



## Immigration Issues

**SWEEPING LEGISLATION INTRODUCED TO REQUIRE LOCAL POLICE TO ENFORCE IMMIGRATION LAW** – With the bipartisan support of two Republicans and one Democrat, Rep. Charlie Norwood (R-GA) has introduced legislation mandating that state and local police enforce immigration law. Entitled the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act, HR 2671), the bill has already garnered 61 additional cosponsors since it was introduced on July 9, 2003. The legislation is extremist and has far-reaching implications. If passed, it would criminalize immigration status violations and drastically expand the role of state and local police in the enforcement of immigration law.

**Background.** Immigration law contains both criminal and civil restrictions. Courts have found that state and local police generally may enforce the criminal provisions, but the civil provisions constitute a complex and comprehensive regulatory scheme that generally is within the exclusive purview of the federal govern-

ment. *See, e.g., Gonzalez v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983). There are some exceptions to this, where Congress has provided in the Immigration and Nationality Act for state and local enforcement. These exceptions include where the attorney general finds there is an immigration “mass influx” (INA § 103(a)(10)), and where a local government contracts with the Justice Dept. to conduct immigration enforcement at the local government’s expense and under the department’s supervision and training (INA § 287(g)).

Entering the United States without inspection is a misdemeanor criminal offense, but the offense is completed once an individual has entered the country. Because many states, such as California, do not authorize police to make arrests for misdemeanors that were not committed in their presence, many police who work in the interior of the United States cannot make arrests for the misdemeanor violation of entry without inspection, which is committed only at the border. *Gonzalez v. City of Peoria*. Being present in the U.S. following an illegal entry, or after overstaying a nonim-

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

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

migrant visa, generally is not a criminal violation, but rather a civil immigration violation.

The attorney general and other Bush administration officials have complicated this legal area by rescinding a portion of a 1996 Justice Dept. Office of Legal Counsel opinion holding that state and local police lack recognized legal authority to enforce the civil provisions of immigration law. The attorney general and other officials have asserted that local police have "inherent authority" to enforce civil immigration law beyond the limited exceptions authorized in the INA, apparently relying on a Tenth Circuit case that does not address the distinction between criminal and civil offenses discussed above. *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). These officials have used this claim to justify inputting information about certain civil immigration violations in the National Crime Information Center (NCIC), the nation's principal automated information-sharing tool for law enforcement for local, state, and federal officers. This effort to enlist state and local law enforcement to enforce civil immigration law has provoked broad opposition, not only from immigrants' rights organizations, but also from law enforcement personnel concerned over its impact on their efforts to build trust in immigrant communities. (For a more comprehensive discussion of this background, see "Policies to Permit Police to Enforce Immigration Law Could Undermine Public Safety, Violate Civil Rights," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 2002, p. 4).

The CLEAR Act would dramatically expand the role of state and local police in immigration enforcement. Some principal features of the bill are outlined below.

**Mandating Local Enforcement of Immigration Law.** The CLEAR Act would not just authorize, but in fact require, the country's over 600,000 state and local police to enforce civil and criminal immigration law. First, as a condition of receiving reimbursement for incarcerating non-U.S. citizens and obtaining funds for immigration enforcement, state and local jurisdictions would be required to institute policies authorizing police to enforce immigration law while in the course of their official duties within two years of CLEAR's enactment.

Second, the legislation would broadly criminalize immigration status violations. Any noncitizen present in the United States in violation of the provisions of the INA would be made subject to imprisonment for up to one year and to a fine. The legislation broadly defines "immigration violators" as noncitizens who

- Are apprehended while entering, or attempting to enter the United States at a time or place other than as designated by immigration officers;
- Enter without inspection;
- Fail to depart the United States within 30 days after the expiration of a nonimmigrant visa or voluntary departure, and are not otherwise in lawful status, or
- Fail to depart within 30 days of a final order of removal and are not otherwise in lawful status.

Thus, for purposes of immigration enforcement, the distinctions between civil and criminal immigration violations would be eliminated and police would be required to arrest all immigration violators.

Third, the legislation would authorize the insertion of immigration data into the National Criminal Information Center (NCIC), the federal database that stores criminal information. It also would

require the Dept. of Homeland Security (DHS) to transmit data on immigration violators to the NCIC. Thus, police officers who encounter immigrants would have at their disposal a database that would provide them information on the immigration violators they encounter.

These three mechanisms would dovetail to create heightened police enforcement of immigration law. If this bill were to become law, any police encounter with immigrants, resulting from either nefarious or innocent acts, would lead to enforcement of immigration law. Thus, an immigrant who had overstayed her visa or entered illegally and was also a crime victim, a battered spouse, or a witness to a crime would be subject to immigration enforcement by police in the same way that an immigrant who was stopped for a traffic violation or arrested for robbery might be.

**Enhanced Civil Penalties and Fees.** The legislation would dramatically stiffen fines for illegal entries and add new provisions allowing the forfeiture of assets of noncitizens who fail to depart the U.S. pursuant to an order of removal and then remain in the U.S. for longer than one year. The current penalties for illegal entry violations under INA sec. 275(b) range from \$50 to \$250. The top end of that range would be increased to \$500 and would reach \$10,000 if the individual had three prior violations.

The legislation would authorize a billion dollars each fiscal year for immigration enforcement. State and local police departments would be able to apply for funds for technology, equipment, and administrative support for housing and processing noncitizens held for immigration violations. Only those agencies that instituted a policy and practice of enforcing immigration laws would be eligible for funds. A third of the money raised from the fees that immigrants pay in applying for benefits would be diverted to enforcement efforts. In addition, the legislation would authorize the attorney general or the secretary of the DHS to increase fees for immigration benefits in order to carry out immigration enforcement.

These provisions are significant for two reasons. First, siphoning off funds from immigration benefits would lower the amount that is spent on processing those benefits. Diverting these funds would probably result in backlogs for adjudicating benefits, and these backlogs are already out of control. Second, with such large amounts to be raised for enforcement, fees for processing immigration-related applications and paperwork would most likely need to be raised.

**Burdensome Reporting Requirements for Local Law Enforcement.**

The legislation would impose onerous reporting requirements on all state and local jurisdictions. Within ten days of encountering an immigration violator, police departments would be required to report the following information about the person to the Justice Dept. and Homeland Security Dept.:

- Name
- Address or place of residence
- Physical description
- Date, time, and location of agent's encounter with immigration violator and the reason for the stop, detention, apprehension, or arrest
- Driver's license number and its state of issuance, if applicable
- Identification number, any designation number on the document, and the issuing entity, if applicable

- The license plate number, make and model of any automobile registered or driven by the violator, if applicable
- A photo, if readily obtainable
- Fingerprints, if readily obtainable

In addition, the legislation would establish a procedure for identifying and notifying state and local entities that fail to comply with reporting requirements. If the attorney general found that a state or local jurisdiction had failed to report or that it engages in a pattern or practice of incomplete reporting, the attorney general would be required to notify the jurisdiction and detail its deficiencies. A jurisdiction would then be required to respond to the attorney general, address each deficiency and provide a plan for correcting it.

