



## Immigration Issues

### **PRESIDENT ANNOUNCES IMPORTANT, BUT FLAWED, IMMIGRATION REFORM PROPOSAL**

– When on Jan. 7, 2004, President Bush outlined his administration’s proposal for comprehensive immigration reform, he cited as reasons for it the fact that “many employers [are] turning to the illegal labor market” and that “millions of hard-working men and women are condemned to fear and insecurity in a massive, undocumented economy.” However, if Congress were to enact the main elements of his proposal, the result would most likely *not* be the elimination of the illegal labor market nor the bringing “above ground” of the millions of undocumented workers currently employed in the United States.

As the centerpiece of his proposal, the president wants to create a new guest worker program with some of the following features:

- All employed undocumented immigrants in the U.S. would be eligible for a temporary nonimmigrant visa if their employers agreed to sponsor them.

- Also eligible for such a visa would be persons not already in the U.S. who had a job offer from a U.S. employer who had tried and failed to fill the position with an employment-eligible worker already in the U.S.

- The new temporary nonimmigrant guest worker visa would authorize its holder to work in the U.S. for up to three years if the visa-holder remained employed, though the visa-holder would not have to be employed the entire time by the original sponsor.

- The three-year guest worker visa would be renewable for an unspecified number of terms, but not indefinitely.

- During their period of lawful guest worker employment, workers would be allowed to travel freely between the U.S. and their homelands.

- The spouse and minor children of a guest worker would be allowed to live in the U.S. with the worker but would not be legally authorized to work in the U.S. unless they qualified to do so as guest workers themselves.

- Guest workers would be eligible to apply for lawful permanent resident status, but they would have to apply through the

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current backlogged system and wait, along with all other applicants for permanent residence, for visas to become available (i.e., the proposal does not envision allowing guest workers to apply for any special adjustment to LPR status once their temporary guest worker visas expire).

- At the end of their period of authorized stay in the U.S., the guest workers would be required to return to their countries of origin.

Other steps the president proposes as part of his immigration reform package include:

- An unspecified increase in the number of permanent resident visas available each year.

- Increased workplace and other enforcement of immigration laws, including the use of biometric identifiers (though the president says he is not calling for the institution of a national ID).

- A requirement that employers report to the government regarding whom they have hired under the guest worker program and who has left their employment, so that the government can track such workers and deport those who have lost their employer sponsorship.

- An option offered to guest workers to have their earnings placed into "preferred tax" accounts that could be drawn down in their countries of origin.

- The negotiation with other countries of social security "totalization agreements" that permit pooling of social security earnings from both the U.S. and the foreign country so that, when they return home, workers from that country are not penalized (in terms of receiving social security benefits) for the time they have spent working abroad.

Despite such enticements intended to encourage immigrants to work legally, critics of the president's proposal doubt that undocumented immigrants are likely to make themselves known to immigration authorities in return for an unknown period of work authorization culminating in a forced return to their countries of origin. Unless they are offered a program that eventually leads to the possibility of becoming U.S. citizens, undocumented people who have much invested in their Stateside life are unlikely to come forward.

Other major flaws in the president's proposal include:

- The fact that a guest worker program made up of millions of relatively low-wage and highly mobile guest workers would be a bureaucratic nightmare to administer.

- The problems of abuse and misuse inherent in guest worker programs, since participants face deportation if they are laid off or fired, which leaves them vulnerable to unscrupulous employers.

- The problems of abuse and misuse of workers that historically have cropped up whenever immigration enforcement has focused on the workplace.

A more thorough analysis of the president's proposal is currently available under "Latest News" on the first page of NILC's website, at [www.nilc.org](http://www.nilc.org).

**BIPARTISAN IMMIGRATION REFORM BILL INTRODUCED BY SENATORS HAGEL AND DASCHLE** – Two weeks after President Bush announced his administration's proposal for comprehensive immigration reform, Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD) in-

troduced bipartisan legislation they hope will help fix the U.S.'s broken immigration system. In broad strokes, their new bill (S. 2010, introduced Jan. 21, 2004) would:

- Provide a mechanism whereby most currently undocumented workers could earn permanent legal status;

- Significantly reduce the waiting time for immigrants coming to join U.S. citizen and lawful permanent resident family members; and

- Create a new temporary worker program that would provide a way for temporary workers who set down roots in the U.S. and choose to stay here to eventually acquire permanent status.

**Family Reunification.** S. 2010 would reclassify the spouses and minor children of lawful permanent residents as "immediate relatives" not subject to per-country immigration limits. It would provide that visas issued to immediate relatives would no longer be counted against the worldwide 480,000-person cap for family-based immigration. And it would make more visas available to other family categories. According to the bill's authors, U.S. State Dept. data suggest that these changes would eliminate the visa backlog in family immigration categories within about four years.

**Earned Adjustment.** S. 2010 would allow for adjustment to lawful permanent residence by workers who can prove "continuous physical presence" in the U.S. (apart from brief, casual, or innocent absences) for at least five years before the bill's date of introduction, who pay a \$1,000 fine plus fees, and who can meet certain other requirements, such as payment of taxes, knowledge of English and civics (or enrollment in relevant classes), and clearance of a law enforcement and criminal background check. To qualify, individuals would also have to prove that they worked during at least three of the five years before the bill's introduction, and that they worked at least one year after the bill was enacted. Exempted from the work requirement would be children under 20, the worker's spouse, and persons granted humanitarian waivers for such reasons as pregnancy or disability.

An additional "transitional worker" program would be available to some undocumented immigrants who do not satisfy the continuous residence and/or work requirements and who have worked in the U.S. for at least two of the five years before introduction of the bill. An apparent drafting error makes the specific requirements for qualifying for this provision a little murky. Upon application, payment of fine and fees and security clearance, those eligible would be granted a three-year temporary status and would eventually qualify for permanent residence if they work for at least two years after enactment of the bill.

Depending on how the transitional worker program is interpreted, it is likely that a million or more persons who have been in the U.S. in undocumented status would be unable to qualify for either the earned adjustment or the temporary worker visas.

**Willing Worker Program.** S. 2010 would significantly modify the current H-2B temporary worker program and create a new H-2C program. Together, the two programs would provide up to 350,000 temporary visas each year, a more than five-fold increase over the number of visas available under the current H-2B program. The spouse and children of a participating worker would be permitted to accompany the worker, though they would be ineligible to be employed in the U.S. unless they qualified independently for temporary worker status. The temporary visas would not be available to undocumented immigrants who have lived illegally in the

U.S. for more than six months.

A key feature of the new program—and one that strongly differentiates it from the president's guest worker plan—is that a temporary worker's employer or the worker's union would be permitted to petition at any time for the worker to remain in the U.S. permanently. In addition, after three years of maintaining lawful temporary status, workers would not need to rely on their employers (or unions) to petition for them because they would be eligible to petition for themselves.

An employer wishing to make use of the program would pay a per-worker fee and would be required to abide by certain regulations designed to protect U.S. workers. For example, participating employers would be required to attest that they are not involved in a labor dispute, that they have tried and failed to recruit employment-eligible workers already in the U.S., and that they will pay the prevailing wage to the temporary workers. S. 2010 provides for an administrative complaint procedure for violations of these provisions that could result in a fine against the employer and equitable relief for the aggrieved worker, and also in the possibility of the employer being barred from participating in the guest worker program for one or more years. Importantly, though, workers would have no access to court to enforce their rights.

Temporary workers would be entitled to the full protection of federal, state, and local labor laws enjoyed by other workers; and the bill provides, among other things, for whistleblower protections intended to address the particular vulnerabilities faced by guest workers who endeavor to vindicate such rights. But, unfortunately, labor laws have proven notoriously insufficient to protect all workers in the sectors in which immigrant workers are concentrated, and S. 2010 provides no additional resources to improve enforcement of workplace protections such as minimum wage and worker safety laws.

