NATIONAL IMMIGRATION LAW CENTER

Immigrants' Rights Update

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Immigration Issues

INS RESTRICTS RELEASE OF INFORMATION ABOUT DETAINEES IN NONFEDERAL INSTITUTIONS – The Immigration and Naturalization Service has issued an interim rule prohibiting the public disclosure by state and local detention facilities or private contract facilities of the name or any other information relating to any detainee held in custody on behalf of the INS. Under the rule, such information may be disclosed only through requests made to the INS and pursuant to federal law, regulations, and executive orders. In promulgating the rule without prior public notice, the INS invoked the "good cause" exception to the Administrative Procedure Act, asserting that the rule is needed "[i]n light of the national emergency declared by the President . . . with respect to the terrorist attacks of Sept. 11, 2001, and the continuing threat by terrorists to the security of the United States, and the need immediately to control identifying or other information pertaining to Service detainees."

According to an Apr. 19, 2002, report in the *New York Times,* Bush administration officials acknowledged that the rule had "at least in part" been prompted by a lawsuit in New Jersey seeking the release of names of immigration detainees held in county jails. In March 2002, a New Jersey state court ordered the release of information regarding INS detainees held in jails in Hudson and Passaic counties. That order was stayed for 45 days pending appeal at the request of the government.

IN THIS ISSUE

IMMIGRATION ISSUES

INS restricts release of information about detainees in nonfederal institutions ... 1

AG issues proposed rule requiring "surrender" of noncitizens ... 2

Divided BIA denies CAT protection to criminal deportee fearing torture ... 2

BIA: Unaccompanied minor detained for over 1 year following arrival allowed to seek asylum despite failure to meet deadline ... 3

BIA will follow federal criminal precedent in determining whether state drug offenses constitute "drug trafficking" aggravated felonies ... 3

AG overrules BIA to limit its authority to give relief to noncitizens who committed violent crimes ... 4

AG extends TPS for Hondurans and Nicaraguans another 12 months and INS automatically extends their work authorization ... 5

INS issues guidance on adjudications-related provisions of USA PATRIOT Act ... 6

State Dept. issues cable on new affidavit of support law ... 7

LITIGATION

3d Circuit: Unless BIA remand is expressly limited, IJ has jurisdiction to grant any relief for which respondent is eligible ... 8

9th Circuit finds BIA summary dismissal of appeal violates due process because of misleading appeal form and lack of notice ... 8

EMPLOYMENT ISSUES

Hoffman: Lower courts limit impact of High Court's decision barring undocumented worker from receiving back pay ... 8

Immigrant workers fired for correcting their employment records ordered reinstated with back pay ... 9

IMMIGRANTS & WELFARE UPDATE

President signs farm bill; food stamp eligibility restored for large numbers of immigrants ... 9

House of Representatives passes Herger bill; other TANF measures introduced in Senate ... 10

Federal Responsibility for Immigrant Health Act introduced ... 11

HHS proposes rule making fetuses eligible for SCHIP ... 11

OMB releases report on costs and benefits of implementing executive order on services for LEP persons ... 12

Driver's license proposals and campaigns: Surprising progress made since 9/11 ... 12

MISCELLANEOUS

Upcoming Florida Immigrant Summit and workers' rights trainings ... 13

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The rule took effect on Apr. 17, 2002, five days before it was published in the Federal Register. Written comments to the rule must be submitted on or before June 21, 2002.

67 Fed. Reg. 19,508 (Apr. 22, 2002).

AG ISSUES PROPOSED RULE REQUIRING "SURRENDER" OF NONCITIZENS — Attorney General John Ashcroft has issued a proposed rule that would require all non–U.S. citizens to turn themselves in to the Immigration and Naturalization Service within 30 days of the date that a removal order against them becomes administratively final. Individuals who fail to comply with this "surrender" requirement would become ineligible for discretionary relief for a period of 10 years, unless they could demonstrate that their failure to surrender was due to exceptional circumstances.

Former Attorney General Janet Reno first proposed a surrender rule for noncitizens with final removal orders in September 1998. That proposal, which was never implemented, would have applied only prospectively to noncitizens placed in proceedings after the effective date of a final rule. In contrast, the new rule would apply to noncitizens already in proceedings, as long as they receive notice of the surrender requirement.

Under the proposed rule, noncitizens may not be released from INS custody unless they agree in writing or on the record to surrender should they become subject to a final order of removal. Immigration judges and the Board of Immigration Appeals are also required to give notice to all noncitizens of the surrender requirement at the time that they issue any decision in a case. Noncitizens subject to the surrender requirement must surrender to the Detention and Removal Program of the INS district office with jurisdiction over the place where their removal hearing was completed. Individuals who become subject to a final removal order while incarcerated in a local, state, or federal facility must surrender within 30 days of their release from custody. The duty to surrender is suspended for individuals who obtain a stay from the INS, the Executive Office for Immigration Review, or a federal court, and the 30-day surrender period begins again on the day such a stay is lifted.

Noncitizens who fail to comply with the surrender requirement after receiving notice of it become ineligible while in the United States, and for a 10-year period following departure from the country, for discretionary relief. They are barred from the following forms of relief: asylum, cancellation of removal, voluntary departure, adjustment of status, change of status, registry, and 212(h) and 212(i) waivers. The rule also provides that motions to reopen or reconsider will not be granted to noncitizens who have failed to comply with the surrender requirement unless (1) the INS district director waived the requirement, or (2) the noncitizen demonstrates by clear and convincing evidence that the failure to surrender was due to exceptional circumstances and that he or she surrendered for removal as soon as possible after those circumstances ended.

The deadline for submitting comments on the proposed rule is June 10, 2002. 67 Fed. Reg. 31,157 (May 9, 2002).

DIVIDED BIA DENIES CAT PROTECTION TO CRIMINAL DEPORTEE FEARING TORTURE – In an en banc decision, a sharply divided Board of Immigration Appeals panel has held that a Haitian national who claimed that he would be detained and likely tortured if he were removed to Haiti does not merit protection under article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The BIA held that the harm the man claimed he would likely suffer would not constitute torture under the CAT and that he had not met his burden of showing that it was more likely than not that he would be tortured if he were returned to Haiti.

The man had been placed in removal proceedings after having been convicted of selling cocaine. At his hearing before an immigration judge, he applied for asylum, withholding of removal, and protection under the CAT. He asserted that individuals who have been convicted of crimes in the U.S. and deported are detained in Haiti when they arrive. Because a Haitian commission charged with deciding whether and when to release such detainees meets irregularly, they may be held indefinitely. He further stated and submitted evidence that Haitian detainees are subject to cruel, inhumane treatment, including torture. In his application for relief, he submitted U.S. State Dept. reports and newspaper accounts of detainees being deprived of adequate food, water, medical care, sanitation, and exercise. In one newspaper article, a man who had been detained after being deported from the U.S. described burns he suffered on his chest and arm. The asylum applicant claimed that he would be subject to similar treatment if he were removed to Haiti. The immigration judge denied his application, and the man appealed.

On appeal, the BIA reviewed the history of the CAT and noted that the U.S. had ratified it subject to five "understandings." ("Understandings" are provisions that bind only the U.S. and not other CAT signatories.) According to the BIA, these understandings have been incorporated into the implementing regulations (8 C.F.R. § 208.18(a)), which set forth criteria for determining whether a particular act constitutes torture. According to the regulations, torture is (1) an act causing severe physical pain or suffering, (2) intentionally inflicted, (3) for a proscribed purpose, (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim, and (5) not arising from lawful sanctions.

The BIA held that, according to these criteria, the harm the asylum applicant claimed he would be likely to suffer would not constitute torture. The BIA first reviewed Haiti's detention of criminal deportees. It held that the policy of incarcerating criminal deportees arises from Haiti's attempt to deter crime. The policy therefore has a legitimate purpose and is a lawful sanction. In addition, the BIA held that there is no evidence that criminals deported to Haiti are mistreated for a specific intent or a proscribed purpose. The BIA distinguished between mistreatment inflicted with specific intent and other harms, such as those stemming from police brutality, that are unanticipated or unintended. According to the BIA, the latter do not constitute torture. Moreover, criminal deportees who are detained upon their arrival in Haiti are not ill-treated in order to elicit confessions from them or to punish others' acts. Thus, the BIA held that the harms that the asylum applicant anticipated he would suffer upon his return to Haiti would not constitute torture.

