., all references to the now defunct Immigration and Naturalization Service have been eliminated from the card. According to USCIS, the new EAD is being produced at a rate of 24,000 per week.

Public Benefits Issues

BILL REQUIRING HOSPITALS TO REPORT UNDOCUMENTED PERSONS DEFEATED – Rep. Dana Rohrabacher's bill threatening access to emergency health care for undocumented non-U.S. citizens was defeated by a vote of 331 to 88 in the U.S. House of Representatives on May 18. The bill was heard on the floor of the House because the House leadership agreed to bypass the normal committee process, under a deal with Rep. Rohrabacher (R-CA) in exchange for his vote in favor of last year's Medicare Prescription Drug, Improvement and Modernization Act (S. 1). Rohrabacher's reluctance to vote for the Medicare bill stemmed from his objection to its section 1011, which provides \$1 billion over two years to reimburse hospitals, doctors, and emergency transportation providers for uncompensated emergency services to undocumented persons.

The Undocumented Alien Emergency Medical Assistance Amendments of 2004, HR 3722, would have denied hospitals and other health care providers reimbursement for uncompensated emergency care to undocumented noncitizens under section 1011 unless they reported those noncitizens to the Dept. of Homeland Security (DHS). Providers would have been required to collect information, including a sworn statement about the noncitizen's employer and a biometric identifier (e.g., a fingerprint), and transmit the information to the DHS in digital form. As a practical matter, this requirement would have obliged providers to verify the immigration status of all uninsured patients presenting health

care emergencies.

The Rohrabacher bill also would have narrowed the scope of emergency health services available to undocumented persons. Under current law, the Emergency Medical Treatment and Active Labor Act (EMTALA) requires medical personnel to screen and stabilize all persons who seek treatment at an emergency room, and strictly limits the conditions under which a patient may be transferred prior to being stabilized. The Rohrabacher bill would have lowered the threshold set by the EMTALA by permitting hospitals to remove any undocumented patient, including a woman in labor, to his or her country of origin when (1) no "significant likelihood" existed that the patient's condition (or if the patient were a woman in labor, her child's condition) would materially deteriorate as a result of the patient being transported or (2) the care the patient needed (a) "involve[d] organ transplantation or other extraordinary medical treatment (or other treatment the estimated cost of which exceed[ed] \$50,000)" and (b) "[was] for treatment of a condition that existed before the [patient] entered the United States or [was] not required as a direct and immediate result of an accident in the United States."

The bill also would have undermined existing public charge law, which provides that health services other than long-term institutionalization are excluded from public charge determinations, by making a noncitizen's inability to pay medical expenses a ground for his or her removal from the U.S. In addition, employers of undocumented workers whose medical expenses were reimbursed by the federal government under section 1011 would have been required to repay the government for those costs.

Proposals such as HR 3722 jeopardize the health of immigrants and the general public by undermining the relationship of trust between health care providers and their patients, and deterring immigrants and their family members from seeking needed health services, including testing and treatment for communicable diseases. Health care providers, including the American Hospital Association and the National Association of Public Hospitals, opposed the bill vigorously. A summary of the bill is available online at www.nilc.org/immspbs/cdev/Rohrabacher_5-04.pdf.

GAO REPORTS ON UNCOMPENSATED CARE TO UNDOCUMENTED IMMIGRANTS—The General Accounting Office (GAO) has issued its response to a July 2002 congressional request for information on the cost to hospitals of providing uncompensated care to undocumented non-U.S. citizens. The report concludes that the cost cannot be accurately determined because the information gathered by the GAO's survey of over 500 hospitals was insufficient to make accurate calculations possible and because hospitals do not routinely collect information on their patients' immigration status. Among the 198 hospitals that *did* provide sufficient information for the GAO to make calculations, the median percentage of uncompensated care (measured as inpatient days) attributable to undocumented persons was below 5 percent.

The GAO's study looked at the costs to hospitals of providing uncompensated care to undocumented persons, the availability of federal funding sources to offset those costs, and the Dept. of Homeland Security's (DHS's) responsibility for covering the medical costs of undocumented persons apprehended by the Border Patrol.