Because labor law enforcement is so ineffective, often the only practical solution available to an exploited worker is to change jobs. S. 2010 would provide for limited implementation of an important feature known as "portability," under which temporary workers would be permitted to change employers without losing their right to remain in the U.S. Under S. 2010, the new employer would have to meet the qualifications and paperwork requirements for participation in the temporary worker program, and would have to file the same petition as the original employer. In some cases the worker would also be required to obtain a waiver from the Dept. of Homeland Security before switching jobs.

More analysis of the Hagel-Daschle immigration reform proposal is available under "Latest News" on the first page of NILC's website, [www.nilc.org](http://www.nilc.org).

**ALL PRACTITIONERS WILL BE REQUIRED TO REGISTER WITH EOIR UNDER PROPOSED RULE** – All attorneys and representatives who appear before immigration judges or the Board of Immigration Appeals will be required to register with the Executive Office for Immigration Review in order to obtain a "user ID" once a rule recently proposed by the U.S. Dept. of Justice becomes final.

Under the proposed rule, each registered immigration law practitioner would be assigned a unique user ID and issued a password. After the registration system was in place, practitioners

would be required to provide their user ID when filing an entry of appearance in a case. Practitioners who failed to register would not be allowed to represent clients before the immigration courts or the BIA. Under "extraordinary circumstances" and only one time per practitioner, an immigration judge could allow a practitioner who had not previously registered to appear before him or her, but only after requiring that the practitioner provide, on the record, the information he or she would have to provide when registering. The IJ would instruct such a practitioner to register online immediately after the hearing.

Practitioners would be required to register online, either from their own computers or via a "dedicated practitioner workstation" that would be available in each public EOIR facility. At the initial registration, they would have to provide their full name, their date of birth, the last four digits of their Social Security number, their mailing addresses, their e-mail address, and limited data about their background, including any bar admissions or, for accredited representatives, the name of and contact information for the recognized organization with which they are associated.

According to the proposed rule's supplementary information, the DOJ is instituting this registration requirement as a component of a new electronic system it is developing for the filing of immigration court cases and appeals to the BIA, and for accessing case files. The user IDs will be instrumental to the EOIR's new electronic case-tracking, scheduling, and practitioner-notification systems, according to the DOJ.

Practitioners, in turn, will be able to maintain and update their EOIR registration information online and, eventually, to submit and retrieve documents to/from the EOIR via the Internet.

The EOIR has not yet set a date by which it will begin registering practitioners. According to the proposed rule's supplementary information, the agency "will provide a minimum of 60 days advance publicity of the availability of the system before adherence to the registration system's requirements will become mandatory for practitioners."

Any written comments on the proposed rule must be received by the EOIR on or before Mar. 1, 2004.

68 Fed. Reg. 75160–64 (Dec. 30, 2003).

**NINETEEN DRIVER'S LICENSE BILLS BECAME LAW IN 2003** – During the 2003 state legislative sessions, at least 119 bills in 40 different states were introduced to address immigrants' ability to obtain a driver's license. Twenty of the bills were signed into law. Approximately 38 of the bills sought to expand immigrants' access to driver's licenses, and 66 bills sought to restrict access.

Most of the expansive bills sought to eliminate lawful presence requirements, expand the list of documents used to prove identity, and allow alternatives to having to provide a Social Security number (SSN). Of the 38 expansive bills, 6 were signed into law. New laws containing the following provisions were passed in the following states:

➤ **Georgia.** An applicant who does not have an SSN may provide certification from the Social Security Administration (SSA) that he or she is not eligible to be issued an SSN.

➤ **Hawaii.** An SSN is required only if the applicant is eligible for one. If the applicant does not have an SSN, the applicant must submit a letter from the SSA stating that he or she is ineligible to

obtain an SSN.

➤ **Kansas.** An applicant for a driver's license must submit an SSN or, if the person does not have an SSN, an individual taxpayer identification number (ITIN). Applicants who do not have an SSN or ITIN must submit a sworn statement to that effect.

➤ **Louisiana.** A temporary license will be issued to "foreign nationals" who have been present in Louisiana for at least 30 days and who are employed in the agricultural industry. Such applicants must provide an ITIN, proof of Louisiana residency, and any other documentation required by the Office of Motor Vehicles. The license will be distinguishable from all other licenses and expire one year from its date of issuance.

➤ **New Hampshire.** Immigrants temporarily residing in New Hampshire may apply for licenses.

➤ **New Mexico.** An applicant who does not have an SSN may submit an ITIN.

California's bill expanding access to driver's licenses for immigrants was signed by former Gov. Davis but was repealed soon after Gov. Schwarzenegger took office. The new governor, negotiating with state legislators, promised to "take a fresh look" at the issue and to consider another bill during the upcoming session.

The restrictive bills that were enacted in 2003 provide, among other things, for new lawful presence requirements, elimination of foreign documents as a form of identification, and requirements that licenses expire when the license-holder's immigration documents expire. Of the 66 restrictive bills, 7 were signed into law. New laws containing the following provisions were passed in the following states:

➤ **Colorado.** Public entities are prohibited from accepting a document that is not "secure and verifiable," including documents not issued by a state or federal jurisdiction or recognized by the U.S. government and not verifiable by federal or state law enforcement, intelligence, or Homeland Security agencies. Note that this law extends beyond the driver's license context to all public services.

➤ **Nevada.** Two laws were passed in Nevada in 2003. The first prevents a consular identification card from being used as proof of age or identity in obtaining a driver's license. (However, the same bill authorizes state and local governmental entities to accept a consular identification card in all other instances when a person needs to identify him or herself.) The second law requires that the license expire with the license-holder's immigration document and that the Dept. of Motor Vehicles can refuse to accept a driver's license issued by another state or the District of Columbia (DC) if the DMV determines that the other state or DC has less stringent standards than Nevada for issuing a driver's license.

➤ **New Jersey.** The new law requires that licenses expire with the license-holder's immigration documents. The law also replaces the state's DMV with the New Jersey Motor Vehicle Commission.

➤ **Tennessee.** The new law prohibits a consular identification card from being used as proof of age or identity in obtaining a driver's license. (The same bill authorizes state and local governmental entities to accept a consular ID card in all other instances when a person needs to provide proof of identity.)

➤ **Virginia.** The new law codifies an existing lawful presence policy. Nonimmigrants can apply for a temporary license, which

will expire with the license-holder's immigration document. If there is no expiration date on the immigration document, a license will be granted for one year.

➤ **West Virginia.** The new law requires that licenses expire with the applicant's immigration documents.

In addition, 15 driver's license-related bills that affect immigrants—but do not directly expand or restrict their access to licenses—were introduced. Six of these bills were signed into law. Arizona, Iowa, Kansas, Kentucky, and New Mexico now require all driver's license applicants to register with the Selective Service. And a Maryland law authorized the creation of a task force to study driver's license documentation, driver's license-related fraud, terrorist watch list developments and possible use, and uninsured and unlicensed driver's data.

For more detail on driver's license bills that were signed into law in 2003, see the table "2003 State Driver's License Proposals" on NILC's website at [http://www.nilc.org/immspbs/DLs/2003\\_DL\\_proposals\\_12-03.pdf](http://www.nilc.org/immspbs/DLs/2003_DL_proposals_12-03.pdf).

#### NEW LAW EXPANDS ELIGIBILITY FOR "T" NONIMMIGRANT STATUS –

Congress has enacted and President Bush has signed the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA), which expands eligibility for T nonimmigrant status for victims of trafficking (for a description of implementation of the original statute, see "DOJ Issues Regulations for T Visas, Available to Victims of Trafficking," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2002, p.2).