The BIA then reviewed whether the applicant had met his burden of proof. In CAT cases, an applicant must show that it is "more likely than not" that he or she will be tortured if returned to a particular country. The applicant had presented documenta-

tion, including newspaper articles and State Dept. reports, on the torture suffered by convicted criminals who are returned to Haiti. The BIA held that the evidence established only that isolated acts of torture occur in Haitian detention facilities. The BIA held that the existence of a pattern of gross, flagrant, mass violations was insufficient to show that a particular individual would be similarly treated. It held that an applicant must show individualized evidence demonstrating that he or she is personally at risk. Since the applicant did not claim that he had suffered torture in the past, since he had no personal knowledge of conditions in Haitian detention facilities, and since he could not meet the individualized standard, the BIA denied his claim.

Two BIA members filed dissenting opinions. Both argued that the applicant had met his burden of proof and took issue with the extreme weight of the burden the majority had required the applicant to meet in supporting his claim under the CAT.

In re J-E-, 23 I. & N. Dec. 291, Int. Dec. 3466 (BIA Mar. 22, 2002).

BIA: UNACCOMPANIED MINOR DETAINED FOR OVER 1 YEAR FOLLOWING ARRIVAL ALLOWED TO SEEK ASYLUM DESPITE FAILURE TO MEET DEADLINE – The Board of Immigration Appeals has issued an en banc precedent decision finding that a Chinese national established "extraordinary circumstances" that excused his failure to apply for asylum within the one-year statutory deadline. The decision comes in the case of an unaccompanied minor who was detained by the Immigration and Naturalization Service on the date of his arrival in the United States and who, for more than a year thereafter, was held in custody without being brought to a hearing.

The respondent in this case was 15 years old when he arrived in the U.S. on July 3, 1998. On the day of his arrival, he was detained by the INS and served with a notice to appear (NTA). The NTA was filed with the immigration court four weeks later. However, although the immigration court repeatedly scheduled master calendar hearings, from August 1998 through February 1999, the INS never brought the respondent to a hearing. On July 13, 1999, the respondent was released from INS detention and paroled to the custody of his uncle. In December 1999, he attempted to file an asylum application with the immigration court, but it was rejected. In May 2000 he did file the application. However, the immigration judge denied it on the grounds that it was not filed within one year of the respondent's arrival in the U.S. and that the respondent failed to show either changed circumstances or extraordinary circumstances to excuse the delay in filing. The respondent then appealed the denial.

On appeal, the BIA noted that the determination of whether an asylum applicant has established extraordinary circumstances to excuse failing to meet the one-year deadline requires "an individualized analysis of the facts of the particular case." Although the regulations explicitly recognize that the fact that an applicant is an unaccompanied minor may constitute an extraordinary circumstance, the BIA found that this fact in itself does not require such a finding. Rather, a respondent "must establish the existence or occurrence of the extraordinary circumstances, must show that those circumstances directly relate to his failure to file the application within the 1-year period, and must demonstrate that the delay in filing was reasonable under the circumstances."

In this case, the BIA concluded that the respondent established extraordinary circumstances. The BIA noted that, once removal proceedings have commenced, the immigration judge has authority to set a deadline for filing an asylum application and that the respondent was not responsible for the INS's failure to bring him to a hearing. The respondent did attempt to file an application in December 1998, five months after his release from detention, and he eventually did file the application within one year of his release from detention. Accordingly, the BIA ordered the case remanded to the immigration judge for consideration of the respondent's asylum application.

BIA Member Filppu, joined by Acting Chair Scialabba and Vice Chair Dunne, as well as Members Cole, Hess, and Pauley, issued a concurring opinion. They agreed that the respondent established extraordinary circumstances excusing his failure to apply for asylum within one year of arrival in the U.S. However, they disagreed with the implication of the majority opinion that a respondent's ability to file an asylum application is constrained by the immigration judge's authority to set deadlines for such filing. *Matter of Y-C-*, 23 I. & N. Dec. 286, Int. Dec. 3465 (BIA Mar. 11, 2002).

BIA WILL FOLLOW FEDERAL CRIMINAL PRECEDENT IN DETERMINING WHETHER STATE DRUG OFFENSES CONSTITUTE "DRUG TRAFFICKING" AGGRAVATED FELONIES – The Board of Immigration Appeals, in an en banc precedent ruling, has overruled prior decisions that sought to establish a federal standard for determining whether state drug offenses constitute "drug trafficking" crimes for purposes of determining whether the conviction establishes deportability as an "aggravated felony" conviction.

The overruled decisions had distinguished appellate rulings in federal criminal cases concerning whether state offenses came within the definition of "drug trafficking" offenses so as to constitute aggravated felonies, on the grounds that those rulings were made for a different purpose—to determine whether a sentence enhancement applied to a defendant, rather than whether the individual was deportable. The new BIA decision rejects the attempt to fashion a uniform federal definition for deportability purposes different than the standard for sentence enhancement purposes. Under the new decision, the BIA will follow such appellate rulings, and, in cases arising in circuits that have not yet decided this issue, the BIA will follow the standards that have been adopted by a majority of circuits. Under the new rule, state convictions for simple possession that could be prosecuted federally only as misdemeanors are considered "aggravated felonies" if the offenses are classified as felonies under state law.

The respondent in this case was convicted twice for possession of cocaine under an Illinois statute classified as a "class 4 felony" under Illinois law. The convictions were for simple possession, with no "trafficking" element. Neither offense could have been prosecuted federally as a felony, because the first conviction was not final when the second possession offense occurred. The issue before the BIA, therefore, was whether a state felony offense that has no "trafficking" element and that could not have been prosecuted federally as a felony nonetheless constitutes an aggravated felony under section 101(a)(43)(B) of the Immigration and Nationality Act.

Under section 101(a)(43)(B), the definition of an "aggravated felony" includes "illicit trafficking in a controlled substance . . .

including a drug trafficking crime (as described in [18 U.S.C. section 924(c)])." The latter provision defines a "drug trafficking crime" as "any felony punishable under" one of three federal drug statutes. In *Matter of Davis,* 20 I. & N. Dec. 536 (BIA 1992), the BIA held that a state drug conviction meets this definition only if it either (1) was a felony under state law and contained a "trafficking" element, or (2) was analogous to an offense that would be punishable as a felony under one of the federal drug laws specified in section 924(c). The BIA adopted this standard in order to promote a uniform federal standard. It followed this rule in *Matter of L-G-,* 21 I. & N. Dec. 89 (BIA 1995), and in *Matter of K-V-D-,* Int. Dec. 3422 (BIA 1999), finding that state convictions classified as felonies under state law did not constitute aggravated felonies because they did not contain a trafficking element and could have been prosecuted only as misdemeanors under federal drug laws.

In deciding now to abandon this standard, the BIA noted that several circuit courts of appeal ruling in criminal cases have used a different analysis. In these cases, the issue has been whether a drug trafficking conviction constitutes an "aggravated felony" such as to require a sentence enhancement when the defendant is convicted for reentry following a removal based on an aggravated felony conviction. These courts have concluded that a drug conviction with no trafficking element constitutes an aggravated felony if it is classified as a felony under the law of the jurisdiction under which the conviction is obtained, whether that jurisdiction is state or federal. *U.S. v. Restrepo-Aguilar,* 74 F.3d 361 (1st Cir. 1996); *U.S. v. Hernandez-Avalos,* 251 F.3d 505 (5th Cir. 2000), *cert. denied,* 122 S.Ct. 305 (2001); *U.S. v. Briones-Mata,* 116 F.3d 308 (8th Cir. 1997); *U.S. v. Ibarra-Galindo,* 206 F.3d 1337 (9th Cir. 2000), *cert. denied,* 531 U.S. 1102 (2001); *U.S. v. Cabrera-Sosa,* 81 F.3d 998 (10th Cir. 1996); and *U.S. v. Simon,* 168 F.3d 1271 (11th Cir. 1999); *cert. denied,* 528 U.S. 844 (1999). On the other hand, two circuits have adopted the BIA's interpretation in immigration cases. *Gerbier v. Holmes,* 280 F.3d 297 (3d Cir. 2002); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996).