***Claims by States and Localities Against the Federal Government.***

In congressional hearings, immigration enforcement advocates have complained that immigration officials do not respond when local police have arrested noncitizens who might be subject to removal. To address this, the legislation would create a claim by states and local entities against federal agencies for failing to cooperate with them to enforce immigration laws. The legislation would also establish new administrative law judges within the Justice Dept. to adjudicate these claims. Judges could fine federal agencies \$1000 for each instance of nonenforcement, upon the determination of a valid claim. If the judge found that the agency had engaged in a pattern or practice of nonenforcement or noncompliance with a state or local law enforcement agency, the judge would be required to fine the agency \$10,000. Appeals could only be brought to the attorney general or secretary of Homeland Security and would not be subject to judicial review.

***Broadened Immunity to Law Enforcement Personnel & Agencies.***

As written, the legislation purports to completely immunize federal, state, and local law enforcement agents from personal liability arising from enforcement of immigration law committed while on official duty. It would also immunize state and local law enforcement agencies from claims for money damages based on civil rights laws for incidents arising out of immigration law enforcement, except in situations where officers violated criminal laws. What this means is that individuals who wish to sue police for harms resulting from governmental action would be unable to bring their claims in court. These claims are generally brought under the Federal Tort Claims Act (FTCA) for claims against the federal government, 42 USC sec. 1983 for claims against state and local police agencies and officers, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for claims against individual federal officers. Because Congress created the FTCA claims provision, Congress can also modify and even eliminate it. However, because *Bivens* claims are grounded in constitutional law, it is questionable whether Congress can eliminate it.

**COMMENTATORS FAVOR *MATRÍCULA CONSULAR*, BUT ID ACCEPTANCE ENCOUNTERS OTHER ROADBLOCKS**

— Nearly 77 percent of those who submitted comments on the U.S. Treasury Dept.'s final rule allowing financial institutions flexibility to decide which documents they would accept as proof of identity said they oppose any changes to the rule. However, the House of Representatives has approved an amendment that would strictly regulate the issuance by foreign governments of consular identification cards to

their own citizens residing in the U.S. And Colorado has enacted a law that severely restricts the acceptance of consular ID cards by public entities within the state.

Prompted at least in part by pressure from House Judiciary Committee chairman James Sensenbrenner Jr. (R-WI), the Treasury Dept. had asked for additional comments on the final rule it issued to implement section 326 of the USA PATRIOT Act (see "Acceptance of the *Matrícula Consular* in the U.S. is Under Attack," IMMIGRANTS' RIGHTS UPDATE, July 15, 2003, p. 3). The department created an unusual mechanism in which those who commented could both vote and submit comments via the department's Web site. A "no" vote meant that banks should continue to be allowed to accept as ID foreign government-issued documents such as the consular ID document (*matrícula consular*) issued by the Mexican government. However, after the comment period ended on July 31, 2003, the Treasury Dept. announced that it would focus on the substance of written comments rather than on the tally of results from the voting.

Banks and banking associations submitted comments strongly opposing a change in the rules. They argued that the new comment period undermined the credibility of the rulemaking process and that acceptance of consular ID cards helps bring the "unbanked" into the mainstream financial system. Rejection of consular ID cards would deprive the government of regulatory oversight, result in retaliatory measures against U.S. government-issued IDs in other countries, reduce the ability of U.S. banks to attract foreign investment, and encourage unregulated remittance systems, they contended.

Advocates for immigrants, including lawmakers, likewise argued that acceptance of foreign government-issued identification such as a consular ID card helps bring immigrants out of the informal and unregulated economy and into the financial mainstream. Without this, many immigrant workers cannot open a bank account, get loans, or establish a credit history. As a result, they are forced to carry and store large amounts of cash (which makes them vulnerable to crime) and rely on illegal loans; their financial transactions are harder to track and to tax; and they have less of a financial stake in their communities. The cards help the police quickly establish the identity of the people with whom they deal, allowing them to focus resources on crime prevention and community safety. Proof of identity enables immigrants to report crimes and other suspicious behavior without fearing that their lack of acceptable ID makes them suspect or puts them at risk. The acceptance of alternative ID also helps law enforcement combat money laundering and terrorism.

Opponents of the card have portrayed its acceptance by business and government entities, including law enforcement, as a veiled form of immigration amnesty, despite the fact that the card neither confers any legal immigration status on its bearers nor grants them permission to be employed in the U.S. or receive public benefits.

The Mexican government has issued consular ID cards to its nationals since 1871. According to the Mexican government, approximately 150 financial institutions, 119 cities, 36 counties, and more than 900 police departments currently accept the card as proof of identity.

It is not clear when the Treasury Dept. will decide whether it will leave the already-published final rule intact or whether it will

issue a new final rule.

However, before the Treasury Dept.'s "additional comments" period ended on July 31, the House of Representatives voted to approve an amendment to the Foreign Relations Authorization Act of 2004–05, HR 1950, which, if agreed to by the Senate, would impose detailed record-keeping and reporting requirements on any country issuing consular ID cards to persons residing in the U.S. and also would establish specific procedures and requirements that must be met before such cards can be issued. The amendment, which was approved on July 15, was sponsored by Rep. John N. Hostettler (R-IN), who earlier had conducted anti-*matrícula consular* hearings.

Under the amendment, the issuing foreign government would be required to report to the U.S. State Dept. the name and address of each person residing in the U.S. to whom a card is issued and, upon request, to submit its records to an audit by the U.S. government. The amendment prescribes the kinds of proof of identity that consular ID-issuing governments would be allowed to accept from their citizens applying for such an ID and the manner in which ID-related records would have to be kept. It also would oblige the issuing government to require cardholders to report any change of address within 30 days. The amendment would require the U.S. State Dept. to issue regulations to enforce all these provisions.

The amendment passed by a 226 to 198 margin, largely along partisan lines. Twenty-three Democrats joined 203 Republicans in favor, while 21 Republicans and 176 Democrats opposed the amendment. (To see how each member voted, go to <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2003&rollnumber=367>.) Passage of the amendment took advocates on both sides of the immigration debate by surprise.

Finally, on May 22, 2003, Governor Bill Owens of Colorado signed legislation that prohibits a public entity (agency, department, board, division, bureau, commission, council, or political subdivision of the state) from accepting an identification document unless it is a document issued by a state or federal jurisdiction or recognized by the U.S. government. The document also must be verifiable by federal or state law enforcement, intelligence, or homeland security agencies. The requirement would not apply to a person reporting a crime; to a public official accepting a crime report, conducting a criminal investigation, accepting an application for services for U.S. citizen children under the Women, Infants and Children (WIC) nutrition program, or providing emergency medical services; to a peace officer in the performance of the officer's duties and within the scope of the officer's employment; or to instances in which federal law mandates acceptance of a document.