The new law expands eligibility for T status in a number of ways. It clarifies that victims who cooperate with state and local law enforcement agencies can qualify for status, as well as those who cooperate with federal authorities. The TVPRA also raises, from 15 to 18 years old, the age at which a person qualifies as a juvenile victim who, to be eligible for T status, is not required to show that he or she has cooperated with law enforcement authorities. The new law also adds unmarried siblings under age 18 to the list of family members who may receive T status when the principal applicant is under age 21. In addition, the TVPRA makes the public charge ground of inadmissibility inapplicable to applicants for T status. The TVPRA also makes T status dependents eligible for legal assistance from agencies funded by the Legal Services Corporation. In addition, the new law establishes federal civil causes of action for sex trafficking, trafficking for forced labor, and coercion resulting in forced labor.

*Trafficking Victims Protection Reauthorization Act of 2003,*  
Public L. No. 108-193 (Dec. 19, 2003).

## Litigation

#### JUDGE APPROVES CATHOLIC SOCIAL SERVICES SETTLEMENT – U.S.

Federal Judge Lawrence K. Karlton has approved a settlement agreement in *Catholic Social Services Inc. v. Tom Ridge* that will allow over 150,000 undocumented immigrants to apply for lawful resident status under the amnesty program created by the Immigration Reform and Control Act of 1986 (IRCA).

Under IRCA, undocumented persons who had resided in the

United States since before 1982 were eligible to legalize their status and eventually apply for permanent residence. The lawsuit challenged an Immigration and Naturalization Service rule that made persons who had traveled briefly abroad during the period of required residence (i.e., between 1982 and the time they applied for amnesty) ineligible for the program. The lawsuit argued that Congress did not intend for such brief trips abroad to disqualify the people who took them from being able to apply for amnesty.

For more on the history of the lawsuit and the settlement agreement's provisions, see "Settlements Reached in *CSS* and *LULAC/Newman*; Amnesty Application Period for Class Members Could Begin in March," IMMIGRANTS' RIGHTS UPDATE, Dec. 18, 2003, p. 4. The settlement agreement in *Newman v. Bureau of Citizenship and Immigration Services* (formerly *League of United Latin American Citizens v. INS*) has not yet been approved by the federal judge presiding over that case.

**LAWSUIT FILED TO ENJOIN ENTRY OF IMMIGRATION RECORDS INTO FBI'S CRIME DATABASE** – Civil rights and immigrant defense organizations have filed a federal lawsuit challenging a post-9/11 initiative by Attorney General John Ashcroft to enlist state and local police in the routine enforcement of federal civil immigration laws. The groups charge that the defendants are entering civil immigration information regarding hundreds of thousands of non-U.S. citizens into the National Crime Information Center (NCIC), the database in which the Federal Bureau of Investigation stores information about criminals, without lawful authority to do so.

The lawsuit, filed in the U.S. District Court for the Eastern District of New York on Dec. 17, 2003, names as defendants the Depts. of Justice and Homeland Security (DOJ and DHS), the FBI, and U.S. Immigration and Customs Enforcement (ICE), as well as the heads of each of these agencies.

The complaint filed with the court argues that, since the inception (in 1930) of the FBI clearinghouse of federal, state, local, and international criminal justice records that in 1967 was renamed the National Crime Information Center, Congress has carefully delineated the categories of information that may lawfully be collected and exchanged through it. In defiance of these guidelines, the complaint charges, in 2002 the defendants began entering into the NCIC records for persons with outstanding orders of deportation, exclusion, or removal whom the defendants believe have remained in the U.S.—persons the government refers to as "absconders." Then in 2003, they began entering records for persons whom the DHS believes have violated a requirement of the National Security Entry-Exit Registration System (NSEERS), the "special registration" program instituted by the attorney general in June 2002.

State and local police officers throughout the U.S. access the NCIC database "millions of times each day," according to the complaint, in the course of performing their regular patrol duties. When a local police officer pulls over a driver for committing a traffic violation, for example, he or she may run the driver's biographical information through the NCIC to check if any arrest warrants are outstanding against the driver. If such a warrant exists, the officer will arrest and hold the driver. By entering information into the database about suspected "absconders" and

violators of NSEERS-related requirements, the defendants hope to enlist state and local police in their efforts to apprehend and arrest such people, despite Congress's having broadly preempted state or local police from making federal immigration-related arrests, except if they follow specific statutory procedures. (For more on this issue of who is authorized to enforce civil immigration laws, see "Alabama State Troopers Said to Receive 'Clear Authority' in Civil Immigration Enforcement," IMMIGRANTS' RIGHTS UPDATE, Nov. 24, 2003, p. 5.)

Furthermore, the lawsuit's plaintiffs charge that the immigration-related data being entered into the NCIC database is, by the DOJ inspector general's own admission, seriously flawed and not reliable (for more on the unreliability of immigration-related data and its implications, see "Justice Dept. Order Exempts Crime Database from Accuracy Requirement," IRU, June 3, 2003, p. 6). As a result, state and local officers who make immigration-related arrests based on that information are liable to be making them wrongfully, both because they are engaging in civil immigration law enforcement activities that Congress has barred the police from performing and because it is likely that the person they are arresting is guilty of nothing more than having done business with one of the government's most inept bureaucracies.

Finally, the plaintiffs charge, the government's misuse of the NCIC database undermines public safety by deterring crime victims and witnesses who are immigrants from cooperating with local or state police, for fear that they may be arrested. It also diverts scarce resources from priorities that local jurisdictions have identified as being most important, exposes officers untrained in the complexities of immigration law to liability for making wrongful arrests, and encourages racial and ethnic profiling on the part of police, the plaintiffs charge.

In their complaint, the plaintiffs ask the court to rule that the defendants' entering of civil immigration information into the NCIC and disseminating it to state and local police officers is not authorized by any statute, that it is unlawful because it encourages police to engage in civil immigration enforcement activities that they are preempted from conducting, and that, unless and until they obtain lawful authority to enter civil immigration information into the NCIC, the defendants must stop entering it and must remove all such information already entered.

The lawsuit's plaintiffs are the National Council of La Raza, the New York Immigration Coalition, the American-Arab Anti-Discrimination Committee, the Latin American Workers Project, and Unite. The complaint is available in PDF format online at [www.aclu.org/Files/OpenFile.cfm?id=14599](http://www.aclu.org/Files/OpenFile.cfm?id=14599).

*National Council of La Raza, et al v. Ashcroft, et al*,  
No. CV 03-6324 (E.D.N.Y., filed Dec. 17, 2003).

**SUPREME COURT TO CONSIDER LEGALITY OF INDEFINITE DETENTION OF INADMISSIBLE IMMIGRANT** – The U.S. Supreme Court has granted a petition for writ of certiorari to consider whether under immigration law the government may indefinitely detain inadmissible immigrants. The case may resolve a split that has developed among the circuit courts of appeal. The petitioner, a Cuban who entered the U.S. during the 1980 Mariel Boatlift, seeks to overturn an adverse decision by the Eleventh Circuit Court of Appeals.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court ruled that

section 241(a)(6) of the Immigration and Nationality Act did not authorize the indefinite detention of lawful permanent residents with final removal orders. The Court instead interpreted the statute as authorizing detention only for the period of time reasonably necessary to carry out the removal. Because the petitioners in *Zadvydas* were lawful permanent residents, the Court did not determine whether the same limitation applies to the detention of inadmissible immigrants under the statute. The Sixth Circuit and the Ninth Circuit have ruled that the reasonableness limitation of *Zadvydas* applies to the detention of inadmissible immigrants, while the Fifth, Seventh, Eighth, and Eleventh Circuits have found that the limitation does not apply. Compare *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) (*en banc*) and *Xi v. INS*, 298 F.3d 832 (9th Cir. 2002); with *Rios v. INS*, 324 F.3d 296 (5th Cir. 2003), *Hoyt-Mesa v. Ashcroft*, 272 F.3d 989 (7th Cir. 2001), *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003), and *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003). *Benitez v. Wallis, Dist. Dir., INS*, 72 U.S.L.W. 3463 (Jan. 16, 2004).