In its decision in *K-V-D-,* the BIA distinguished the circuit court criminal decisions finding state felony convictions to be aggravated felonies even though they could not have been prosecuted federally as felonies on the grounds that the definition for criminal sentence enhancement serves different purposes than for removal. Only the Fifth Circuit has expressly rejected this distinction, again in a criminal case. *Hernandez-Avalos*, *supra.* Following that decision, the BIA overruled *K-V-D-* and held that it will follow *Hernandez-Avalos* in cases arising in the Fifth Circuit. *Matter of Salazar,* 23 I. & N. Dec. 223 (BIA 2002) (see "BIA Rules that State Deferred Adjudication of First-Time Drug Offense Does Not Eliminate Effect of Conviction for Immigration Purposes," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 4). Now the BIA has decided to abandon the effort to establish a uniform federal standard and instead will follow circuit court criminal precedent. In those circuits that have not ruled on this issue, the BIA will follow the rule that the majority of circuits have adopted.

Under the BIA's new rule, state court felony convictions will still have to be prosecutable as federal felonies in order to constitute aggravated felonies for immigration purposes in the Second and Third Circuits. The decision does not state what rule the BIA will follow in the First Circuit, which has followed the majority rule for criminal sentence enhancement purposes but expressly distinguished its ruling from the immigration context. *Restrepo-Aguilar, supra.* This case arose in the Seventh Circuit, which has not ruled on the issue. The BIA therefore followed the majority rule, finding that the state felony conviction constitutes an aggravated felony, even though it could have been prosecuted federally only as a misdemeanor.

Advocates representing respondents affected by the BIA's new rule should investigate the possibility of using state procedures to reduce a felony conviction to a misdemeanor. See *La Farga v. INS,* 170 F.3d 1213 (9th Cir. 1999) (Arizona conviction reduced to misdemeanor treated as misdemeanor for immigration purposes); *Matter of Song,* 23 I. & N. Dec. 173 (BIA 2001) (one-year sentence for theft subsequently reduced to 360 days no longer constitutes an aggravated felony theft offense because sentence under one year). In addition, in the Ninth Circuit, the expungement of a first-time drug possession offense eliminates its immigration effects. *Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir. 2000). *Matter of Yanez-Garcia,* 23 I. & N. Dec. 390, Int. Dec. 3473 (BIA May 13, 2002).

AG OVERRULES BIA TO LIMIT ITS AUTHORITY TO GIVE RELIEF TO NON-CITIZENS WHO COMMITTED VIOLENT CRIMES – Attorney General John Ashcroft has reversed a ruling of the Board of Immigration Appeals in which the BIA had granted a waiver and adjustment of status to a refugee from Haiti. In overturning the decision, the attorney general found that because the respondent was convicted of a serious violent crime, she would have to demonstrate that denying her adjustment would cause "exceptional and extremely unusual hardship." The attorney general also denied her applications for asylum and withholding of removal and found that her appeal from the immigration judge's denial of relief under the Convention Against Torture (CAT) was untimely.

The respondent in this case, a Ms. Jean, was admitted to the United States as a refugee in November 1994. In August 1995, she pled guilty to one count of second-degree manslaughter in connection with the death of a 19-month-old child who was in her care. She was sentenced to from two to six years' incarceration.

After she completed this sentence, Jean applied for adjustment under section 209(a) of the Immigration and Nationality Act. The Immigration and Naturalization Service denied this application and then initiated removal proceedings against Jean. At her hearing, Jean requested adjustment and a waiver under INA section 209(c), and also requested asylum, withholding of removal, and relief under the CAT. The immigration judge ruled that her conviction constituted an "aggravated felony" and found that she was ineligible for any relief from removal. The IJ apparently analyzed the adjustment application under INA section 245 rather than the refugee adjustment provision of section 209, which does not require that the applicant show that he or she is of good moral character and for which nearly all grounds of inadmissibility may be waived. The IJ also did not explain why he denied deferral of removal under the CAT, for which the criminal conviction would have been irrelevant. Jean appealed to the BIA, which reversed and remanded the case, finding that the conviction did not constitute a "crime of violence" such as to constitute an "aggravated felony."

On remand, the IJ again denied adjustment, this time based on a weighing of the positive and negative equities in Jean's case. He denied asylum, again finding that the conviction constituted a "crime of violence" aggravated felony, but also finding that Jean failed to demonstrate an objectively reasonable fear of persecution. Jean and her husband had testified that the husband was assaulted and nearly killed in the early 1990s because of his work with the Fanmi Lavalas, a political party headed by Jean-Bertrand Aristide. Their home was also burned, and the father and two cousins of the husband were killed. The IJ found that because these attacks were targeted against the husband, Jean failed to establish that she would be targeted for persecution. The IJ also denied withholding of removal because Jean failed to demonstrate a risk that she would be persecuted if she were returned to Haiti. In a separate ruling issued several weeks later, the IJ also denied relief under the CAT, finding that Jean had not demonstrated that she would be in danger of attack if she were returned to Haiti.

On appeal, the BIA again reversed the IJ, finding that the conviction did not constitute a "crime of violence." The BIA also held that Jean had established eligibility for a waiver under INA section 209. Finding that the equities warranted granting a waiver, the BIA granted adjustment to lawful permanent resident status. It did not address the asylum, withholding, and CAT claims because the adjustment granted full relief.

The attorney general then directed the BIA to refer the case to him for review under 8 CFR section 3.1(h)(1)(i). He then issued the decision described below, noting that "[t]his published decision is binding on the BIA and is intended to overrule any BIA decisions with which it is inconsistent."

In the decision, before turning to the merits, the attorney general found that Jean had failed to timely appeal the denial of her application for CAT relief. The IJ had denied all other relief on May 4, 2000, and his decision denying CAT relief was issued on May 25, 2000. Jean filed a notice of appeal on June 6 addressing the May 4 ruling and another notice on June 28 addressing the May 25 ruling. The INS argued that both notices of appeal were untimely because they were filed more than 30 days after the decisions they sought to review were issued. However, the attorney general found that the May 4 ruling was not a final disposition, since the CAT claim was not addressed until later. The 30-day window for filing the appeal did not begin to run until May 25, when the IJ ruled on the CAT claim. Therefore the June 6 notice of appeal was timely filed. However, since that notice did not address the CAT claim and the June 28 notice was untimely, the attorney general concluded that Jean failed to timely appeal the denial of CAT relief.

On the merits, the attorney general reversed the BIA's grant of a waiver under INA section 209(c). Ashcroft rebuked the BIA for giving "little or no significance" to the nature of the crime in this case, which involved the beating and shaking of a young child to death. The decision finds that the balance of equities "will nearly always require the denial of a request for discretionary relief from removal where an alien's criminal conduct is as serious as that of the respondent." Indeed, "It would not be a prudent exercise of the discretion afforded to me by [section 209(c)] to grant favorable adjustments of status to violent or dangerous individuals except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases where the alien clearly demonstrates that the denial of status would result in exceptional and extremely unusual hardship"—and even such a showing "might still be insufficient."

With respect to the asylum claim, the attorney general questioned the BIA's conclusion that the second-degree manslaughter conviction was not a "crime of violence." Without resolving this issue, Ashcroft found that Jean "is manifestly unfit for a *discretionary* grant of relief" (emphasis in original). With respect to the withholding claim, the attorney general upheld the IJ's conclusion that Jean failed to establish a likelihood of persecution. The decision also finds that "[t]he political climate in Haiti has changed dramatically since the respondent left in 1994, and it is no longer likely that her life or freedom would be threatened there."

Concluding that Jean is not eligible for any relief, the attorney general reversed the decision of the BIA and remanded the case with instructions to dismiss the appeal.

Matter of Jean, 23 I. & N. Dec. 373,
Int. Dec. 3472 (AG May 2, 2002).