**DREAM ACT REINTRODUCED IN SENATE**—A new version of the bipartisan DREAM Act, which addresses the tragedy of young people who grew up in the United States and have graduated from U.S. high schools but whose future is circumscribed by current immigration laws, has been introduced in the Senate by Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL). Under current law, these young people generally derive their immigration status solely from their parents, and when the parents are undocumented or in immigration limbo, their children have no mechanism to obtain legal residency. The Development, Relief, and Education for Alien

Minors (DREAM) Act (S. 1545), introduced on July 31, 2003, provides such a mechanism for those who are able to meet certain conditions.

The leading bill in the House addressing the same issue is HR 1684 (Cannon, R-UT), known as the Student Adjustment Act. HR 1684 was introduced this spring and currently has 66 cosponsors from both parties.

Like last year's version of the DREAM Act, which was also sponsored by Sen. Hatch, S. 1545 would enact two major changes in current law:

- Eliminate the federal provision that discourages states from providing in-state tuition without regard to immigration status; and
- Permit some immigrant students who have grown up in the U.S. to apply for legal status.

But S. 1545 differs in some important respects from its predecessor.

Unlike last year's bill, DREAM 2003 sets up a two-stage process for applying for legal status. Immigrant students who have grown up in the U.S., graduated from high school here, and can demonstrate good moral character would initially qualify for "conditional lawful permanent resident" status, which would normally last for six years. During the conditional period, the immigrant would be required to go to college, join the military, or work a significant number of hours of community service. At the end of the conditional period, those who meet at least one of these requirements would be eligible for regular lawful permanent resident status.

If enacted, DREAM 2003 would have a life-changing impact on the students who qualify, dramatically increasing their average future earnings—and, consequently, the amount of taxes they would pay—while significantly reducing criminal justice and social services costs to taxpayers.

Advocates believe that S. 1545 has a reasonable chance of passage in this session of Congress, in large part because Senators Hatch and Durbin were willing to bridge the bitter partisan divisions that have plagued the Senate this year. The bill already has 15 cosponsors representing a wide swath of the political spectrum; others are expected to announce their support now that Congress has reconvened after its summer break.

The following are some of the key features of DREAM 2003:

**Restore State Option to Provide In-State Tuition Benefit.** DREAM 2003 would repeal section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which discourages states from providing in-state tuition or other higher education benefits without regard to immigration status.

**Who Qualifies for Legal Residency.** Under DREAM 2003, most students of good moral character who came to the U.S. before they were sixteen years old and at least five years before the date of the bill's enactment would qualify for conditional permanent resident status upon acceptance to college, graduation from high school, or being awarded a general equivalency diploma (GED). Students would not qualify for this relief if they had committed crimes, were a security risk, or were inadmissible or removable on certain other grounds.

**Conditional Permanent Resident Status.** Qualifying students would be granted conditional permanent resident status, which would be similar to lawful permanent resident status, except that

it would be awarded for a limited period of time—6 years, under normal circumstances—instead of for an indefinite one. Students with conditional permanent resident status would be able to work, drive, go to school, and otherwise participate normally in day-to-day activities on the same terms as other Americans, except that they would not be able to travel abroad for lengthy periods. Time spent by young people in conditional permanent resident status would count towards the residency requirements for naturalization to U.S. citizenship.

**Requirements to Lift the Condition and Obtain Regular Lawful Permanent Resident Status.** At the end of the conditional period, regular lawful permanent resident status would be granted if, during the conditional period, the immigrant had maintained good moral character, avoided lengthy trips abroad, and met at least one of the following three criteria:

1. Graduated from a 2-year college or a vocational college that meets certain criteria, or studied for at least 2 years towards a bachelor's or a higher degree; or
2. Served in the U.S. armed forces for at least 2 years; or
3. Performed at least 910 hours of volunteer community service.

The 6-year time period for meeting these requirements would be extendable upon a showing of good cause, and the Dept. of Homeland Security would be empowered to waive the requirements altogether if compelling reasons such as disability prevented their completion and if removal of the student would result in exceptional and extremely unusual hardship to the student, or to the student's spouse, parent or child.

**TPS EXTENDED FOR NATIONALS OF EL SALVADOR, SOMALIA, LIBERIA; VALIDITY OF SALVADORAN EADs AUTOMATICALLY EXTENDED** – The secretary of Homeland Security has published separate notices in the Federal Register extending the designations of El Salvador, Somalia, and Liberia as countries whose nationals and residents currently in the United States qualify for temporary protected status (TPS).

The designation of El Salvador, which had been due to expire on Sept. 9, 2003, will be in effect a further 18 months, until Mar. 9, 2005. A 60-day reregistration period began July 16, 2003, and will remain in effect until Sept. 15, 2003. Because of the large number of Salvadorans affected by the extension and the likelihood that many will not be able to receive new employment authorization documents (EADs) under the extension until after their current ones expire, the notice also extends the validity of these EADs a further six months, until Mar. 9, 2004.

Separate notices extend the designation for Somalia, which had been due to expire on Sept. 17, 2003, to Sept. 17, 2004, and for Liberia, which had been due to expire on Oct. 1, 2003, to Oct. 1, 2004. The 60-day reregistration period for Somalian TPS began July 21, 2003, and will remain in effect until Sept. 19, 2003. The reregistration period for Liberian TPS began on Aug. 6, 2003, and will end on Oct. 6, 2003.

TPS is granted to persons in the U.S. from countries that are designated because they are experiencing armed conflict, environmental disaster, or certain other conditions that prevent the return of their nationals. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. The attor-

ney general designated El Salvador for TPS in March 2001, following a series of severe earthquakes that left over one fourth of the country's population without adequate housing, and the designation was subsequently extended. The authority to make TPS designations was transferred to the secretary of Homeland Security as part of the legislation creating that department, and the secretary has now decided to extend the designation for El Salvador for a further 18 months. The notice explains that "the economy of El Salvador is not yet stable enough to absorb returnees from the United States should TPS not be extended."

The attorney general first designated Somalia for TPS in Sept. 1991 because of ongoing armed conflict in Somalia. Subsequently the designation was extended annually, and in Sept. 2001 the attorney general redesignated the country for TPS, allowing later arrivals from Somalia to be included. The current notice extending the designation for Somalia explains that continuing armed conflict in the country continues to justify the TPS designation.

The attorney general designated Liberia for TPS on Oct. 1, 2002, because of ongoing armed conflict in Liberia, and the secretary of Homeland Security is extending the designation for the same reason.