#### 9TH CIRCUIT OVERTURNS BIA FINDING THAT STATE CONVICTION FOR SIMPLE DRUG POSSESSION IS "AGGRAVATED FELONY" –

The U.S. Court of Appeals for the Ninth Circuit has issued a decision rejecting the finding of the Board of Immigration Appeals that an Arizona conviction for possession of methamphetamine constitutes an "aggravated felony" for purposes of immigration law. The conviction was a felony under Arizona law but under federal law could only have been prosecuted as a misdemeanor. The court concluded that for a drug conviction to constitute an aggravated felony for immigration purposes, it must either have a trafficking element or be punishable as a felony under federal drug laws.

In so ruling, the court distinguished between the determination of what constitutes an aggravated felony for purposes of sentence enhancement and the determination for immigration purposes. The Ninth Circuit and most other circuits have found that for purposes of applying federal sentencing guidelines that require an increased sentence where an immigrant has illegally reentered the United States following removal for having committed an "aggravated felony," a drug conviction with no trafficking element is considered an aggravated felony if it is classified as a felony under the law of the jurisdiction under which the conviction is obtained, whether state or federal. In distinguishing between this context and that of immigration law, the court reasoned that the need for national uniformity is a fundamental concern of immigration law, whereas criminal sentencing is primarily a state function. Applying a uniform federal standard to the determination of what constitutes an aggravated felony for immigration purposes ensures that fortuitous differences in state laws do not result in nonuniform differences in treatment under immigration law of similarly situated immigrants. Both the Second and Third Circuits have issued rulings that make this distinction. *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002).

As an example of the discrepancies that would arise from allowing differences in state laws to determine what constitutes an aggravated felony for immigration law purposes, the court noted that possession for one's own use of 30 grams or less of mari-

juana would not be a deportable offense, much less an aggravated felony, in most states; however, in North Carolina it would constitute an aggravated felony, barring nearly all forms of relief from removal, if the state definition were controlling.

The decision rejects the rule announced by the BIA in *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002). In *Yanez* the BIA abandoned its prior precedent decision of *Matter of K-V-D-*, 22 I. & N. Dec. 89 (BIA 1999), in which it distinguished between the purposes of sentence enhancement and immigration law, and fashioned a federal standard to ensure uniformity in determining when a drug conviction is considered an aggravated felony for immigration purposes. Noting that the Fifth Circuit had rejected its approach in *K-V-D-*, the BIA decided to abandon it and instead to follow the law of the circuit in which each case arises, including criminal law precedent. Thus, in circuits with no immigration law precedent on this issue, but with precedent regarding the definition of "aggravated felony" for sentence enhancement purposes, such as the Ninth Circuit prior to this most recent decision, the BIA would simply apply the criminal law precedent (for a fuller description of *Yanez*, see "BIA Will Follow Federal Criminal Precedent in Determining whether State Drug Offenses Constitute 'Drug Trafficking' Aggravated Felonies," IMMIGRANTS' RIGHTS UPDATE, May 30, 2002, p.3). Subsequently, even though the Second Circuit had distinguished between the criminal and immigration law contexts for aggravated felony determinations in *Aguirre*, the BIA decided to apply the Second Circuit's criminal law precedent to the immigration law determination, in *Matter of Elgendi*, 23 I. & N. Dec. 515 (BIA 2002), reasoning that the Second Circuit's prior decision was based on uniformity considerations which the BIA now rejects.

The court concluded that, because the petitioner's offense does not involve a trafficking element and is not punishable as a felony under federal law, it does not constitute an aggravated felony for immigration purposes. Accordingly, the BIA erred in finding him ineligible for cancellation of removal, and the court remanded the case for further proceedings.

*Cazarez-Gutierrez v. Ashcroft*, \_\_ F.3d \_\_,  
No. 02-72978 (9th Cir. Jan. 26, 2004).

## Employment Issues

#### CONCERNS RAISED ABOUT POTENTIAL IRS SHARING OF ITIN-RELATED INFORMATION –

Agents in the office of the U.S. Treasury Inspector General for Tax Administration (TIGTA) may have improperly targeted for investigation persons who used individual taxpayer identification numbers (ITINs) when filing their income tax returns. The TIGTA is the law enforcement arm of the U.S. Treasury Dept. Advocates are concerned that a result will be to discourage the nation's millions of immigrant taxpayers from filing tax returns.

Immigrant tax-filers who are not eligible for a Social Security number can apply for an ITIN so they can comply with their legal obligation to file tax returns. The confidentiality of that information is protected under section 6103 of the Internal Revenue Code. As the Internal Revenue Service's (IRS's) national taxpayer advocate recognized in her most recent annual report to Congress

(dated Dec. 31, 2003), "Nowhere is the importance of the confidentiality protections of tax return information under IRC section 6103 more apparent than with the taxpayer population using ITINs . . . Confidentiality of ITIN information . . . is critical to encouraging undocumented taxpayers to file tax returns." The annual report acknowledges that many taxpayers using ITINs are undocumented and that "[t]he IRS ITIN databank is understandably of interest to other federal agencies charged with enforcing the immigration laws and protecting national security." Nevertheless, the IRS recognizes that it must "vigorously protect" the confidentiality of ITIN information. As the report notes, "Despite the distinctly undesirable behaviors actually or potentially associated with ITINs, the [IRS] remains legally responsible for enforcement of the nation's tax laws with respect to ITIN holders."

Recently, however, it has come to light that Louisville, Kentucky-based TIGTA agents targeted for investigation tax-filers who used ITINs because the ITINs appeared on their W-2 forms, indicating that they were working without proper employment authorization. As a result of the investigations, the TIGTA filed federal criminal charges unrelated to the enforcement of tax laws against the ITIN-users, and the latter now face removal proceedings. Since the TIGTA and the IRS are separate agencies within the U.S. Treasury Dept., one possible explanation for how TIGTA agents knew whom to target was that Louisville-based IRS agents tipped them as to which tax-filers had used ITINs.

One taxpaying worker, a tobacco picker who in 2000 worked a few months for a nursery, is facing serious document fraud charges as a result of a TIGTA investigation. TIGTA agents used the fact that the worker's wife's W-2 contained an ITIN as a reason for contacting his prior employer and immigration authorities. The criminal charges the TIGTA subsequently filed against him are for alleged fraudulent use of a Social Security number and an alien registration (or "green") card, not for any violation of tax laws. A conviction of document fraud can permanently bar an undocumented person from adjusting to legal status or immigrating to the U.S. Compounding the seriousness of the TIGTA's action against the tobacco picker is the fact that the criminal complaint it filed in federal court contains the worker's legitimate ITIN, as well as the name, address, and Social Security number of the person whose SSN he allegedly used when applying for the nursery job—an alarming invitation to anyone with access to the complaint to steal the SSN-owner's identity.

The TIGTA agent who conducted the investigation advised the taxpayer's lawyer that the IRS has compiled a list of 250,000 persons nationwide whom the agency suspects are undocumented. The agent advised the lawyer that, for national security reasons, his personal intention is to prosecute as many of these people as possible. The IRS subsequently has denied that it has such a list.

In a letter to the taxpayer's lawyer, the IRS's national taxpayer advocate maintained that "it is not the policy of the IRS to release tax returns or return information to federal agencies for investigation of nontax crimes unless a Federal district court judge or magistrate has issued to us an ex parte order requiring the release of that information. IRC 6103(i)(1)." She acknowledged that congressionally-authorized taxpayer clinics for persons of low income serve immigrants who are not legally eligible to work in the

U.S. She asserted that IRS employees are required to release information to TIGTA in the course of an official TIGTA investigation and that she had been personally advised by the acting Treasury inspector general for tax administration that it is completely inaccurate to state that TIGTA is investigating 250,000 taxpayers with the intent of prosecuting those who are undocumented and have committed document-related crimes. She advised the lawyer that "TIGTA is now looking into the way in which this particular case was handled" and that she has "been assured that this kind of issue and action is not in its normal investigative inventory for handling in the manner this case was handled." She reiterated that the "protections of IRC 6103 for tax returns and tax return information is [sic] very great." (For a copy of the national taxpayer advocate's letter to the tobacco worker's attorney, contact NILC's Joan Friedland at [friedland@nilc-dc.org](mailto:friedland@nilc-dc.org).)