AG EXTENDS TPS FOR HONDURANS AND NICARAGUANS ANOTHER 12 MONTHS AND INS AUTOMATICALLY EXTENDS THEIR WORK AUTHORIZATION – The Immigration and Naturalization Service has published notices in the Federal Register extending the attorney general's designation of Honduras and Nicaragua as countries whose nationals and residents currently in the United States qualify for temporary protected status (TPS). The designations, which had been due to expire on July 5, 2002, will be in effect until July 5, 2003. In a separate notice, the INS has also extended the validity of employment authorization documents (EADs) issued under the Honduran and Nicaraguan TPS program until Dec. 5, 2002.

TPS is granted to persons from countries that are designated by the attorney general as experiencing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning. TPS allows individuals to remain and work in the United States during the period of TPS designation. The INS first made the current TPS designations for Honduras and Nicaragua in January 1999, in the wake of the devastation caused by Hurricane Mitch. The current INS notices regarding the extension state that "[a]lthough there are strong indications of progress in recovery efforts, recent droughts as well as flooding from Hurricane Michelle in 2001 have added to the humanitarian, economic, and social problems initially brought on by Hurricane Mitch in 1998, making the country unable, temporarily, to handle the return of approximately [105,000 Hondurans and 6,000 Nicaraguans]."

To register for the one-year extension, nationals of Honduras and Nicaragua (and individuals of no nationality who last habitually resided in those countries) previously granted TPS must apply for it during the registration period that began on May 3, 2002, and ends on July 2, 2002. Such persons need only file Form I-821, Application for Temporary Protected Status (without the filing fee), Form I-765, Application for Employment Authorization, and two identification photographs (1½" x 1½"). Applicants who seek work authorization under the extension must submit the $120 filing fee or a fee waiver request with the Form I-765;

those who do not need work authorization must still submit Form I-765, but without the fee. Applicants who previously registered for TPS and were fingerprinted do not need to be refingerprinted and do not need to submit the $50 fingerprinting fee. Prior registrants who were not previously fingerprinted because they were under 15 years of age but who now must be fingerprinted also must pay this fee.

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

• be a national of Honduras or Nicaragua (or a person with no nationality who last habitually resided in either of those two countries);

• have been continuously physically present in the U.S. since Jan. 5, 1999;

• have continuously resided in the U.S. since Dec. 30, 1998; and

• be admissible as an immigrant, except as otherwise provided under Immigration and Nationality Act section 244(c)(2)(A), and not ineligible under INA section 244(c)(2)(B).

Each applicant for late initial registration must also be able to show that, during the registration period beginning Jan. 5, 1999, and ending July 5, 2000, he or she:

• was a nonimmigrant or had been granted voluntary departure status or any relief from removal;

• had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal pending or subject to further review or appeal;

• was a parolee or had a request for reparole pending; *or*

• was the spouse or child of an individual currently eligible to be a TPS registrant.

In a separate notice, the INS has announced the automatic extension of the employment authorization documents of Hondurans and Nicaraguans who received EADs under the TPS program. The reason for this extension is that the INS recognizes that many reregistrants will not receive new EADs until after their current ones have expired. The extension applies to Hondurans and Nicaraguans who currently hold EADs that expire on July 5, 2002, and have the notation "A-12" or "C-19" (under "Category," for Form I-766 EADs) or "274a.12(a)(12)" or "274a.12(c)(19)" (under "Provision of Law," for Form I-688B EADs). Such cards are automatically valid now until Dec. 5, 2002. However, the individuals who benefit from this extension still must reregister for TPS by July 2, 2002, in order to have employment authorization throughout the extended TPS period.

67 Fed. Reg. 22,450 (May 3, 2002) (Nicaraguan TPS extension);
67 Fed. Reg. 22,451 (May 3, 2002) (Honduran TPS extension);
67 Fed. Reg. 22,454 (May 3, 2002) (EAD extension).

INS ISSUES GUIDANCE ON ADJUDICATIONS-RELATED PROVISIONS OF USA PATRIOT ACT – The Immigration and Naturalization Service has issued policy guidance and field instructions regarding the provisions of the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 that relate to adjudications. The USA PATRIOT Act provided special immigrant status (allowing adjustment to lawful permanent residence status) to immigrants and their dependents whose visa petitions or labor certification applications were revoked or terminated because the attacks resulted in the death or disability of the petitioner or the loss of employment. The act also granted special immigrant status to grandparents of children who lost both parents in the terrorist attacks of Sept. 11, 2001. In a number of circumstances, the act also allows individuals to have their applications or petitions for immigration status adjudicated despite the fact that the petitioner or principal beneficiary was killed. The act also temporarily extended many adjudications-related deadlines. The guidance is contained in a memorandum issued by INS Executive Associate Commissioner Michael Pearson on Mar. 8, 2002.

Special Immigrant Status. The memo notes that three groups of immigrants are eligible for special immigrant status under the USA PATRIOT Act. The first group consists of principal immigrants who are beneficiaries of immigrant visa petitions, fiancé(e) petitions, or labor certification applications that were filed on or before Sept. 11, 2001, and that have been revoked, terminated, or otherwise nullified because of a terrorist attack on Sept. 11. The attack must have resulted in the death or disability of the petitioner, applicant, or beneficiary, or the loss of employment due to physical damage to or destruction of the business of the petitioner or applicant. The second group consists of spouses and children of immigrants who were such principals' beneficiaries. The relationship of spouse or child must have existed on Sept. 10, 2001, and the spouse or child must "follow to join" (immigrate based on the derivative relationship) by Sept. 11, 2003. Even if the principal beneficiary has died, the law allows the spouse and child to immigrate as if the death did not occur. The third group of special immigrants consists of the grandparents of children whose parents both died as a result of the Sept. 11 attacks, as long as either parent was a citizen or national of the United States or a lawful permanent resident on Sept. 10, 2001.

The memo provides that immigrants who fall within any of the three categories described above may apply for benefits by filing INS Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant, with the INS office having jurisdiction over the immigrant's place of residence. They should indicate in Part II, Box K, of the petition that they are applying for benefits under the USA PATRIOT Act and indicate the specific reason why they qualify (e.g., as principal, spouse/child of principal, or grandparent).

Petitioners should include evidence that demonstrates their eligibility, including proof of the death, disability, or loss of employment due to physical damage resulting from a Sept. 11 attack. Proof of a petition or application that was revoked or terminated may include a statement describing it, a receipt issued by the INS, or other evidence. The memo requires that grandparents who are self-petitioning show that they are coming to the U.S. to assume legal custody of the orphaned grandchild before the child turns 21 years of age, or that the child was under age 18 at the time the petition was filed and is not now older than 21.

Once the self-petition is approved, the petitioner may file Form I-485, Application to Register Permanent Residence or Adjust Status, with all supporting documents. At the time of filing for adjustment, the applicant may also apply for work authorization.

Relief for Surviving Spouses and Children. Under section 423(a) of the act, if a U.S. citizen was killed as a direct result of a Sept. 11 attack, his or her spouse and/or children continue, for a two-year period, to be considered "immediate relatives" for purposes of petitioning for permanent residence. However, a surviving spouse

who was legally separated from the decedent when the latter died or who has since remarried cannot take advantage of this provision. Children of attack victims continue to be considered immediate relatives for this two-year period even if they marry or reach 21 years of age. The memo provides that in order to benefit from this provision, immigrants must file an I-130 petition within two years of the death of the citizen. Each individual must file a separate petition. On it, the petitioner should indicate "USA PATRIOT Act, Section 423(a)" in Box A, for Relationship.

Under section 423(b) of the act, if an LPR who was killed as a direct result of a Sept. 11 attack had a pending petition on behalf of a spouse, child, or unmarried son or daughter, the petition remains valid and the beneficiary retains his or her priority date despite the death of the petitioner. Beneficiaries in this case may apply for deferred action status in order to remain in the U.S. and have employment authorization until they can apply for adjustment. They may also be eligible for the special immigrant benefits described above. The spouse, child, son, or daughter of an LPR killed in a Sept. 11 attack who does not have a pending visa petition may file a petition and have it adjudicated as if the LPR petitioner were still alive. To do so, such persons should file an I-130 petition with the INS service center having jurisdiction over their place of residence, with evidence to establish eligibility under this provision. While waiting for their priority date to be reached, they may apply for employment authorization and deferred action status.