To register for the extension for Salvadorans, nationals of El Salvador (and individuals of no nationality who last habitually resided in El Salvador) previously granted TPS must apply for it during the registration period that began on July 16, 2003, and ends on Sept. 15, 2003. Nationals of Somalia (and individuals of no nationality who last habitually resided in Somalia) previously granted TPS must apply for the Somalian extension during the registration period that began on July 21, 2003, and ends on Sept. 19, 2003. And nationals of Liberia (and persons of no nationality who last habitually resided in Liberia) must apply for the extension between Aug. 6 and Oct. 6, 2003. Such persons need only file Form I-821, Application for Temporary Protected Status (without the filing fee), Form I-765, Application for Employment Authorization, and two identification photographs (1½" x 1½").

Applicants who seek work authorization under any of the extensions must submit the \$120 filing fee or a fee waiver request with the Form I-765; those who do not need work authorization must still submit Form I-765, but without the fee. Applicants who previously registered for TPS and were fingerprinted do not need to be refingerprinted and do not need to submit the \$50 fingerprinting fee. Prior registrants who were not previously fingerprinted because they were under 14 years of age but who now must be fingerprinted also must pay this fee.

Applicants for TPS from El Salvador must submit their applications to the Bureau of Citizenship and Immigration Services (BCIS) *service center* having jurisdiction over the applicant's place of residence. Applicants for TPS from Somalia or Liberia must submit their applications to the BCIS *district office* having jurisdiction over the applicant's place of residence.

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

- be a national of El Salvador, Somalia, or Liberia (or a person with no nationality who last habitually resided in one of these countries);
- have been continuously physically present in the U.S. (for Salvadorans, since Mar. 9, 2001; for Somalis, since Sept. 4, 2001; and for Liberians, since Oct. 1, 2002);

- have continuously resided in the U.S. (for Salvadorans, since Feb. 13, 2001; for Somalis, since Sept. 4, 2001; and for Liberians, since Oct. 1, 2002); and
- be admissible as an immigrant, except as otherwise provided under Immigration and Nationality Act sec. 244(c)(2)(A), and not ineligible under INA sec. 244(c)(2)(B).

Each applicant for late initial registration must also be able to show that during the initial registration period (for Salvadorans, from Mar. 9, 2001, through Sept. 9, 2002; for Somalis, from Sept. 4, 2001, through Sept. 17, 2002; and for Liberians, from Oct. 1, 2002, through April 1, 2003), he or she:

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

The notice extending TPS for Salvadorans also extends the validity of EADs that were issued pursuant to the TPS program for an additional six months. The automatic extension applies to EADs bearing a Sept. 9, 2003, expiration date that were issued on either (1) Form I-766 with the notation "A-12" or "C-19" on the face of the card under "Category," or (2) Form I-688B with the notation "274A.12(A)(12)" or "274A.12(C)(19)" on the face of the card under "Provision of Law." This extension is automatic, but individuals having such EADs still must reregister for TPS during the 60-day registration period in order to obtain an EAD valid until Mar. 9, 2005 under the new extension.

68 Fed. Reg. 42071-74 (July 16, 2003) (El Salvador);

68 Fed. Reg. 43147-50 (July 21, 2003) (Somalia).

**BIA: GRANT OF A PARDON DOES NOT ELIMINATE REMOVABILITY BASED ON CONVICTION FOR DOMESTIC VIOLENCE OR CHILD ABUSE** – The Board of Immigration Appeals has ruled that the grant of a full and unconditional presidential or gubernatorial pardon does not waive removability for having been convicted of a crime of domestic violence or child abuse under section 237(a)(2)(E)(i) of the Immigration and Nationality Act.

In the case the BIA decided, the respondent had been charged with removability both for having an aggravated felony conviction under INA sec. 237(a)(2)(A)(iii) and for having a conviction for a crime of domestic violence or child abuse under sec. 237(a)(2)(E)(i). Both charges were based on the same conviction for sexual battery, which was pardoned by the state of Georgia.

The BIA concluded, as a matter of statutory interpretation, that the pardon eliminated removability under the aggravated felony charge but not under the domestic violence charge. It found this conclusion to be dictated by the plain language of INA sec. 237(a)(2)(A)(v), which provides that specified provisions of sec. 237(a)(2)(A) do not apply to a criminal conviction if the respondent has been granted a full and unconditional presidential or gubernatorial pardon. While the aggravated felony ground of removability is listed in this section, the domestic violence ground is not.

*In re Jung Tae Suh*, 23 I. & N. Dec. 626 (BIA 2003).

**BCIS PUBLICIZES SERVICES OFFERED BY THE NATIONAL CUSTOMER SERVICE CENTER** – The Bureau of Citizenship and Immigration Services has posted detailed information on its Web site regarding the use of the National Customer Service Center (NCSC). For many kinds of inquiries and services, the agency has made the NCSC the point of contact, rather than the service center or local BCIS office where an application or petition may be pending. The information is contained in a memo, which provides direction as to which requests should first be directed to a service center or local office, and which should be directed to the NCSC. The memo may be accessed at [www.bcis.gov/graphics/services/ncsc.htm](http://www.bcis.gov/graphics/services/ncsc.htm).

The memo notes that NCSC customer service representatives have access to the same information about the general processing of a case that is directly available to customers through the automated case status function, which may also be accessed through the BCIS Web site or by telephone (see "INS Establishes Online Case Status Service," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 2002, p. 6).

In May, the agency initiated filing by e-mail of two commonly used forms, Form I-90, Application to Replace Permanent Resident Card, and Form I-765, Application for Employment Authorization, and the agency has plans to expand e-mail filing to other forms. The increasing use of automatic services may ultimately improve the agency's ability to respond to inquiries. However, as part of the process of implementing the NCSC inquiry system, the BCIS severely limited direct phone access to the service centers, and many attorneys and representatives have complained that this has made it much more difficult to access information and correct errors.

## Litigation

**9TH CIRCUIT RULES BIA "STREAMLINING" PROCEDURES CONSTITUTIONAL** – The U.S. Court of Appeals for the Ninth Circuit has upheld the constitutionality of the "streamlining" procedures of the Board of Immigration Appeals. Under this procedure, appeals from immigration judge decisions may be reviewed by a single BIA member and "affirmed without opinion" even where the BIA member does not agree with the IJ decision but believes that any error was without prejudice. The decision also finds that the appellate court does not have jurisdiction to review whether the "affirmance without opinion" procedure was properly applied, in cases where the ruling concerns a discretionary determination that itself would not be subject to appellate court jurisdiction.

In 1999 the Executive Office for Immigration Review promulgated regulations that allowed review of IJ decisions by a single BIA member rather than by a three-member panel in cases that met certain criteria. The regulation allowed the BIA to designate certain categories of cases as subject to streamlining, and in successive directives the BIA chair designated several categories of cases for streamlining. In 2002 the attorney general promulgated regulations that vastly expanded the streamlining program, making single-BIA member review the norm rather than the exception (see "Attorney General Issues Final Rule to Reform BIA," IMMIGRANTS' RIGHTS UPDATE, Sept. 10, 2002, p. 1).