In an effort to determine hospital costs, the GAO surveyed

hospitals in 10 states selected for their relatively high proportions of undocumented residents: Arizona, California, Florida, Georgia, Illinois, New Jersey, New Mexico, New York, North Carolina, and Texas. The survey asked hospitals to report their numbers of inpatient days for persons with and without Social Security numbers (SSNs) and used the comparison to estimate the share of uncompensated care costs attributable to undocumented persons. Inpatient days were used in lieu of emergency room admissions because hospitals are more likely to have complete information on those patients and because hospitals reported that the majority of uncompensated care costs are associated with inpatients.

While the survey response rate was 70 percent, only 39 percent of the surveyed hospitals provided enough information for the GAO to make accurate calculations. The GAO found that in those 198 hospitals the percentage of uncompensated care days attributable to undocumented persons ranged from 0 to 17 percent, with a median of 4.3 percent for hospitals in the bottom and middle thirds and 4.9 percent for hospitals in the top third.

The GAO used the absence of an SSN as a proxy for undocumented status, although the researchers acknowledged that this proxy would include persons who did not provide an SSN for privacy or other reasons and would exclude any undocumented patients who gave false SSNs. To test the accuracy of this proxy, the survey also asked hospitals if they had a method for identifying undocumented patients. The GAO reports that fewer than 5 percent of the hospitals replied that they had a method for identifying undocumented patients, and that these methods varied and led to results that were inconsistent with the results based on the lack of an SSN.

Regarding the DHS's responsibility for covering the costs of medical care for undocumented persons, the GAO found that the DHS is responsible for providing medical care only for persons it has taken into custody, who are typically persons of special enforcement interest, such as drug smugglers. Border Patrol agents reported that they normally refer persons needing medical attention to hospitals without taking them into custody or attempting to determine their immigration status. Persons needing medical attention may also be admitted into the U.S. under humanitarian parole, but such cases do not occur often.

The report also looked at sources of federal funding for care to undocumented persons. The GAO identified emergency Medicaid and Medicaid disproportionate share hospital (DSH) grants to hospitals that serve a relatively large share of low-income persons as sources, noting that many undocumented persons are not eligible for emergency Medicaid. The report also pointed to the \$25 million allocated to states to assist with the costs of providing care to undocumented persons under the 1997 Balanced Budget Act, but noted that this funding (which ended in 2001) was generally used by states for their Medicaid programs and was not distributed to providers. Finally, the GAO pointed to the funds authorized under the Medicare Prescription Drug, Improvement and Modernization Act of 2003 to reimburse hospitals and other providers for uncompensated emergency services to undocumented persons.

The GAO report recommends that the Dept. of Health and Human Services, in establishing a payment process for the funds, "develop appropriate internal controls" to ensure that payments

are made only to undocumented immigrants or other persons specified by statute. The Centers for Medicare and Medicaid Services is working with provider organizations and others to develop a payment process. NILC has developed written comments that are posted at www.nilc.org/immspbs/health/Issue_Briefs/MPDIMActsec1011_061004.pdf.

USDA ISSUES PROPOSED RULES AFFECTING IMMIGRANTS' ACCESS TO FOOD STAMPS – The U.S. Dept. of Agriculture (USDA) has issued proposed rules to implement the Farm Security and Rural Investment Act of 2002 (“farm bill”). The farm bill restored federal food stamps eligibility to three groups of immigrants who had been rendered ineligible by the 1996 federal welfare law: (1) “qualified” immigrants with disabilities, regardless of their date of entry into the U.S.; (2) persons who have resided in the U.S. in a “qualified” immigrant status for at least five years; and (3) “qualified” immigrant children, regardless of their date of entry into the U.S. The proposed rules implement eleven provisions of the farm bill, including the restorations for immigrants.

The proposed rules, like earlier guidance issued by the USDA, provide helpful clarifications of the law and address some of the barriers that prevent eligible immigrants from securing food stamps. The rules could be improved, however, to ensure that, as Congress intended, immigrant families with children have access to critical nutrition assistance.