However, in what is evidently a troubling departure of opinion and interests, the TIGTA made clear in a January 2004 report that it disapproves of restrictions on the IRS sharing ITIN-related information, complaining that this prevents the IRS from "assist[ing] with addressing unauthorized immigration or unauthorized work." (The report, titled "The Internal Revenue Service's Individual Taxpayer Identification Number Creates Significant Challenges for Tax Administration," Ref. No. 2004-30-023, Jan. 2004, is available online at [www.ustreas.gov/tigta/2004reports/200430023fr-redacted.html](http://www.ustreas.gov/tigta/2004reports/200430023fr-redacted.html).)

Immigrants' rights and taxpayers' advocates were gratified by the national tax advocate's clear recognition of the potential for cases such as the tobacco picker's to discourage taxpayers from filing tax returns. However, the impact of the TIGTA's actions call for a clear statement of commitment from the highest reaches of the Treasury Dept. that such enforcement actions will not be tolerated. Accordingly, the National Immigration Law Center, the Center for Economic Progress, the National Consumer Law Center, the National Council of La Raza, the National Employment Law Project, the Midwest Immigrant and Human Rights Center, and the Louisville LegalAid Society Low Income Tax Clinic have written to the secretary of the Treasury, the IRS commissioner and other high-ranking Treasury Dept. officials seeking to obtain such a commitment.

The organizations expressed their deep concern that the IRS and the TIGTA are using their resources to enforce immigration laws, an activity that is not within their jurisdiction and that only serves to undermine tax administration purposes. If complying with the tax laws renders immigrants more vulnerable to immigration enforcement than they would have been had they not filed tax returns, then many of the resources that have gone into conducting outreach and education among the growing immigrant communities across the U.S. urging them to apply for ITINs and file their taxes will be for naught. As a law enforcement agency, the TIGTA should be focusing its efforts on fighting tax evasion, money laundering, and other tax-related criminal activities rather than acting as deputized immigration agents. Likewise, the IRS should be working towards removing the barriers to compliance faced by immigrant taxpayers rather than cooperating in immigration enforcement activities that will undo any efforts to bring all workers into the tax system.

This issue arises at a critical time during the tax-filing season. Before taxpayers' advocates can continue confidently assisting

immigrant taxpayers this season and advising them that the IRS will not share the information on their returns with other government agencies, they need to hear a definitive and official public statement to that effect from the IRS commissioner and the Treasury Dept.'s inspector general and/or secretary. So do immigrants' advocates who educate and advise taxpayers about their rights and obligations with respect to tax laws. Anything less will result in advocates having to inform immigrant taxpayers that, while it is their obligation to file tax returns, if they do so there is also a great risk that, if they got their job by using fraudulent documents, they will be criminally prosecuted and possibly deported.

While advocates have always had some concerns about whether it is safe for immigrant tax-filers to use an ITIN, the post-9/11 climate has clearly made this an even more urgent concern. While these latest enforcement developments might be limited to Kentucky, and while it is possible that any further enforcement in these cases will be quelled, the risk of any future inappropriate enforcement action still exists unless the Treasury Dept. issues a clear policy statement and puts internal mechanisms in place to prevent it from occurring.

As a result of the renewed debate over immigration reform and what to do about the millions of undocumented immigrants now living and working in the U.S., many more immigrants are coming forward to file tax returns as a means of showing that they have voluntarily complied with U.S. tax laws and are persons "of good moral character." Discouraging people from filing their taxes clearly conflicts with the immigration law's requirement that immigrants, lawful or undocumented, comply with the tax laws, and it provokes fear within the immigrant taxpayer community that will make it more difficult for undocumented workers to "come out of the shadows" once immigration reform becomes a reality.

**MASSACHUSETTS BOARD DOES NOT EXTEND *HOFFMAN'S* REACH AND AFFIRMS UNDOCUMENTED WORKERS' RIGHT TO WORKERS' COMPENSATION**—The Reviewing Board of the Massachusetts Dept. of Industrial Accidents (DIA) recently issued an important decision upholding the right of undocumented workers to be compensated under state workers' compensation laws. The DIA issued its decision after hearing an appeal by the company that insured the employer of an injured undocumented worker who was awarded workers' compensation.

In appealing the decision, the insurance company asserted that the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), bars the worker from receiving workers' compensation benefits because he is undocumented. (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.) The DIA based its ruling that *Hoffman* does not bar undocumented workers from receiving workers' compensation on two findings.

First, the DIA ruled that a contract of employment between an employer and an undocumented worker is an enforceable contract, insofar as all workers, regardless of immigration status, should be compensated for legitimate work injuries under the contract of workers' compensation insurance. Second, the DIA ruled that

*Hoffman* does not preempt the interpretation of Massachusetts law as giving undocumented workers an enforceable contract of employment for purposes of workers' compensation.

The case involved a fifty-one-year-old cleaner and construction laborer, Guillermo Medellín, who fell into an eight-foot-deep hole after the ground crumbled beneath his feet while he was excavating poles with a jackhammer. Despite surgeries and extensive physical therapy, his right arm remains impaired. Medellín filed a claim for workers' compensation, but the insurance company resisted payment. During a hearing on Medellín's claim, he admitted that he was unauthorized to work in the U.S. because he was on a visitor's visa, and that he was using a false Social Security number to work. The judge presiding over the hearing awarded Medellín continuing workers' compensation, including temporary and total incapacity benefits, under Massachusetts state law. In doing so, the judge relied on a 1997 Massachusetts workers' compensation case that established that undocumented workers are employees under the state workers' compensation law, and that, therefore, an employee's immigration status does not bar receipt of benefits under this law.

The insurance company appealed the decision only after the Supreme Court issued its decision in *Hoffman*. Though Medellín argued that the insurance company had waived its right to appeal because it did not challenge the claim on the basis of his status as an undocumented worker at the time of the hearing, the DIA ruled that the company's timing was reasonable because *Hoffman* "has vastly changed the legal landscape for undocumented immigrant employees."

In considering the appeal, the DIA first analyzed Medellín's workers' compensation award in the context of the *Hoffman* decision. The DIA recognized that despite *Hoffman*, other "traditional" sanctions under the National Labor Relations Act (NLRA) still stand. In fact, it quoted the Supreme Court's assertion that "[I]ack of authority to award backpay does not mean that the employer gets off scot-free." The DIA also recognized the federal district court decision in *Singh v. Jutla, et al*, 214 F.Supp. 2d 1056 (N.D. Cal. 2002) (for more on *Singh*, see "Court Denies Motion to Dismiss in Retaliation Case Where Worker Was Reported to INS," IRU, Oct. 21, 2002, p. 10) and the amici curiae briefs submitted on behalf of Medellín that interpret *Hoffman* as reaffirming that undocumented workers are "employees" under the NLRA and other federal statutes such as the Fair Labor Standards Act.

However, the DIA declined to accept the argument that *Hoffman* unequivocally supports the position that there is a legitimate employment relationship between undocumented workers and their employers. Instead, the issues the DIA considered seminal in determining whether Medellín should be covered under the state's workers' compensation laws were (1) whether a non-U.S. citizen worker's engaging in illegal employment as defined by section 274a of the Immigration and Nationality Act (i.e., being employed in the U.S. without employment authorization) makes his or her contract of employment under Massachusetts workers' compensation law also illegal, and (2) if it does not—i.e., if state law is construed as supporting an enforceable contract of employment for undocumented workers—whether federal immigration law preempts this law.