The respondents in this case, the Carriches, are Mexican nationals who at their removal hearing applied for cancellation of

removal for non-lawful permanent residents under section 240A(b) of the Immigration and Nationality Act. The IJ denied their application, finding that they had failed to meet the "exceptional and extremely unusual hardship" requirement for cancellation. The Carriches appealed, but the appeal was reviewed by a single BIA member under the 1999 regulations, and the IJ opinion was affirmed in a form order with no BIA opinion. The Carriches then petitioned for review of this ruling by the court of appeals.

On appeal, the Carriches contended that the streamlining procedures violate due process. They also contended that streamlining in their case was improper under the regulations because the determination of whether an applicant has met the hardship standard for cancellation is inherently an individual, factual determination. 8 CFR sec. 3.1(a)(7)(ii)(A) provides that a case may be streamlined only if it "does not involve the application of precedent to a novel fact situation."

The court rejected both the due process and regulatory challenges to streamlining. The court concluded that the "practical effect" of streamlining is that "the IJ's decision becomes the BIA decision." The court recognized that under the streamlining regulations a single BIA member can affirm an IJ decision without issuing an opinion based on different reasons than those set forth in the decision. However, the court considered that while such an action poses a "risk" to the BIA of being reversed by the court of appeal, the fact that the court can review the decision minimizes the likelihood that streamlining will result in denials of due process. Thus, "it is the BIA, not the alien petitioner, that is saddled with any errors the IJ makes and with the risk of reversal on grounds that do not reflect the BIA's actual reasons."

The court also reasoned that, while the facts of each case may be different, "not every case presents a factual situation that requires the BIA to establish and reassess the boundaries of the 'exceptional and extremely unusual hardship' standard." The court concluded that "it is neither arbitrary nor a violation of due process for the BIA to decide that a particular case clearly falls within, or outside, those boundaries."

A majority of the three-member appellate panel also concluded that the court does not have jurisdiction to determine whether streamlining was appropriate under the regulations, in cases where the appeal concerns only discretionary determinations. The Ninth Circuit has found that section 242(a)(2)(B) of the INA eliminates jurisdiction for the court of appeals to review the BIA's discretionary determination of whether an applicant for cancellation has met the hardship standard. *Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003) (for a discussion of *Romero-Torres*, see "9th Circuit Finds No Jurisdiction to Review BIA's Determination That Cancellation Hardship Requirement Not Met," IRU, June 3, 2003, p. 8). The court concluded that this bar to jurisdiction also applies to reviewing whether streamlining was appropriate in cases concerning only discretionary determinations. The court reasoned that to determine whether streamlining was appropriate in this case, it "would necessarily be engaged in a merits analysis of the hardship claim," and that would conflict with the jurisdictional bar.

Judge Thomas G. Nelson filed a partial dissent, contending that the determination whether the streamlining regulation was properly applied does not involve discretionary determinations and is properly within the court's jurisdiction. He agreed with the

majority's conclusion that the streamlining procedure does not violate due process. A petition for rehearing is pending.

*Falcon Carriche v. Ashcroft*, No. 02-71143  
(9th Cir. July 14, 2003).

#### **9TH CIRCUIT OVERTURNS BIA FINDING THAT LPR ABANDONED STATUS**

— The U.S. Court of Appeals for the Ninth Circuit has reversed a decision of the Board of Immigration Appeals that had found that a lawful permanent resident abandoned his LPR status as a result of repeated trips he made to his home country. On reviewing the evidence and relying on the factual findings of the immigration judge, which the BIA had adopted, the court found that the government failed to establish by clear and convincing evidence that the respondent abandoned his LPR status.

The respondent in this case, Eshghan Khodagholian, is an Iranian national who was admitted to the United States as an LPR in 1993, together with his wife and their two children. On moving to the U.S., the family kept their house and other assets in Iran. They took up residence in the U.S., and the children were enrolled in school, but Khodagholian was employed only sporadically. During the five years following his admission to the U.S. as an LPR, Khodagholian made three trips to Iran. On the first trip he traveled with his family to sell some items and gather documents the children needed for school. The wife and children returned to the U.S. after two months, but Khodagholian stayed two additional months. On the second trip, Khodagholian traveled alone and stayed for five to six months to care for his dying mother and orphaned nephews. On the third trip, Khodagholian returned to Iran to sell the family's house. On arrival in Iran, he was stopped by police and told he could not leave the country until he satisfied a tax bill owing from his sale of a partnership before he immigrated to the U.S. Only after he had been in Iran for 11 months did the government clear him to leave the country, and he ended up staying in Iran for an additional four months. On return to the U.S., he was stopped by inspectors at the airport and charged with having abandoned his LPR status.

At Khodagholian's removal hearing, the immigration judge found that none of the three absences, considered alone, would establish abandonment of residence. However, the IJ noted that the third absence was particularly troubling, both because of its fifteen-month duration and because it lasted four months beyond the date Khodagholian was cleared to leave Iran. The IJ also noted that, although Khodagholian's uncle had sponsored his admission and claimed he would employ him, Khodagholian apparently never worked for him and was only employed sporadically in the U.S. The IJ concluded that the totality of circumstances established that Khodagholian had abandoned his status. On appeal, the BIA adopted the IJ's findings and dismissed the appeal, and Khodagholian filed a petition for review.

On petition for review, the Ninth Circuit found that the government failed to establish that any of the absences were other than a temporary visit abroad. While the fifteen-month stay of the last visit was the most troubling, most of it was involuntary because of the tax bill. Moreover, throughout the five-year period the family retained a U.S. residence, the children were enrolled in school, and the wife was employed in the U.S. While the government argued that the fact that Khodagholian and his family received welfare benefits during this period should also be

considered, the court noted that this consideration is not relevant to the issue of whether the respondent abandoned his LPR status. The court concluded that the absences, whether considered individually or in the totality of circumstances, did not establish by clear and convincing evidence an abandonment of LPR status. *Khodagholian v. Ashcroft*, No. 02-71317 (9th Cir. July 14, 2003).

#### **9TH CIRCUIT RULES THAT AG AND DHS SECRETARY ARE PROPER RESPONDENTS FOR HABEAS PETITION CHALLENGING IMMIGRATION DETENTION**

—The U.S. Court of Appeals for the Ninth Circuit has ruled that the attorney general and the secretary of the Dept. of Homeland Security are the proper respondents for a habeas petition filed by an immigration detainee. The decision comes on the appeal from a district court denial of a habeas petition filed against the Immigration and Naturalization Service by a pro se detainee.

While in a habeas case the proper respondent is the “custodian” of the detainee, the dismantling of the INS and the transfer of most of its functions to the DHS presented an issue of first impression for the court as to who should be considered the proper custodian. In concluding that both the attorney general and the DHS secretary should be named as respondents, rather than the official with immediate responsibility over the facility where the immigrant is detained, the court relied on the fact that immigration detainees may frequently be transferred from one facility to another. A significant consequence of the decision is that habeas petitions need not be filed in the particular federal district where the petitioner is currently detained.