Surviving spouses and children of employment-based LPRs or of applicants for adjustment based on employment who were killed as a direct result of a Sept. 11 attack may have their adjustment applications adjudicated as if the death did not occur, as long as their adjustment applications were filed on or before Sept. 11, 2001. No new application or petition need be filed.

In all of the above cases, the public charge ground of inadmissibility does not apply, and no I-864 affidavit of support is required.

Temporary Extension of Adjudications-related Deadlines. In addition to these provisions, the USA PATRIOT Act also extended a number of deadlines for various categories of non–U.S. citizens. The memo notes that because the guidance is being issued after many of these extensions have passed, "it is unlikely that many aliens remain able to benefit" from these particular extensions. The extensions that have already passed include:

• a 60-day extension for nonimmigrants who were prevented from filing a timely application for extension of stay or change of status because of the Sept. 11 terrorist attacks;

• an extension of immigrant visas to Dec. 31, 2001, for immigrants whose visas had expiration dates prior to that date but who were unable to enter the U.S. prior to the expiration of their visas as a direct result of the Sept. 11 terrorist attacks;

• a 90-day extension of parole, including advance parole, where a grant of parole expired on or after Sept. 11 and the noncitizen was unable to return to the U.S. prior to the expiration of the parole because of the Sept. 11 attacks; and

• a 30-day extension of voluntary departure for immigrants whose grant of voluntary departure expired between Sept. 11 and Oct. 11, 2001. In these cases the extension is automatic and the noncitizen does not have to demonstrate that the delay in departure was due to a Sept. 11 attack. A departure within 30 days of the voluntary departure deadline is deemed a timely departure.

Another extension included in the act applies to noncitizens who were lawfully present in the U.S. on Sept. 10, 2001, in a nonimmigrant status and who were disabled as a result of a Sept. 11 attack. They may continue in that status for a period of one year after the disability occurred. If their status as documented on Form I-94 is valid for a longer period, it continues to be valid. A similar provision extends the status of nonimmigrants who were the dependent spouses or children of nonimmigrants who died or were disabled as a result of the Sept. 11 attacks. Individuals who are eligible for these extensions must apply for an extension with the appropriate INS service center. Under the statute, all nonimmigrants subject to this extension are employment authorized and must be issued an employment authorization document (EAD) within 30 days of their applying for it by the local INS district office.

The act also extends to Apr. 1, 2002, the deadline for using a diversity visa immigrant visa number, for individuals who were unable to use a fiscal year 2001 diversity visa number by Sept. 30, 2001, because of the Sept. 11 attacks. Under the act, spouses and children of noncitizens who were issued a FY 2001 diversity visa number and who died because of a Sept. 11 attack are deemed to retain their dependent status as if the death did not take place, until June 30, 2002. The memo instructs ports of entry to admit applicants for admission who are eligible for benefits under this extension.

Age-out Benefits for Certain Children. The act also allows noncitizen beneficiaries of visa petitions or adjustment applications filed on or before Sept. 11 who turned 21 years of age after Sept. 11 to be considered as if they were children for an additional 45 days. In effect, this extends the time in which the INS may grant adjustment. This extension is not limited to individuals who were directly affected by the Sept. 11 attacks.

Temporary Administrative Relief. The act also authorizes the attorney general to grant temporary administrative relief to any noncitizen who was lawfully present in the U.S. on Sept. 10, 2001, and who was the spouse, parent, or child a person who died or was disabled as a direct result of a Sept. 11 attack. The memo provides that such relief in the form of deferred action status and employment authorization will be provided on a case by case basis to individuals who apply for it.

Memorandum to Regional Directors from Michael A. Pearson, Executive Associate Commissioner Office of Field Operations, HQADN 70/23.1 (Mar. 8, 2002), *reprinted at* 79 INTERPRETER RELEASES 485 (Apr. 1, 2002).

STATE DEPT. ISSUES CABLE ON NEW AFFIDAVIT OF SUPPORT LAW – The U.S. State Dept. has issued a cable informing all the department's diplomatic and consular officers of the enactment of the Family Sponsor Immigration Act of 2001 (H.R. 1892). H.R. 1892 amends the Immigration and Nationality Act to allow the beneficiary of an immigrant visa petition to designate an alternate sponsor if the original petitioning sponsor dies before the beneficiary is able to immigrate. The new provision is applicable to cases in which the Immigration and Naturalization Service determines that humanitarian reasons exist for not revoking the immigrant visa petition. President George W. Bush signed the law on Mar. 13, 2002.

An enforceable affidavit of support is required of all persons who apply for a family-based immigrant visa or for family-based adjustment of status on or after Dec. 19, 1997. The affidavit is also required of employment-based visa applicants in cases where a relative of the applicant either filed the employment-based petition on behalf of the visa applicant or has a significant ownership interest in the entity that filed the petition. The enforceable affidavit is a contract requiring the person who signs it to maintain the immigrant at 125 percent of the federal poverty income level.

Prior to the enactment of H.R. 1892, if a petitioning relative died after the petition was approved but before the beneficiary immigrated to the U.S., the petition was automatically revoked unless the INS decided, for humanitarian reasons, not to revoke it. However, this humanitarian exception did not waive the requirement that the petitioner have filed an affidavit of support on behalf of the beneficiary, and for this reason many beneficiaries were not able to immigrate. The new law provides a remedy to this problem by allowing the beneficiary to substitute a spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, or legal guardian to serve as sponsor in place of the original petitioner who has died.

The law requires the new petitioner to meet all other requirements under INA section 213A(f)(1). Under these requirements, the petitioner must be a U.S. citizen, 18 years of age, and domiciled in a U.S. state, the District of Columbia, or any territory or possession of the U.S. In addition, the petitioner must demonstrate that he or she has the resources to maintain the intending immigrant at an annual income equal to at least 125 percent of the federal poverty level.

The Apr. 15, 2002, State Dept. cable informs all diplomats and consular posts that the law takes effect immediately and applies to all petitions where deaths have occurred before, on, or after the date of the enactment of H.R. 1892.

Litigation

3D CIRCUIT: UNLESS BIA REMAND IS EXPRESSLY LIMITED, IJ HAS JURISDICTION TO GRANT ANY RELIEF FOR WHICH RESPONDENT IS ELIGIBLE – The U.S. Court of Appeals for the Third Circuit has reversed a ruling of the Board of Immigration Appeals that denied asylum and withholding of deportation to a Liberian national. The BIA had previously remanded the case to the immigration judge for purposes of considering eligibility under the Convention Against Torture (CAT). The IJ granted not only CAT relief but also asylum and withholding based on changed country conditions, and the BIA reversed the grant of asylum and withholding on the grounds that the IJ's jurisdiction on remand was limited to the application for CAT relief.

The Third Circuit reversed the BIA's denial of asylum and withholding based on established BIA precedent. The BIA and the parties "essentially agreed" that the scope of an IJ's jurisdiction on remand is governed by *Matter of Patel,* 16 I. & N. Dec. 600 (BIA 1978). In *Patel,* the BIA ruled that when it remands a case to an IJ, it divests itself of jurisdiction over the case unless it expressly retains jurisdiction and limits the remand. Unless the BIA both retains jurisdiction and limits the scope of remand, the IJ on remand may consider any matters deemed appropriate. In this case the BIA remanded the case "for consideration of the respondent's claim pursuant to CAT regulations" but neither expressly limited the remand to that issue nor expressly retained jurisdiction over the case. Accordingly, the court found that the BIA erred in concluding that the IJ lacked jurisdiction to grant asylum and withholding.

Johnson v. Ashcroft, __ F.3d __, No. 01-1331
(3d Cir. Apr. 16, 2002).