Addressing the first issue, the DIA concluded that employment contracts between undocumented workers and employers are enforceable contracts for the purposes of coverage under state workers' compensation laws. The DIA based its decision on previous case law regarding fraudulent inducement to enter a contract. It reaffirmed prior rulings holding that, while the defrauded party (in this case, the employer) can repudiate a contract upon learning of the fraud (in this case, learning that an employee was not, in fact, authorized to be employed in the U.S.), that repudiation does not in any way operate retroactively—i.e., it does not capture an event (such as a workplace accident) that occurred prior to it. In addition, the DIA examined whether the enforceability of the contract was “tainted” by the illegality of the worker's conduct. Applying the tests established by Massachusetts courts, the DIA concluded that it is not. “[T]he nature of the employment contract was affected by the illegal conduct of the employee insofar as Mr. Medellín sought and attained the employment by fraudulent means,” the DIA found. “However, that illegal behavior was, at most, an incidental part of the contract performance.” The DIA also concluded that “[t]he policy against illegal immigration is, of course, a strong one, but it is juxtaposed against the policy of [the Massachusetts workers' compensation statute] that ensures that legitimate work injuries are compensated under the contract of workers' compensation insurance, which remedy is an integral component of the contract of employment.”

The DIA then addressed the second issue, namely whether federal immigration law preempts a construction of state law as supporting an enforceable contract of employment for undocumented workers. In determining that that federal law does not preempt the Massachusetts workers' compensation statute, the DIA noted that it is a well-established principle that states have great latitude under their powers to legislate matters involving “the protection of the lives, limbs, health, comfort, and quiet of all persons.” The DIA concluded that mandatory insurance schemes, including workers' compensation, are within these powers.

The DIA also cited the McCarran-Ferguson Act, in particular 15 USC sec. 1012(b), which establishes that state laws enacted “for the purpose of regulating the business of insurance” do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise. The DIA relied on a U.S. Supreme Court ruling that federal immigration law does not specifically relate to the business of insurance and relied on a prior state court decision to conclude that the Massachusetts workers' compensation statute is a law enacted for the purpose of regulating the business of insurance. By making these two findings, the DIA upheld, despite *Hoffman*, Massachusetts common law establishing that employees' status as undocumented workers does not bar them from receiving workers' compensation otherwise due under state law.

The insurer has appealed the decision. NILC appeared as amicus curiae along with the National Employment Law Project. Briefs on this case are available by contacting NILC's Anita Sinha at [sinha@nilc.org](mailto:sinha@nilc.org).

*Medellín v. Cashman KPA, et al.*, Board No. 03324300,  
Massachusetts Dept. of Industrial Accidents,  
Reviewing Board Decision, Dec. 23, 2003.

**FEDERAL COURT IN N. Y. GRANTS PROTECTIVE ORDER FOR H-2A AGRICULTURAL WORKERS AND ISSUES INJUNCTIVE ORDER IN IMPORTANT RETALIATION CASE** – In an opinion that unequivocally upholds the antiretaliation protections afforded to workers who take steps to enforce their workplace rights, a federal court in New York has granted a group of agricultural workers a temporary restraining order against the former owner of the farm on which they worked.

The court found that the individual, Donald Perry, unlawfully retaliated against four agricultural workers after they filed a complaint against the farm under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA, also known as AWPA). In doing so, the court enjoined Perry from contacting any local, state, or federal government official or agency with regard to the four workers, and restrained and enjoined Perry from any further retaliation. Importantly, the court ruled that the antiretaliation provisions of both the FLSA and the MSAWPA applied to Perry, even though he himself was not the employer of the four workers.

The plaintiffs in the case are from Peru and entered the U.S. as nonimmigrant H-2A agricultural workers. They worked for and lived on Becker Farms during the summer and fall of 2001. Becker Farms is owned and operated by Oscar and Melinda Vizcarra, who are husband and wife. Ms. Vizcarra is the daughter of the defendant, Donald Perry. Perry formerly owned and operated Becker Farms and continues to live within the confines of the Becker Farms property.

On Nov. 2 or 3, 2001, the plaintiffs left the farm with all of their belongings and without informing anyone that they were leaving. About two days later, Mr. Vizcarra reported them missing to the Immigration and Naturalization Service. He told Perry that the workers had left the farm and that he had already called the INS. He also told Perry that the INS seemed reluctant to pursue the workers without having an address or location where they might be found. On Nov. 15, 2001, Perry himself called the INS to report that the workers had absconded. According to Perry, the INS again seemed reluctant to track them down.

On Nov. 28, 2001, the four workers filed a claim against Becker Farms and Oscar and Melinda Vizcarra under the FLSA, the MSAWPA, and other laws, alleging that they had not been paid for many hours of work they had performed and that they had not been paid overtime. The complaint was served on the Vizcarras that day.

When Perry found out about the suit a day or two later, he immediately went to an INS office and met with an agent. Perry once again reported that the workers had absconded, but this time he also stated that the plaintiffs are part of a Peruvian terrorist group's “sleeper cell” here in the United States. Prior to the filing of the workers' complaint, the court later noted in its decision, Perry never made any such allegation to anyone. The decision lists a sample of the various government agencies and officials Perry repeatedly contacted after the workers filed their complaint. They included the U.S. attorney general, the N.Y. state attorney general, the U.S. Dept. of Labor, the N.Y. State Police, the INS, the U.S. Dept. of Homeland Security, and the U.S. State Dept. Perry told these agencies not only that the plaintiffs are part of a terrorist sleeper cell, but also that they had been involved in trafficking and smuggling of other Peruvians who sympathize

with their terrorist organization. Perry also reported the plaintiffs' attorney to officials, accusing the attorney of being involved in alien trafficking and smuggling.

During a court hearing, Perry admitted that he had no evidence that the plaintiffs are terrorists or members of a sleeper cell. The court found that his claims were unfounded, that he had known that they were baseless, and that he "asserted these sensational yet unsubstantiated claims to government authorities for the sole purpose of preventing or dissuading plaintiffs from pursuing the Becker Farms litigation."

The court found that the plaintiffs would suffer irreparable harm if the court did not issue a preliminary injunction enjoining Perry from continuing to retaliate against them. In doing so, the court stated, "Perry's retaliation negatively affects plaintiffs' ability to enforce their rights under the FLSA and MSAWPA. . . . Perry's retaliatory actions undermine the important purposes of the anti-retaliation provisions of FLSA and MSAWPA, and could potentially chill other migrant workers who might seek to enforce their rights."

The court then found that the plaintiffs also demonstrated a likelihood of success on the merits of their FLSA and MSAWPA claims. The court concluded that the plain language of the antiretaliation provisions of both statutes renders them applicable to any "person," and therefore the provisions do *not* just apply to employers. This finding was important because Perry was not the four workers' employer, despite his connections to the farm on which they had worked. In finding that the plaintiffs had demonstrated a likelihood of success on the merits of their case, the court also ruled that the workers had established a prima facie case of retaliation (i.e., a case sufficient on its face and supported by at least the requisite minimum of evidence).

Perry, who argued his case *pro se* (i.e., he represented himself), asserted a number of defenses, all of which the court found to have no merit. First, he argued that the plaintiffs were required to exhaust certain administrative remedies before bringing any litigation in federal court. The court, however, noted that Perry did not cite any authority for his claim, and that "[i]n fact there are many cases in which H-2A workers have filed wage cases in state or federal court without first going through an administrative process."

Perry also argued that the plaintiffs were collaterally estopped from pursuing their claim in federal court because the Office of the New York State Attorney General had already determined that Perry is not liable for retaliation. In rejecting this argument, the court first noted that the state attorney general's office had not, in fact, yet made such a determination. However, even if it had, such a determination would not have a collateral estoppel or preclusive effect on the case, the court held, because the legal issues are different: The state attorney general's office was investigating Perry for retaliation under New York labor law, whereas the plaintiffs were alleging retaliation under federal law. According to the court, "The difference in the laws enforced is critical because New York Labor Law applies only to employers and their agents . . . while the FLSA and MSAWPA anti-retaliation provisions apply to any 'person.'"