In finding that the heads of the two federal agencies with authority over immigration detention are the proper respondents rather than the immediate custodian, the court distinguished the decisions of two other circuits, *Vasquez v. Reno*, 233 F.3d 688 (1st Cir. 2000), *cert. denied*, 534 U.S. 816 (2001), and *Li v. Maugans*, 24 F.3d 500 (3d Cir. 1994). The court noted that both of those cases relied on nonimmigration cases and did not consider the particular circumstances of immigration detention. The court rejected the claim that naming the heads of the agencies as respondents would open the door to forum-shopping by petitioners, noting that traditional venue considerations still require that actions be brought only in districts with some relationship to the case, such as the district where the material events in the case took place, or the district most convenient for the parties. Moreover, the court noted that “there are indications that the district courts in areas where immigration detention centers are located have been flooded with detainee habeas petitions,” and the court’s decision may tend to alleviate this problem.

Having found that the petition in this case did not name the proper respondents, the court remanded the case to the district court to allow the petitioner to amend the petition to name these officials as respondents.

*Armentero v. INS*, No. 02-55368 (9th Cir. Aug. 26, 2003).

## **Employment Issues**

#### **TEXAS COURT RULES THAT UNDOCUMENTED WORKERS ARE ENTITLED TO DAMAGES FOR LOST EARNING CAPACITY IN STATE NEGLIGENCE ACTIONS**

—A Texas trial court has determined that the U.S. Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v.*

*NLRB*, 535 U.S. 137 (2002), does not prevent the state of Texas from awarding damages, including damages for lost earning capacity, to an individual who is not lawfully in the United States. (For a summary of the *Hoffman* decision, see “Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing,” IMMIGRANTS’ RIGHTS UPDATE, Apr. 12, 2002, p. 10.)

Gustavo Guzman, a chicken catcher for a contractor of Tyson Foods, was injured when a Tyson employee ran into him with a forklift. Guzman sued Tyson, claiming that the accident was caused by the negligence of Tyson and its employee. A jury awarded Guzman \$745,496 in damages, which included damages for lost earning capacity. Tyson appealed, arguing that *Hoffman Plastic* “militates against any award of wages as damages to undocumented laborers.”

The court rejected that argument and found that *Hoffman* “only applies to an undocumented alien worker’s remedy for an employer’s violation of the [National Labor Relations Act] and does not apply to common-law personal injury damages.” The court further held that “Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for earning capacity.”

A New York State trial court recently issued a similar decision, also allowing undocumented workers to recover lost wages as tort damages. (For a summary of that decision, see “N.Y. Court Rules That Undocumented Workers Are Entitled to Damages for Lost Wages in State Tort Actions,” IMMIGRANTS’ RIGHTS UPDATE, July 15, 2003.)

*Tyson Foods, Inc. v. Guzman*, 2003 Tex. App. LEXIS 6643 (Tex. July 31, 2003).

#### **IJ RULES INS AGENTS ARE BOUND BY FORMER OI 287.3A REGARDING ENFORCEMENT ACTIONS DURING LABOR DISPUTES**

—In a recent decision, an immigration judge terminated removal proceedings against two garment workers on the grounds that the Immigration and Naturalization Service violated former Operations Instruction (OI) 287.3a, Questioning Persons During Labor Disputes (redesignated as 33.14(h) of the Special Agent Field Manual (SAFM) as of Apr. 28, 2000), when INS agents raided a factory in Manhattan, prompted by a call from an employer.

The employer called the INS in 1998 after a group of its employees who were involved in an organizing campaign with the Union of Needletrades, Industrial and Textile Employees (UNITE!), filed complaints with the U.S. Dept. of Labor (DOL) and the National Labor Relations Board (NLRB) concerning unpaid wages for overtime hours worked. The INS agents who raided the factory arrested the workers and put them in removal proceedings.

In immigration court, the workers filed a motion to suppress all evidence that the INS had obtained in the raid and to terminate proceedings on the ground that the INS had failed to follow OI 287.3a. They also alleged that the INS engaged in selective enforcement against the Latino workers when they did not question persons of other ethnicities who were working alongside the Latinos who were questioned and subsequently detained.

The OI requires that “whenever information received from any source creates suspicion that an INS enforcement action might involve the Service in a labor dispute, a reasonable attempt should be made by Service enforcement officers to determine whether there is a labor dispute in progress.” The OI lists three sources

that the INS can contact to determine whether a labor dispute is in progress: the NLRB, the DOL, and the state department of labor. The INS argued that the OI is merely an instruction without the same force of law as an officially promulgated rule or regulation and that, therefore, failure to follow it was not grounds for terminating the removal proceedings.

Alexis Aleinikoff, who was the INS executive associate commissioner for programs between mid-1995 and Jan. 1997, served as an expert witness on behalf of the workers. He had been responsible for promulgating the OI, and he testified that INS agents are generally expected to follow OIs and were bound by this particular one. He explained that the OI was created for "a combined purpose": it "prevents the Service from being manipulated by employees or employers in the context of a labor dispute" and also "from getting involved in labor issues, which are already regulated by federal labor laws."

The IJ rejected the INS's arguments and granted the workers' motion, finding that the workers had demonstrated that the INS obtained the evidence of their removability or deportability in an "illegal and egregious manner." She concluded that the OI was binding on the INS agents because it affects individual rights under federal labor laws. The IJ also concluded that the INS agents who conducted the raid had not followed the agency's own procedures, including obtaining approval from senior INS officials and consulting with state and federal labor agencies before undertaking it, and that because the OI "was designed to protect fundamental labor rights, the Services' failure to adhere to OI 287.3a invalidates [the] removal proceedings."

*In re: Herrera-Priego*, USDOJ EOIR (July 10, 2003).

**HOFFMAN: FEDERAL COURT RULES UNDOCUMENTED WORKERS ENTITLED TO DAMAGES FOR RETALIATORY TERMINATION, BUT NOT TO BACK PAY OR FRONT PAY**

— A federal district court in Illinois has denied in part the defendants' summary judgment motion in a lawsuit brought under the Fair Labor Standards Act (FLSA), rejecting their argument that the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), bars an award of compensatory damages. (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.) The court, however, determined that *Hoffman* bars back pay and front pay.

In Nov. 1999 Italia Foods, a manufacturer of frozen Italian foods, stopped compensating workers at one and a half times their regular wage for overtime hours worked and began paying them straight time without any deductions. Jose Renteria sued under the FLSA and the Illinois Minimum Wage Law. When three other workers joined the lawsuit, the employer fired them. The plaintiffs then added retaliatory discharge claims to their lawsuit.