9TH CIRCUIT FINDS BIA SUMMARY DISMISSAL OF APPEAL VIOLATES DUE PROCESS BECAUSE OF MISLEADING APPEAL FORM AND LACK OF NOTICE – The U.S. Court of Appeals for the Ninth Circuit has reversed a ruling of the Board of Immigration Appeals that summarily dismissed an appeal for lack of specificity in the notice of appeal. In reversing the decision, the court cited prior cases in which it has criticized the notice of appeal form for more than 10 years. The court has repeatedly found the form to be misleading because it leaves very little space for a respondent to describe the reasons for the appeal. Although the form has been revised to include a notice of the requirement that the form specifically indicate the basis for the appeal, little space on the form is allocated for this purpose. The court found that the lack of space gives a false impression that little detail is required and that this defect is exacerbated by the BIA's failure to give notice before summarily dismissing the case. The court concluded that the combination of the defective form and the lack of notice and opportunity to correct any lack of specificity violate due process.

Vargas-Garcia v. INS, __ F.3d __, No. 00-71019
(9th Cir. Apr. 25, 2002).

Employment Issues

***HOFFMAN:* LOWER COURTS LIMIT IMPACT OF HIGH COURT'S DECISION BARRING UNDOCUMENTED WORKER FROM RECEIVING BACK PAY** – The impact of the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB,* 122 S. Ct. 1275—in which the Court barred an undocumented worker from receiving back pay (under the National Labor Relations Act) as a remedy for having been unlawfully fired—was immediately felt across the country by immigrant workers and their advocates. Amidst the confusion and misinformation about the implications of this decision, the rights of low-wage immigrant workers have been revindicated by three recent lower court decisions. (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10.)

In the first case, *Flores et al. v. Albertsons, Inc. et al,* 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. Apr. 9, 2002), the federal district court for the Central District of California held that *Hoffman* does not affect the right of undocumented workers to be paid for work actually performed and that therefore the plaintiffs' immigration status was irrelevant in this class action of janitors claiming unpaid wages under the Fair Labor Standards Act. The defendants had petitioned the district court judge to review and reconsider a lower decision by the magistrate judge, who held that the defen-

dants could not ask for documents pertaining to the immigration status of any of the class members. The district court judge affirmed the magistrate judge's findings that allowing defendants access to those records would have an "*in terrorem* effect" on the janitors, and that it was highly "likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation."

In a similar holding, a superior court in San Diego, California, found that *Hoffman* does not limit the rights of undocumented workers seeking unpaid minimum wages and overtime under the California Labor Code. After it had already decided in favor of the worker shortly before the *Hoffman* decision, the court in *Valadez v. El Aguila Taco Shop* (Case No. GIC 781170) reopened the case *sua sponte* (on its own motion) and asked the parties to brief the impact of *Hoffman* on California wage and hour law. Based on the briefing and hearing on Apr. 18, 2002, in which the Division of Labor Standards Enforcement of the California Dept. of Industrial Relations intervened on behalf of the worker, the court upheld the judgment in favor of the worker.

Immediately following the *Hoffman* decision, the defendant in *Rivera et al v. Nibco*—a language discrimination case under Title VII of the Civil Rights Act (Title VII) in Fresno, California—immediately filed a motion for reconsideration of an existing protective order granted by the magistrate judge which prohibits the defendant from inquiring into the plaintiffs' immigration status in the discovery process. The defendant argued that the *Hoffman* decision also limits an undocumented worker's right to back pay under Title VII and that, because some of the 25 plaintiffs might be undocumented, the defense was entitled to information about their immigration status. On Apr. 22, 2002, the federal district court for the Eastern District of California denied the motion for reconsideration, stating that the *Hoffman* decision was not controlling, since it was not a discovery case. The court noted that the Supreme Court did not address *how* information about a plaintiff's immigration status could be obtained in the first place. The defendant has now filed a petition with the Ninth Circuit Court of Appeals for an interlocutory appeal regarding the protective order and *Hoffman*'s impact on remedies available under Title VII.

Advocates who would like copies of the briefs in these cases can contact Marielena Hincapié of NILC's Oakland office at 510-663-8282 x. 305 or at hincapie@nilc.org.

IMMIGRANT WORKERS FIRED FOR CORRECTING THEIR EMPLOYMENT RECORDS ORDERED REINSTATED WITH BACK PAY – An arbitrator has held that two workers from El Salvador were terminated without just cause when they came forward to correct their employment records after providing false documents at the time of hire and has ordered the employer to reinstate the two workers with back pay.

When they were first hired, Ana Mancia and Feliciano Sinecios provided false Social Security numbers (SSNs) and green cards when filling out job applications and I-9 employment eligibility verification forms for AmeriPride Linen and Apparel Services (AmeriPride). Shortly afterwards, the workers applied for and were approved for temporary protected status (TPS). They each subsequently obtained a valid SSN. With the help of coworkers, Mancia and Sinecios each voluntarily went to company management to provide their new SSN. However, management told them to bring a letter from the Social Security Administration (SSA) explaining why they had two different SSNs. AmeriPride terminated Mancia's employment on Oct. 29, 2001, after she failed to produce such a letter from the SSA. Similarly, Sinecios was fired after admitting to having provided false documents. They were both fired for "dishonesty," which is a ground for immediate termination under their union contract.

Their union, Local 66L of the Union of Needletrades, Industrial and Textile Employees (UNITE!), filed a grievance on their behalf, alleging that AmeriPride terminated Mancia and Sinecios in violation of the "just cause" clause in their collective bargaining agreement. The arbitrator found there was credible evidence establishing that AmeriPride "did not consistently apply its 'dishonesty' rule to cases involving employees that submitted new social security cards to replace social security cards submitted at the time of hire." Since Mancia and Sinecios "were not treated in the same manner as other similarly situated employees," the employer was found to have acted in violation of the just cause principle. The arbitrator ordered that AmeriPride reinstate these two workers, compensate them for any lost wages or benefits, and expunge their personnel files of any references to their terminations.

In ordering these remedies, particularly back pay, the arbitrator held that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* (see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10) did not preclude such remedies. As opposed to the worker in *Hoffman,* who was not authorized to work at the time he was fired, Mancia and Sinecios applied and were approved for lawful immigration status prior to being fired. Moreover, the issue of their use of false documents at the time of hire came up because they voluntarily came forward to management to correct their records, rather than the information being discovered as a result of management's own actions. The arbitrator also distinguished *Hoffman* by noting that an award of reinstatement and back pay in this case does not encourage illegal immigration, since Mancia and Sinecios already have lawful status. Instead, the arbitrator reasoned, these remedies could encourage workers to voluntarily seek lawful status.

AmeriPride Linen and Apparel Services and Local 66L, Union of Needletrades, Industrial and Textile Employees (UNITE!), AFL-CIO, FMCS Case No. 021120-01435-3, Apr. 4, 2002.

Immigrants & Welfare Update

PRESIDENT SIGNS FARM BILL; FOOD STAMP ELIGIBILITY RESTORED FOR LARGE NUMBERS OF IMMIGRANTS – Culminating years of advocacy efforts, President George W. Bush has signed into law the broadest restoration of immigrants' eligibility for food stamps since the 1996 welfare law was enacted. The provisions are contained in the Farm Security and Rural Investment Act of 2002, which passed the House of Representatives on Apr. 30, 2002, and the Senate on

May 8, 2002.

The farm bill restores food stamp eligibility to the following three groups of immigrants:

• *Qualified immigrants who have lived in the U.S. in qualified status for at least five years.* The Bush administration estimates that this provision, which is due to take effect on Apr. 1, 2003, would make eligible about 363,000 immigrants who are currently barred from receiving assistance. In addition to restoring benefits to these immigrants, this provision effectively removes the seven-year cap on eligibility for refugees and asylees. Under current law, these categories of immigrants, as well as Cuban/Haitian entrants, Amerasians, and persons granted withholding of deportation, are exempt from immigrant restrictions only during the first seven years after they obtain the relevant status. These immigrants, who will have been in qualified immigrant status for more than five years, will retain their benefits even after the seven-year period expires.

• *Qualified immigrant children, regardless of date of entry.* Children would not be subject to the five-year bar on eligibility or to deeming provisions. Under current law, qualified immigrant children are exempt from immigrant restrictions only if they were lawfully residing in the U.S. on Aug. 22, 1996 (the date of the welfare law's enactment) or meet another exemption. This restoration is due to take effect on Oct. 1, 2003.