For example, Congress explicitly exempted immigrant children from the sponsor deeming rules. Under deeming, the income of an immigrant’s sponsor (the person who filed an affidavit of support on behalf of the immigrant) is added to the immigrant’s in determining his or her eligibility for benefits, often rendering the immigrant ineligible as “over-income.” In households where the parent and child have the same sponsor, the proposed rules would deem only a portion of the sponsor’s countable income as available to the household. But adding even a portion of the sponsor’s income could reduce or eliminate the child’s nutrition assistance. And the proposed rules fail to provide a similar “disregard” to households with sponsored immigrant parents and *U.S. citizen* children; *all* of the sponsor’s countable income is added to these households’ incomes.

Reducing the food stamp allocation of unsponsored family members based on a sponsor’s income also violates the terms of the affidavit of support, which in no way obligates the sponsor to provide for other family members. To resolve this issue, the household should be divided into different units. In a household with a sponsored parent and two children (either sponsored immigrant or U.S. citizen children), for example, the two children should be considered separately, with only their parent’s income counted in determining their eligibility. Then the sponsored parent’s eligibility would be determined separately, with the sponsor’s income considered. Alternatively, the sponsored immigrant could be allowed to “opt out” of the household and be treated under the state’s procedures for lawfully present immigrants rendered ineligible for food stamps by the 1996 federal welfare law. The rules also should ensure that U.S. citizen children with sponsored immigrant parents receive the same level of assistance as similarly situated immigrant children.

The proposed rules include helpful provisions that should be retained. For example, the USDA confirmed that a sponsored

immigrant can “opt out” of the assisted unit if the family is concerned about the requirement that the immigrant’s and sponsor’s names and addresses be reported to the U.S. attorney general if the sponsored immigrant is granted the “indigence” exemption from deeming (for households earning less than 130 percent of the federal poverty level). The rules encourage states to ensure that the immigrant consents to any information-sharing with the attorney general or the sponsor.

The proposed rules should be amended to clarify that victims of trafficking, spouses and children of U.S. citizen veterans, and lawful permanent residents who have left the U.S. for short periods of time without abandoning their residency in the U.S. are eligible for food stamps.

Finally, to ensure that eligible immigrants are not deterred from seeking assistance, the food stamp rules should address other barriers, such as concerns about sponsor liability. The regulations should remind agencies that they are not required to pursue sponsors and that they can take equitable factors into account in determining whether to do so. The USDA should reiterate the language in its January 2003 Guidance (“Non-Citizen Requirements in the Food Stamp Program,” available at www.fns.usda.gov/fsp/rules/Legislation/pdfs/Non_Citizen_Guidance.pdf), which explains that state agencies cannot keep any portion of reimbursement collected and will not be penalized for choosing not to pursue sponsors.

There are particularly strong reasons to ensure that children are not penalized by the sponsor liability rules. Congress restored food stamps for children and exempted them from the sponsor deeming rules. The farm bill also excluded children’s food stamps from the list of benefits to which the sponsor’s contract (the affidavit of support) refers in defining the benefits subject to reimbursement. To be consistent with congressional intent, the rules should instruct states not to pursue reimbursement for food stamp benefits used by these children.

NILC’s comments on the proposed rules are posted at www.nilc.org/immspbs/fnutr/foodasst/nilcfdstmpcmnts_061504.pdf. 69 Fed. Reg. 20723–64 (Apr. 16, 2004).

CONNECTICUT RESTORES STATE-FUNDED BENEFITS TO IMMIGRANTS –

When Gov. John G. Rowland signed HB 5689 into law on May 21, 2004, Connecticut restored state-funded public assistance benefits to immigrants. While Connecticut was one of the first states to use state-only dollars to cover immigrants who became ineligible for federal benefit programs under the 1996 federal welfare law, restrictions were subsequently implemented that prohibited the state Dept. of Social Services from accepting any new public assistance applications from such immigrants after June 30, 2003.

The state-funded benefits that were restored by the new law include Medicaid, the Connecticut home-care program, food stamps, and cash assistance. All lawfully residing immigrants who meet the categorical requirements for the programs will be eligible. Applicants for cash assistance must pursue U.S. citizenship “to the maximum extent allowed by law” unless they are incapable of doing so due to a medical problem, language barrier, or other reason as determined by the commissioner of Social Services. To be eligible for the food stamp program, immigrants must have resided in Connecticut for at least six months. New eligibility rules will go into effect on July 1, 2004.

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