The defendants moved for summary judgment, citing *Hoffman* for the proposition that if plaintiffs prevail on their retaliatory discharge claim, they are not entitled to back pay, front pay, or compensatory damages, because when they were employed they were not legally authorized to work in the United States. The court rejected the argument as to compensatory damages, agreeing with the decision of a California federal court, *Singh v. Jutla, et al.*, 214 F. Supp. 2d. 1056 (N.D. Cal. 2002). (For a discussion of that case, see "Court Denies Motion to Dismiss in Retaliation

Case Where Worker Was Reported to INS," IRU, Oct. 21, 2002.) The court reasoned that, "unlike the remedy of back pay or front pay, the remedy of compensatory damages does not assume the undocumented worker's continued (and illegal) employment by the employer." *Renteria, et al. v. Italia Foods, Inc., et al.*, 2003 U.S. Dist. LEXIS 14689 (N.D. Ill., Aug. 21, 2003).

**OSC ANNOUNCES 2003-04 GRANTEES**—The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has awarded nearly \$675,000 in grants to eleven nonprofit organizations, which will conduct public education programs for workers and employers about immigration-related job discrimination, the OSC announced on Aug. 14. The grants range from \$40,000 to \$85,000, providing critical support to these organizations beginning Oct. 1, 2003, and continuing through Sept. 30, 2004.

The OSC's mission is to educate workers and employers about the antidiscrimination provisions of the Immigration and Nationality Act, enforce legal protections against citizenship and national origin-based discrimination, and document-related abuse in hiring and firing. The OSC is part of the U.S. Dept. of Justice's Civil Rights Division and is independent from the Bureau of Citizenship and Immigrations Services (BCIS) and the Bureau of Immigration and Customs Enforcement (BICE) that are part of the new Dept. of Homeland Security.

The new grantees include the New York City Commission on Human Rights, in conjunction with the New York Immigration Coalition, which will provide education in all five boroughs of New York City in addition to other counties outside of New York City and whose workshops will focus on employers, service providers, and immigrant workers; the Los Angeles-based Asian Pacific American Legal Center of Southern California, in partnership with the Asian Law Caucus of San Francisco, which will educate workers and employers in Los Angeles and San Francisco; and the San Diego-based International Rescue Committee, which will provide antidiscrimination education to refugees, asylees, and other immigrant workers.

Catholic Charities of Dallas, another grantee, will provide services to workers and employers in northern Texas, Arkansas, New Mexico and Oklahoma, while Catholic Charities of Houston will educate employers and workers in southwestern Texas, including key communities along the Mexican border. Catholic Charities of St. Petersburg in Florida will use its grant to provide educational workshops to workers and small businesses through its network of service providers. And Hogar Hispano/Catholic Charities of Arlington, Virginia, will educate employers, as well as workers in the Metropolitan Washington, D.C., area.

The Georgia Hispanic Chamber of Commerce in Atlanta will provide education services to employers and Hispanic workers throughout Georgia. The Illinois Dept. of Human Rights, which is based in Chicago, will focus on employers, immigration service providers, and workers in a statewide educational program. And Legal Aid Services of Oregon will educate agricultural workers with a statewide media campaign and group presentations.

NILC also received funding from the OSC with which it will conduct a national program to educate immigration service providers and pro bono attorneys through a series of workshops and conference presentations around the country, as well as regional seminars in Phoenix, Arizona; Miami, Florida; and Orange

County, California.

More information about the grantees and the OSC's work can be found at [www.usdoj.gov/crt/osc](http://www.usdoj.gov/crt/osc).

## Immigrants & Welfare Update

**WIA BILL FOR LEP PERSONS INTRODUCED BY SENATORS CLINTON AND ENSIGN** – Senators Clinton (D-NY) and Ensign (R-NV), joined by Senator Bingaman (D-NM), have introduced legislation that will improve job training services and Adult Basic Education (ABE) for immigrants and persons who are limited English proficient (LEP). The Access to Employment and English Acquisition Act (S. 1543), introduced July 31, 2003, would amend the Workforce Investment Act (WIA) by providing incentives for states to help individuals who face language-related barriers to employment and job and by making programs that integrate job training and language acquisition more accessible. Senators Clinton, Ensign, and Bingaman serve on the Health, Education, Labor, and Pensions (HELP) Committee, which is scheduled to reauthorize the WIA this year. The senators will work to incorporate S. 1543 into the WIA bill as it moves through the HELP Committee.

The WIA is scheduled to be reauthorized by Sept. 30, 2003. The House of Representatives passed legislation reauthorizing the WIA on May 8, 2003. The Workforce Reinvestment and Adult Education Act (HR 1261) mainly reflects the administration's priorities for reauthorization and falls short of addressing the needs of LEP job seekers in a meaningful way. But the bill does include some proposals that represent a step in the right direction (see "House Passes Workforce Investment Act Reauthorization Bill," IMMIGRANTS' RIGHTS UPDATE, June 3, 2003, p. 10). Meanwhile, Senate HELP Committee worked throughout the summer recess to draft bipartisan legislation to reauthorize the WIA. The committee released a third "discussion draft" at the end of August, although it acknowledged that not all sections have been agreed upon. NILC submitted comments to the committee on the draft regarding incorporating provisions of S. 1543. It is expected that the bill will be introduced in early September and there is a tentative plan to mark-up the bill on Sept. 24.

The key provisions of S. 1543 are the following:

1. *Requirement that states describe how they will serve LEP populations in the state plan.* Current law requires states to describe how they will serve the employment and training needs of dislocated workers, low-income individuals, homeless individuals, ex-offenders, individuals training for nontraditional employment, and other individuals with multiple barriers to employment, but not persons who are LEP. Including LEP persons will help focus the states' planning efforts to ensure that the unique needs of LEP persons are adequately met.

2. *Requirement that states comply with Title VI of the Civil Rights Act of 1964 by requiring "appropriate" translation and interpretation services.*

3. *Adjusted performance measures that take into consideration low levels of English proficiency.* States are currently assessed on their effectiveness in delivering WIA services through a performance accountability system that allows for adjusted levels of performance. Adjusted levels of performance are currently negotiated between each governor and the U.S. Dept. of Labor

(DOL), taking into account economic conditions and the characteristics of the population. S. 1543 defines those characteristics to include, among other indicators, low levels of English proficiency.

4. *Incentives to serve "special populations."* Under current law, bonus grants are awarded only to states that exceed their performance measures. S. 1543 would also award grants based on the performance of the state in serving "special populations," including LEP persons.

5. *Programs that serve LEP persons are eligible for demonstration, pilot, and research funding.* Current law does not include programs that serve LEP persons as eligible for this funding. It is critical for programs that integrate language acquisition and job training to be eligible for inclusion in these projects and to be researched for their effectiveness.

6. *Improved access to training services.* Training services are currently viewed as a last resort in many states, making it difficult for persons in greatest need of job training to obtain them. S. 1543 allows job seekers to enroll in services that best meet their needs. The bill also clarifies that bilingual training or vocational English as a second language (ESL) instruction can count as a training activity.