• *Qualified immigrants who are receiving disability-related assistance, regardless of date of entry.* Under current law, qualified immigrants receiving disability-related benefits are eligible only if they were lawfully residing in the U.S. on Aug. 22, 1996, or meet another exemption. This restoration is due to take effect on Oct. 1, 2002.

As the bill progressed through both houses of Congress, advocates were able to defeat provisions that would have undermined the restorations of immigrant eligibility, including onerous work history tests and citizenship requirements.

The turning point in the negotiations came when Rep. Joe Baca's (D-CA) motion to instruct the farm bill conferees to restore food stamps benefits to immigrants passed by a vote of 244-171. All but 5 Democrats, joined by 47 Republicans, voted in support of the motion. The strong "yes" vote occurred despite last-minute efforts by the opposition to circulate extraordinary inaccuracies about the content of the motion. Its approval sent a strong message to the conferees about the breadth of support for restoration of benefits to immigrants.

Advocates credit this historic victory to the persistent efforts of a broad coalition of immigrants' rights, faith-based, anti-hunger, and anti-poverty groups. The support of organizations representing state and local officials was also instrumental.

HOUSE OF REPRESENTATIVES PASSES HERGER BILL; OTHER TANF MEASURES INTRODUCED IN SENATE – The Republican bill to reauthorize the Temporary Assistance for Needy Families (TANF) program has passed the House of Representatives, while one related bill and one proposal have been introduced in the Senate. Rep. Wally Herger (R-CA), chairman of the House Ways and Means Subcommittee on Human Resources, introduced H.R. 4090, the Personal Responsibility, Work, and Family Promotion Act of 2002, on April 9, 2002 (see "House Human Resources Subcommittee to Mark Up TANF Bill; Other TANF Reauthorization Proposals Introduced," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 12). The bill was passed by the full Ways and Means Committee on May 2, 2002, and it passed the House by a 229-197 vote on May 16.

In the Senate, Sens. Thomas Carper (D-DE) and Evan Bayh (D-IN) introduced S. 2524, the Work and Family Act, and Sen. John Breaux (D-LA), one of the original architects of the 1996 welfare bill, issued a press release describing his "tri-partisan" TANF proposal. The chairs of the Finance Committee, which has jurisdiction over TANF, have yet to release their proposal but are expected to use the Breaux proposal as a starting point. Sen. John Kerry (D-MA) also introduced a bill confirming that "qualified" immigrants are eligible for certain Dept. of Housing and Urban Development (HUD) rental housing programs.

Herger Bill. The Herger bill does not include any benefits restorations for immigrants. It increases the work requirement to 40 hours per week from 30 and includes a dangerous "superwaiver" provision that would allow states to waive nearly every rule and regulation governing programs run by the Depts. of Health and Human Services, Labor, and Education. Rep. William Thomas (R-CA), chair of the House Ways and Means Committee, offered an amendment that requires the secretary of Health and Human Services, in consultation with the attorney general, to submit a report to Congress on the enforcement of the affidavit of support and sponsor deeming requirements. The amendment was approved along with the rest of the bill on May 16.

Carper/Bayh Proposal. Sens. Carper and Bayh, joined by Sens. Bob Graham (D-FL), Joe Lieberman (D-CT), Zell Miller (D-GA), Jean Carnahan (D-MO), Ben Nelson (D-NE), and Bill Nelson (D-FL), introduced S. 2524, the "Work and Family Act." The bill includes a number of positive provisions for immigrants, including a state option to eliminate the five-year bar in TANF, supplemental funds to help states implement this provision, a GAO study to analyze the impact of the Supplemental Security Income restrictions on immigrants, and an increase from 12 to 24 months in which TANF recipients may participate in vocational education. The bill also provides a state option to restore Medicaid and the State Children's Health Insurance Program to lawfully present children and pregnant women. However, the bill imposes the increased work requirements that were included in Chairman Herger's and President Bush's proposals.

Breaux's Proposal. On May 2, Sen. Breaux and five other members of the Senate Finance Committee sent a letter to Senate Finance Chairs Charles Grassley (R-IA) and Max Baucus (D-MT) outlining their priorities for TANF reauthorization. The priorities include a state option to restore TANF to qualified immigrants and an increase from 12 to 24 months for TANF recipients to participate in education and training. Although their proposal increases the percentage of the caseload that must be engaged in work from the current 50 percent to 70 percent by 2007, it maintains the 30-hour-per-week work requirement for individuals.

Kerry's Housing Bill. Sen. Kerry introduced S. 2116, the Welfare Reform and Housing Act. The bill conforms immigrant eligibility for HUD rental housing programs to other federal programs by confirming that qualified battered immigrants and Cuban/Haitian entrants are eligible. The 1996 federal welfare law provides access to most federal public benefits for qualified immigrants, including battered immigrants and Cuban/Haitian entrants. How-

ever, section 214 of the Housing and Community Development Act, an earlier statute that governs eligibility for HUD programs, does not include these two immigrant categories.

FEDERAL RESPONSIBILITY FOR IMMIGRANT HEALTH ACT INTRODUCED – A bipartisan group of senators has introduced a bill that would expand low-income immigrants' access to health care. Sponsored by Sens. Jeff Bingaman (D-NM), John McCain (R-AZ), Robert Torricelli (D-NJ), and Jon Corzine (D-NJ), the Federal Responsibility for Immigrant Health Act (FRIHA), S. 2449, combines several important proposals that had previously been under consideration.

Under current law, states can obtain federal Medicaid reimbursement only for emergency medical services (including child birth–related labor and delivery services) provided to immigrants who are ineligible for "full-scope" Medicaid. The denial of preventive and primary health care forces many immigrants to defer treatment for chronic or preventable conditions until they have progressed to the emergency stage. The FRIHA, which was introduced on May 2, 2002, would expand the "emergency Medicaid exception" to provide Medicaid reimbursement for pregnancy-related services, including prenatal and family planning services, and testing and treatment of communicable diseases. The bill would also expand the definition of an emergency to include chemotherapy, dialysis, and services necessary to prevent an emergency.

The 1996 welfare law included a provision that attempted to restrict states' ability to use their own funds to provide certain state or local public benefits, including most nonemergency health services, to undocumented immigrants. The provision required state legislatures to pass a law, after the welfare law's Aug. 22, 1996, effective date, expressly stating their intention to provide these benefits to undocumented persons. (*Ed..'s note:* A number of legal scholars have concluded that this provision amounts to an unconstitutional interference in the governance of the states.) The FRIHA would exempt all state and local health benefits from this provision, confirming that states need not pass new laws to continue providing these services. The bill also would allow states to waive Medicaid residency requirements for persons who entered the U.S. on nonimmigrant visas as well as immigrants who were paroled into the country.

Finally, the bill would expand federal funding for emergency services that hospitals and related providers deliver to undocumented persons outside of the Medicaid program. The bill accomplishes this by reauthorizing funding, which the Balanced Budget Act of 1997 provided between fiscal years 1998 and 2001, for fiscal years 2003 to 2007, and increasing the amounts from $25 million to $50 million per year. Funds would be allocated to the 15 states with the highest percentage of undocumented persons, based on Immigration and Naturalization Service data.

HHS PROPOSES RULE MAKING FETUSES ELIGIBLE FOR SCHIP – The U.S. Dept. of Health and Human Services (HHS) has published a proposed rule that would make fetuses eligible for the State Children's Health Insurance Program (SCHIP). Titled "Eligibility for Prenatal Care for Unborn Children," the proposed rule would make fetuses eligible for SCHIP from the date of their conception. The proposed change promises to provide federally funded prenatal care for immigrants and other low-income women who are not eligible for Medicaid.

The proposed regulations, published on Mar. 5, 2002, implement this change by modifying the definition of a child eligible for SCHIP. Under the current regulations a child is defined as "an individual under the age of 19." 42 CFR § 457.10. The proposed rule would amend the definition by adding the words "including the period from conception to birth." The rule would also require states to screen pregnant women for Medicaid eligibility before enrolling their fetuses in SCHIP.