Finally, Perry had asserted that the injunction the plaintiffs sought would violate his First Amendment right to free speech. The court soundly rejected this claim. "The injunctive relief re-

quested does not violate Perry's First Amendment right to engage in retaliatory conduct prohibited under the FLSA and the MSAWPA," it found. "Stated differently, Perry has no constitutional right to make baseless accusations against plaintiffs to government authorities for the sole purpose of retaliating against the plaintiffs for filing the Becker Farms litigation."

The court's decision is an important victory for immigrant workers who are often subjected to retaliatory actions for attempting to assert their workplace rights. The court's protective order provides advocates with another useful example of an order that helps protect the rights of plaintiffs who are in the middle of litigation. Finally, the injunction is important because it will help protect the plaintiffs from further retaliation as their case proceeds. Perry has appealed the decision to the Second Circuit Court of Appeals.

The plaintiffs were represented by Patricia C. Kakalec and Daniel Werner of the Farmworker Legal Services of New York, Inc., and by Nancy Jean Schivone of the Legal Aid Society of Mid-New York, Inc., in New Paltz, NY. Advocates interested in reading the briefs for this case may contact NILC's Anita Sinha at [sinha@nilc.org](mailto:sinha@nilc.org).

*Centeno-Bernuy, et al. v. Perry*, No. 03-CV-457-A (W.D.N.Y. filed Dec. 18, 2003), 2003 U.S. Dist. LEXIS 23609.

#### SETTLEMENTS AND RESOLUTIONS REACHED BY OSC IN DISCRIMINATION

**CASES** – Employment discrimination cases in which the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) has obtained settlements and informal resolutions since last September have included a couple employer "document abuse" cases, a case in which an airline's policy was to recruit only U.S. citizens for flight attendant positions, and a case in which a naturalized U.S. citizen was fired on suspicion of not being work-authorized, despite having presented valid evidence that she was employment-eligible. The OSC is part of the Civil Rights Division of the U.S. Dept. of Justice.

***Carlos A. Leal v. Triangle Services, Inc.*** On Sept. 17, 2003, the OSC entered into a settlement agreement with Triangle Services Inc. of Orlando, Florida, to resolve a charge alleging that it fired an asylee in violation of the document abuse provision of the Immigration and Nationality Act. When the employment authorization document that the asylee had presented upon first completing the I-9 employment eligibility verification process expired and Triangle was requiring the asylee to reverify his employment eligibility, the company refused to accept the other acceptable documents he presented. Under the terms of the settlement agreement, Triangle agreed to pay a civil penalty of \$1,100 for a single act of document abuse, \$13,802 in back pay and interest, \$599 for incurred medical expenses, and also the amount the asylee would have been paid for accrued paid days off. The company also agreed to post antidiscrimination notices and to train its employees regarding the antidiscrimination provision of the INA.

***Mata v. Masonite Holdings Inc.*** The charging party in a second document abuse case was a Mexican national and lawful permanent resident whom Masonite Holdings Inc. denied employment on the ground that he was not work-authorized, despite the fact that he provided two documents legally acceptable for demonstrating his employment eligibility. The company had been ac-

cepting comparable documents from native-born U.S. citizens when verifying their employment eligibility. The OSC found reasonable cause to believe that the charging party, a Mr. Mata, had been the victim of document abuse on the basis of his citizenship status. The OSC successfully resolved the charge without filing a complaint. In an Oct. 22, 2003, settlement agreement, Masonite agreed to provide Mata \$4,476 in back pay and all benefits considered back pay (sick leave, annual leave, fringe benefits, and insurance coverage) that he would have earned had he been hired. Masonite also offered Mata the job for which he had originally applied. Furthermore, Masonite agreed to pay \$500 in civil penalties, post antidiscrimination educational notices in the workplace, and have its managers trained in the I-9 employment eligibility verification process.

**Omni Air International.** On Oct. 17, 2003, the OSC closed its independent investigation of and issued a letter of resolution to OmniAir International in Tulsa, Oklahoma, after receiving a letter from the airline stating that it had removed from flight attendant recruiting announcements a notice that the positions were open only to U.S. citizens and that it had instructed its recruiters that no "U.S. citizen-only" requirement applied to flight attendants. Omni operates passenger aircraft for major tour operators and the U.S. Dept. of Defense, but Omni's contract with the latter requires only that *cockpit* crew members be U.S. citizens. Because no economic victims of the rescinded policy could be identified, and because Omni corrected its practice so quickly, no formal settlement was entered.

**Rubi v. The Republican Nat'l Capitol Hill Club.** On Nov. 18, 2003, the OSC issued a letter of resolution dismissing the charge of Maria J. Rubi, a naturalized U.S. citizen, who alleged that the Capitol Hill Club in Washington, D.C., terminated her employment despite the fact that she provided documentation demonstrating her work authorization. In response to the investigation, the employer voluntarily entered into a bilateral settlement agreement with Rubi in which it agreed to pay her \$10,000 in back pay. The OSC issued the letter of resolution after ascertaining that the settlement fully resolved Rubi's claims, and it also conducted a training on the I-9 employment eligibility verification process for the employer's supervisors and managers.

For more information about the OSC's work, including reports about recent case resolutions, visit its website at [www.usdoj.gov/crt/osc/](http://www.usdoj.gov/crt/osc/). To report cases of discrimination, workers and advocates can call the OSC toll free at 1-800-255-7688 (the TDD number for the hearing-impaired is 1-800-237-2515). Employers can obtain more information on immigration-related unfair employment practices by calling the OSC toll free at 1-800-255-8155 (the TDD number for the hearing impaired is 1-800-362-2735).

## Public Benefits Issues

**PRESIDENT'S FY 2005 BUDGET INCLUDES 1-YEAR SSI ELIGIBILITY EXTENSION** – President Bush's fiscal year 2005 budget, released in early February, includes a one-year extension of Supplemental Security Income (SSI) benefits to elderly and disabled refugees and asylees who are scheduled to lose their benefits. As proposed, the change would take effect Sept. 30, 2004, and would

expire at the end of FY 2007. After that, refugees and asylees who do not become U.S. citizens would be able to receive SSI benefits for only seven years after entering the U.S.

SSI provides cash assistance to elderly people and to people who cannot work due to blindness or disability. Immigrant eligibility for a wide range of safety-net benefits, including SSI, was severely restricted by the 1996 federal welfare law. However, Congress provided a window of SSI eligibility for certain categories of immigrants who came to the United States fleeing persecution. People in these categories—which include asylees, refugees, Cuban-Haitian entrants, persons granted withholding of removal, and some Amerasian immigrants—were made eligible for SSI during the first five years after securing their status. After five years, if these immigrants had not become U.S. citizens or qualified under another exception, they would lose their subsistence grant. In 1997, recognizing that it takes more than five years to naturalize, Congress extended to seven years the eligibility for SSI of people in these categories.

A combination of backlogs in the system by which immigrants adjust to permanent residence, processing delays, and language and other barriers have prevented many of these immigrants from becoming citizens within seven years. As a result, thousands of otherwise eligible immigrants have already lost or will soon lose their SSI benefits. According to the Social Security Administration, over 1500 immigrants "timed out" of their SSI benefits in 2003. Another 8,500 will lose their benefits in 2004. (A state-by-state breakdown of the number of refugees projected to reach the

### **Number of Immigrants Projected to Reach 7-Year SSI Cut-Off, By Year**

2004	8,523
2005	7,133
2006	7,604
2007	9,042
2008	5,851
2009	4,066

*SOURCE: Social Security Administration, Sept. 2003*

end of their SSI eligibility is available at the NILC website: [www.nilc.org](http://www.nilc.org).)

While the president's proposed one-year extension would provide short-term relief for some of those who face termination of their SSI grant because of the current seven-year limit, it would not help many immigrants who have already lost their benefits. Almost all of

those formerly eligible for SSI who have already timed out of the SSI program will have already been in the U.S. for eight years by the time the extension is enacted.