7. *Amended Adult Basic Education (ABE) funding formula.* Under current law, LEP persons with a high school degree are not considered in the distribution of ABE funds—even though they are enrolled in ABE programs, such as ESL. S. 1543 amends the ABE funding formula to include the actual number and percentage growth of state LEP populations with a high school degree.

8. *Improved access to ABE funding for community-based organizations.* Current law requires that all eligible providers have "direct and equitable" access to funding under Title II, which funds ABE (which includes ESL). S. 1543 requires states to include a description in their state plan of how they will ensure direct and equitable access, including how the capacity of community-based organizations will be built. The bill also requires the state, in awarding grants or contracts, to consider the degree to which the provider will serve those "most in need," including individuals who are LEP.

9. *Requires data collection on 16 to 18-year-old students.* Advocates are concerned that youth are being steered to adult education rather than high school due to the increased demands for better student performance that the No Child Left Behind Act has placed on high schools. In order to assess whether these concerns are justified and, if they are, what the impact of this trend is on 16 to 18-year-old students, S. 1543 requires data collection and reporting to the U.S. Dept. of Education and to Congress.

Advocates' strategy is to get the provisions of S. 1543 into the HELP Committee bill. Advocates hope to get more cosponsors on the bill to demonstrate that LEP issues are important to the Senate. At this time, it is unclear when the bill will reach the Senate floor. A copy of S. 1543 can be found at <http://thomas.loc.gov>.

**FINAL GUIDANCE ON ACCESS TO SERVICES FOR LEP PERSONS PUBLISHED; COMMENTS SOUGHT** – The U.S. Dept. of Health and Human Services (HHS) has published its final guidance to federal

fund recipients on access to programs and services for limited English proficient (LEP) people. Released on Aug. 8, 2003, the guidance became effective immediately, pending modification after HHS receives public comments on it.

The guidance was issued to advise recipients of HHS funds on the actions they should take to provide LEP persons with meaningful access to funding recipients' activities and programs, as required under Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits national origin discrimination by recipients of federal funds. This latest guidance supersedes HHS's guidance on LEP access published Aug. 30, 2000, and was developed to conform with "standard" guidance published by the U.S. Dept. of Justice (DOJ) last year (see "DOJ Publishes Final Guidance on Providing LEP Persons Access to Services," IMMIGRANTS RIGHTS UPDATE, July 29, 2002, p. 16). HHS has disappointed advocates by failing to tailor its guidance by setting higher standards than those in the DOJ guidance. And in some respects, the HHS guidance falls below the minimum standards established by the DOJ. For example, the guidance authorizes HHS funding recipients to refer LEP individuals to other recipients rather than requiring them to provide language assistance services, deletes language requiring recipients to consider the potential for increased contact with LEP persons if they engage in appropriate outreach, and reduces expectations for recipients' development of a written language assistance plan.

HHS funds support a wide range of essential services, including the Temporary Assistance to Needy Families (TANF) program, medical services provided through Medicaid, the State Children's Health Insurance Program (SCHIP) and Medicare, child support enforcement, child abuse and domestic violence prevention, immunization and other public health programs, Head Start, and substance abuse prevention efforts. HHS published the guidance pursuant to Executive Order 13166, which clarifies the requirements of Title VI and requires federal funds-granting agencies to publish guidance to their recipients on the recipients' obligations to LEP persons.

This is the third time HHS has published guidance for public comment. HHS republished its original guidance for additional comment on Feb. 1, 2002, pursuant to instructions in a July 8, 2002, memorandum from the DOJ. On Mar. 14, 2002, the Office of Management and Budget (OMB) issued a report to Congress on the benefits and costs of implementing Executive Order 13166. The OMB report recommended the adoption of uniform guidance across all federal agencies, with flexibility to permit tailoring for each agency's specific requirements. Consistent with this OMB recommendation, the DOJ published LEP guidance for its recipients and instructed other federal agencies to use it as a model for their guidance.

HHS has provided a generous 120-day public comment period to encourage comments from the public and to give funding recipients an opportunity to discuss in their comments their experience with the guidance. Advocates are encouraged to submit comments reaffirming the importance of language assistance for LEP persons. Comments must be submitted on or before Jan. 6, 2004.

68 Fed. Reg. 47311-23 (Aug. 8, 2003).

**"EMERGENCY MEDICAL CONDITION" GIVEN GENEROUS INTERPRETATION BY ARIZONA COURT** – The Arizona Supreme Court recently interpreted Arizona's emergency Medicaid law to enable a patient's emergency Medicaid coverage to continue after his or her health condition is stabilized. This decision interprets the meaning of "emergency medical condition" more broadly than earlier decisions in other jurisdictions. Emergency Medicaid is available to qualifying individuals without regard to their immigration status, including undocumented persons. The court's decision has national significance because it interprets a definition of "emergency medical condition" in the federal Medicaid Act, incorporated into the Arizona law by reference.

The Medicaid Act defines "emergency medical condition" as:

a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including extreme pain) such that the absence of immediate medical attention could reasonably be expected to 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.

The case before the Arizona Supreme Court specifically addressed whether an undocumented patient's emergency medical condition has ended when the patient's initial injury has stabilized to the point that the patient can be transferred from a hospital's acute care ward to a sub-acute ward.

The court concluded that the statutory definition, and the realities of medical treatment, did not permit the use of a bright-line test, such as a patient's transfer to a sub-acute ward, to determine when an emergency has ended. In doing so, the court disagreed with the federal Second Circuit Court of Appeals, which, in *The Greenery Rehabilitation Group, Inc. v. Hammon, et al.*, 150 F.3d 226 (2d Cir. 1998), had concluded that a patient's emergency condition ends once the patient is stabilized. The Arizona court explained that "reliance on the notion of stabilization . . . fails to account for either the wide variety of emergency conditions or patients' responses to treatment."

*Scottsdale Healthcare, Inc. v. Arizona Health Care Cost Containment System Administration*, 2003 Ariz. LEXIS 108 (Aug. 21, 2003).

## Miscellaneous

**WORKERS' RIGHTS AND PUBLIC BENEFITS TRAININGS PLANNED FOR THIS SUMMER AND FALL** – Upcoming NILC and California Immigrant Welfare Collaborative trainings with definite dates include sessions on **immigrants' access to public benefits** to be held in **Los Angeles (Oct. 15, 2003)** and **Oakland, California (Oct. 30, 2003)**.

In addition, NILC is planning to hold **immigrant workers' rights** trainings this **November** in **New York**, New York, and **Salt Lake City**, Utah. Other workers' rights trainings are tentatively slated for **Chicago**, Illinois; **Houston**, Texas; **Los Angeles**, California; **Miami**, Florida; **Phoenix**, Arizona; and **Portland**, Oregon.

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

## **The National Immigration Law Center...**

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