However, only U.S. citizens and certain "qualified" immigrants are eligible to receive SCHIP. The proposed regulations do not explain how these requirements would be applied to a fetus. A fetus is neither a citizen nor an immigrant. A child born in the United States is a U.S. citizen, but the child must be born to acquire that status. The background section of the Federal Register notice states, "It is anticipated that the children covered by this regulation will become eligible for the SCHIP program after birth." This language can be read to suggest that all fetuses whose mothers apply for SCHIP will be presumed to be future U.S. citizens. In any case, there is no rational basis in law for HHS to treat fetuses differently based on the immigration status of their mothers-to-be. If any fetus carried by an income-eligible mother is regarded as meeting the immigration status or citizenship requirements of SCHIP, all fetuses should be.

The proposed regulations also fail to address the pregnant woman's rights as a medical patient. The background section states that '[p]renatal care involves monitoring the health of both the mother and the unborn child" and that "[t]his regulatory clarification is intended to benefit both the unborn children and their mothers." However, the proposed rule does not address the woman's right to receive medical services that are not for the direct benefit of the fetus, to make choices for her own health in situations where her best interest conflicts with that of the fetus, and to make informed decisions about the health care services her fetus will receive.

The Bush administration has recognized the critical importance of providing prenatal care to all pregnant women. However, legislation that provides prenatal coverage to all low-income women would represent a more straightforward, and less controversial, way of achieving that important goal. Currently, no such legislation is pending, but there are several proposals that would move coverage in that direction. The Federal Responsibility for Immigrant Health Act (S. 2449) would provide federal matching funds for prenatal care to immigrants who are eligible for emergency Medicaid. This includes "not qualified" immigrants and qualified immigrants subject to the five-year bar.

The Immigrant Children's Health Improvement Act (ICHIA) would give states the option of providing SCHIP and Medicaid to immigrant pregnant women and children who are lawfully present in the U.S. The Temporary Assistance for Needy Families (TANF) reauthorization bill introduced by Sen. John D. Rockefeller (D-WV), S. 2052, incorporates ICHIA, as does the proposal by Sens. Thomas Carper (D-DE) and Evan Bayh (D-IN), The Work and Family Act.

67 Fed. Reg. 9,936 (Mar. 5, 2002).

OMB RELEASES REPORT ON COSTS AND BENEFITS OF IMPLEMENTING EXECUTIVE ORDER ON SERVICES FOR LEP PERSONS – The Office of Management and Budget (OMB) has released its report on the costs and benefits of implementing an executive order intended to ensure limited English-proficient (LEP) persons' access to public services. The Mar. 14, 2002, report makes a number of positive statements about the benefits of language access services. However, it conflates the costs of implementing Executive Order 13166 with costs related to compliance with Title VI of the Civil Rights Act of 1964.

Title VI prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin. Discrimination on the basis of national origin includes the failure to provide LEP persons with meaningful access to federally funded activities and programs.

The executive order requires all federal agencies to develop internal plans, and agencies that provide federal financial assistance to develop guidance to recipients, on providing LEP persons meaningful access to their programs and services (65 Fed. Reg. 50,121–22 (Aug. 16, 2000); see "DOJ Issues Policy Guidance on Discrimination against Persons with Limited English Proficiency," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2000, p. 12.)

The report was issued pursuant to a provision that was inserted in the congressional appropriations bill for 2002 (P.L. 107-67) by congressional critics of the executive order. The provision directed the OMB to assess the total costs and benefits of implementing the order and to submit a report to the House Appropriations Committee.

The OMB published a request for information to assist in the preparation of its report. The unusual request asked for anecdotal, as well as statistical, information, and the majority of responses it elicited were submitted by advocates and state governments. In addition, several groups of advocates and provider organizations met with OMB staff, at OMB's invitation, for discussion of their responses. Many advocates urged the agency to distinguish between expenses due to Title VI obligations from any additional costs of implementing the executive order. Unfortunately, the OMB's reports fails to make this distinction.

While acknowledging the difficulty of quantifying the costs of providing language assistance, the report attempts to estimate them in four areas: transportation (departments of motor vehicles), benefits (food stamps), immigration, and health care. The authors estimated that the cost of providing language assistance to an LEP person ranged from 0.5 percent (of the total cost of a health care encounter) to 1.7 percent (of the overall cost of DMV services) and 15 percent (of food stamps). The authors estimated that the cost across all government services was probably closer to 1 or 2 percent. The report also emphasized that these were estimates based on overall costs, which did not take into consideration language assistance currently provided. It concluded that the actual cost of "implementing the [executive order]" may be substantially less.

The report does not shy away from discussing benefits as well as costs. The authors acknowledge the "multitude of benefits" that result from LEP persons' improved access to programs and services. These include avoidance of medical errors, reductions in emergency room use, improved household access to food and nutrition, and improved compliance with immigration rules and restrictions. Improved access to services, the report points out, benefits both LEP individuals and the government agencies that serve them.

The OMB's report is available at www.whitehouse.gov/omb.

DRIVER'S LICENSE PROPOSALS AND CAMPAIGNS: SURPRISING PROGRESS MADE SINCE 9/11 – In the months before the attacks of Sept. 11, 2001, efforts to expand access to driver's licenses for immigrants had made significant progress across the country. Advocates in at least fifteen states sought to remove restrictions such as Social Security number (SSN), lawful presence, or documentation requirements, which prevent many immigrants from securing driver's licenses and automobile insurance. Some state campaigns proposed that alternative identifiers, such as the individual tax identification number (ITIN), could be used in lieu of an SSN. Other campaigns sought to expand the categories of immigrants that may be eligible for a driver's license or to broaden the list of acceptable documents. Immigrants' rights advocates were joined by law enforcement, religious organizations, organized labor, and businesses in demonstrating the benefits of increasing access to driver's licenses, including improved highway safety, reduction of insurance costs, and fraud prevention.

After Sept. 11, however, many of these campaigns were halted temporarily, as numerous proposals to restrict access to driver's licenses were introduced. Many of these proposals—such as requirements that immigrants apply for licenses in specific offices in the state, or that licenses expire with the immigration document presented as evidence of eligibility—targeted immigrants specifically. Other proposals would have required that fingerprints be submitted with the application or that a mark be placed on immigrants' licenses to distinguish them from others. In response to these proposals, immigrants and their advocates noted that placing restrictions on immigrants' driver's license eligibility is a highly ineffective method of combating terrorism. Instead of addressing terrorism, the restrictive measures prevent families from driving to work, school, or the doctor. Ensuring that all drivers are tested, licensed, and able to obtain car insurance better protects public safety and security.

Though 44 restrictive proposals were introduced in various jurisdictions, such measures have been passed only by Colorado, Kentucky, New Jersey, and Virginia. And, in response to advocates' concerns, some of the most severe restrictions were removed from these bills prior to passage. Fourteen of the restrictive proposals have been defeated, and the remaining 24 bills face legal, fiscal, practical, and political obstacles. At the same time, the campaigns to expand access to driver's licenses are moving forward. One law passed in New Mexico and 10 of the original 15 "expansive" proposals have been defeated. At least four states, including California, Missouri, New York, and South Carolina, currently are considering proposals to improve public safety and security by expanding access to driver's licenses.

Upcoming Florida Immigrant Summit and Workers' Rights Trainings

DATES

- June 26–28, 2002 Florida Immigrant Summit, *Miami, Florida*
  Issues to be addressed: Public benefits–related and immigrant workers' rights
  Sponsored by the Florida Immigrant Advocacy Center
- July 23, 2002 Immigrant Workers' Rights Training, *Las Vegas Nevada*
- August 2, 2002 Immigrant Workers' Rights Training, *Raleigh-Durham, North Carolina*
- August 16, 2002 Immigrant Workers' Rights Training, *Minneapolis, Minnesota*
- September 13, 2002 Immigrant Workers' Rights Training, *Austin, Texas*

For more information about these trainings, including how to register for them, contact Mike Muñoz of the National Immigration Law Center at 213/639-3900 ext. 110.

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