In addition, even if a one-year extension is approved, many immigrants eligible for it will not be able to become citizens before the extension expires. Under current immigration law, only 10,000 permanent resident visas are available yearly for asylees who want to adjust to permanent residence, far fewer than the number of asylees waiting to adjust. The backlog is so large that asylees must wait many years to obtain lawful permanent residence; then it takes at least another four years to obtain their U.S. citizenship.

Elderly and disabled immigrants face other obstacles to obtaining citizenship that many simply are unable to overcome. Some are too old or infirm to learn English or to prepare adequately for passing the required civics test. Refugees, asylees, and Cuban-Haitian entrants come to the U.S. to escape persecution, and many have either witnessed or themselves endured events that left them severely physically or psychologically traumatized. Their

resulting disabilities, which qualify them for SSI benefits, make it difficult for them to fulfill the normal requirements for naturalization. Although waivers are available to people who, because of disabilities, are not able to meet the English and civics-related requirements for naturalization, refugees are not always aware of how to apply for such waivers, and many never seek assistance in such matters because, as a result of language and cultural factors, they are hesitant to talk to strangers about their disabilities.

The relevant part of the president's budget proposal reads as follows:

The Budget would allow refugees and asylees to receive SSI for eight years after entry into the country. Currently, refugees and asylees who have not become citizens can only receive SSI for seven years after entry. The proposal recognizes that some individuals have been unable to obtain citizenship within seven years due to a combination of processing delays, and for asylees, statutory caps on the number who can become permanent residents. The policy would continue through 2007.

— [www.whitehouse.gov/omb/budget/fy2005/ssa.html](http://www.whitehouse.gov/omb/budget/fy2005/ssa.html)

#### **N.C. APPEALS COURT OVERTURNS DECISION DENYING MEDICAID COVERAGE OF CHEMOTHERAPY AS TREATMENT FOR EMERGENCY CONDITION**

— A North Carolina court of appeals recently overturned a lower court's ruling that an immigrant's inpatient chemotherapy treatments were not within the scope of an "emergency medical condition" under the state and federal Medicaid laws. Medicaid for emergency medical conditions is available to eligible individuals, including undocumented persons, without regard to immigration status. Like the Arizona Supreme Court's recent decision in *Scottsdale Healthcare, Inc. v. Arizona Health Care Cost Containment System Administration*, 75 P.3d 91 (Ariz. 2003) (see "'Emergency Medical Condition' Given Generous Interpretation by Arizona Court," IMMIGRANTS' RIGHTS UPDATE, Sept. 4, 2003, p. 11), the case has national significance because it interprets a provision of federal Medicaid law that is applicable in each state's Medicaid program.

North Carolina provides emergency Medicaid

(c) . . . for care and services necessary for the treatment of an emergency condition if:

(1) the alien requires the care and services after the sudden onset of a medical condition (including labor and delivery) that manifests itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical treatment could result in

- (A) Placing the patient's health in serious jeopardy,
- (B) Serious impairment to bodily functions, or
- (C) Serious dysfunction of any bodily organ or part.

N.C. Admin Code tit. 10, r. 50B.0302 (June 2002).

This language follows closely the U.S. Dept. of Health and Human Services regulation defining an emergency medical condition, 42 CFR sec. 440.255(b).

The petitioner in the case before the court was Benito Luna, an undocumented immigrant who was diagnosed with a cancer-

ous tumor on his spine. Luna's tumor was surgically removed, and he was discharged from the hospital after rehabilitation, then readmitted on seven separate occasions for scheduled inpatient chemotherapy treatments. The state Medicaid agency approved Luna's application for emergency Medicaid for his surgery. However, the agency denied the emergency Medicaid coverage for the chemotherapy treatments on the ground that the chemotherapy was not provided to address an emergency medical condition. The lower court agreed with the agency's interpretation and denied coverage for the chemotherapy treatments.

The lower court set forth several conclusions, including findings that "[e]mergency medical conditions do not include chronic debilitating conditions resulting from the initial event which later require ongoing regimented care" and that "[t]he potentially fatal consequences of discontinuing ongoing care, even if such care is medically necessary, does not transform the Petitioner's condition into an emergency medical condition."

The court of appeals rejected the lower court's decision. The appellate court concluded that it was an issue of medical fact whether Luna's chemotherapy was treatment for a "chronic debilitating condition" or a necessary course of treatment for his initial emergency medical condition, and that the lower court had failed to establish the facts necessary to support its conclusion. "The factual question to be addressed," according to the appellate court, "is whether the absence of 'immediate medical attention' . . . could result in one or all of the three consequences listed in the [state emergency Medicaid] regulation." The court of appeals further rejected the lower court's claim that the potentially fatal consequences of denying necessary care do not transform a condition into an emergency, concluding that this finding directly contravened the regulation.

The court distinguished Luna's situation, in which he sought care for "a finite course of treatment of the very condition that sent him to the emergency room," from cases involving patients with chronic conditions. These cases include *The Greenery Rehabilitation Group, Inc. v. Hammon, et al.*, 150 F.3d 226 (2d Cir. 1998), a leading case on the interpretation of "emergency medical condition" in the Medicaid Act. The appellate court concluded that the analysis by the Arizona Supreme Court in *Scottsdale* was most applicable, because of the similar facts, identical statutory language, and clarity of guidance provided by the decision.

The court of appeals remanded the case to the lower court with instructions to resolve, as a matter of fact, (1) whether, at the time he sought the services at issue, Luna's condition was manifesting itself by acute symptoms, and (2) whether the absence of immediate medical attention could reasonably be expected to place his health in serious jeopardy or result in serious impairment to bodily functions or serious dysfunction of any bodily organ or part.

*Benito Luna v. Division of Social Services*,  
589 S.E. 2d 917 (N.C. Ct. App. 2004).

#### **10TH CIRCUIT PANEL UPHOLDS COLORADO'S AUTHORITY TO TERMINATE MEDICAID FOR THOUSANDS OF IMMIGRANTS**

— In a 2 to 1 decision, a Tenth Circuit Court of Appeals panel has upheld Colorado's authority to terminate federally funded Medicaid for thousands of lawfully present immigrants, including seniors, persons with disabilities, and members of families who have lived in the United States for years.

On Mar. 5, 2003, Colorado passed a law ending Medicaid eligibility for most "qualified" immigrants, asserting that the 1996 federal welfare law granted states permission to exclude from coverage all but a small group of these immigrants. Implementation of the cuts was scheduled for Apr. 1, 2004. On Mar. 27, the plaintiffs challenged the state's discrimination against immigrants as impermissible under the equal protection clause of the U.S. Constitution. The plaintiffs also claimed that Colorado violated the Medicaid Act and due process by failing to provide adequate notice and hearing rights for immigrants facing the loss of health coverage.

The district court granted a temporary restraining order but denied the plaintiffs' request for a preliminary injunction. The court of appeals granted an injunction blocking the Medicaid terminations pending appeal and invited the federal government to participate in the case. The Tenth Circuit panel issued its decision on Jan. 12, 2004, based primarily on its conclusion that, since the federal statute permits the state to exclude these immi-

grants from coverage, the state's action need only be "rational" to be upheld.

In a forceful dissent, Judge Henry argued that the opinion unduly minimizes the relevant U.S. Supreme Court precedent, *Graham v. Richardson*, 403 U.S. 65 (1971), and "compromises [the Tenth Circuit's] equal protection jurisprudence." In *Graham*, the Court used strict scrutiny to strike down state discrimination against immigrants, despite the state's claim that its restriction was authorized by a federal law.

The three judges agreed that Colorado violated the Medicaid Act by failing to provide a right to pretermination hearings for those who failed to return redetermination forms to the state. The panel directed the district court to preliminarily enjoin the state from denying appeal requests by these Medicaid recipients.

The plaintiffs plan to seek a rehearing on the other issues before the entire Tenth Circuit Court.

*Soskin v. Reinertson*, No. 03-1162,  
2004 U.S.App. LEXIS 343 (Jan. 12, 2004).

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