



## Immigration Issues

### **INS SUPPORTS WORLD TRADE CENTER RECOVERY EFFORTS BY PLEDGING NOT TO SEEK OR USE IMMIGRATION INFORMATION PROVIDED TO LOCAL AUTHORITIES**

– Among the thousands of victims of the Sept. 11, 2001, attack on the World Trade Center in New York City were many hundreds of immigrants. According to press reports, the missing and dead include nationals of at least 60 countries. Recognizing that victims of the disaster and their family members include undocumented immigrants and that the family members may be deterred from coming forward by fears of deportation, Immigration and Naturalization Service Commissioner James Ziglar has issued a statement to give assurance that the INS will not arrest or detain immigrants seeking information about missing

persons and will not seek or use immigration information provided to local authorities.

On Sept. 21, Ziglar stated: “All of us in the INS family have been deeply shocked and saddened by the terrible loss of life and destruction in New York. We are committed to supporting the rescue and recovery efforts taking place at the World Trade Center. We have heard disturbing reports that some people whose loved ones are missing have not come forward because of immigration issues. We cannot let that happen. It is crucial that local authorities get the help they need in identifying victims and the missing. I want to personally urge the immigrant community to come forward, and assure everyone that INS will not seek immigration status information provided to local authorities in the rescue and recovery efforts.”

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

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**INS ISSUES RULE EXPANDING ITS AUTHORITY TO DETAIN NONCITIZENS WITHOUT CHARGE IN RESPONSE TO WTC AND PENTAGON ATTACKS** –

The Immigration and Naturalization Service has issued an interim regulation, effective immediately, that expands the length of time that the INS can detain noncitizens arrested without a warrant before the agency decides whether to bring removal charges against them. According to the supplemental information published with the rule in the Federal Register, the rule was issued without a period for public comment to enable the INS “to process cases—including establishing true identities and communicating with other law enforcement agencies—that arise in connection with the emergency posed by the recent terrorist activities perpetrated on United States soil.”

The rule amends 8 CFR section 287.3(d) to increase the period of time that the INS is permitted to detain a noncitizen without charge from 24 hours to 48 hours and to allow “an additional reasonable period of time” in the event of “an emergency or other extraordinary circumstance.” The INS published the rule with a request for public comments, which must be received on or before Nov. 19, 2001. 66 Fed. Reg. 48,334 (Sept. 20, 2001).

**LEGISLATION COUNTERING TERRORISM PROPOSED** – In response to the tragic events of Sept. 11, two pieces of legislation countering terrorism have been proposed, one coming from the Bush Administration and the other from members of the House of Representatives.

Proposed by Attorney General John Ashcroft, the Anti-Terrorism Act of 2001 (ATA) contains sweeping provisions. The legislation is part of a package that also includes immigration provisions, broadened authority for the use of law enforcement tools such as surveillance and wiretapping, and border security measures. Lawmakers, both Republican and Democrat, have expressed concerns about the legislation’s scope, especially its impact on civil liberties.

On Oct. 2, 2001, Congressman James Sensenbrenner (R-WI), chair of the House Judiciary Committee, and Congressman John Conyers (D-MI), the committee’s ranking Democrat, introduced a more limited bipartisan bill titled the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT). The bill represents an attempt at a compromise between some of the administration’s harshest proposals restricting civil liberties and the concerns of lawmakers, particularly with respect to immigration.

These proposals are extremely fluid and their details continue to be negotiated. Nevertheless, it is highly likely that passage of an anti-terrorism bill with new restrictions on immigration and immigrants will take place before the end of this first session of the 107th Congress, which is expected to adjourn by the end of this month (October 2001).

Highlights of some of the immigrant-related provisions contained in the current proposals follow. Since the details are rapidly changing, this summary is intended to provide only a general sense of the proposals being considered.

**IMMIGRATION HIGHLIGHTS OF THE ATA**

**Expansion of Terrorist Definition.** The bill would expand the definition of “terrorism” and “terrorist activities” to encompass a broader range of activities, rendering aliens charged with engag-

ing in them inadmissible or deportable. In a concession to lawmakers’ concerns, the current version of the bill no longer contains a provision that would have made spouses and children of terrorists inadmissible or deportable merely on the basis of their relationship to a terrorist. It also eliminated a provision under which an alien would have been found inadmissible or deportable on the mere basis of having given funds to a terrorist organization or to an organization that engages in terrorist activity.

**Certification and Detention.** The proposal creates a provision authorizing the Immigration and Naturalization Service to “certify” an alien, including a lawful permanent resident, if the attorney general has reasonable grounds to believe that the person may engage in, further, or facilitate terrorist activity or otherwise endanger the national security of the United States. Certified aliens may be detained indefinitely.

**Limits on Judicial Review.** A prior version of the proposal sought to proscribe all judicial review of certification. In contrast, the most recent version does allow habeas review in the U.S. District Court for the District of Columbia, and the scope of the review would include all issues related to the detention, including certification.

**Super Retroactivity.** The proposal would apply to all aliens, even if they entered the U. S. before its enactment or whether their conduct occurred before passage. It would also apply to all past, pending, or future deportation, exclusion, removal, or other immigration proceedings.

**FEATURES OF THE PATRIOT ACT OF 2001**

**Expansion of Terrorist Definition.** The PATRIOT Act would expand the definition of terrorism and terrorist activities as well as broaden the current grounds of inadmissibility and deportability relating to terrorist activities in a manner similar to that proposed in the most recent version of the ATA.

**Certification and Detention.** Under the proposal, the attorney general may certify an alien if he has reasonable grounds to believe that the alien is engaged in terrorist activities or otherwise engaged in activity that endangers national security. The INS may hold the alien in detention for up to seven days without bringing charges. If the alien is not charged within seven days, the attorney general must release the alien. In addition, the certification process would be the nondelegable duty of the attorney general or the INS commissioner.

**Limits on Judicial Review.** The proposal would allow judicial review of certification to be held only in the U.S. District Court for the District of Columbia. No other review, including review under the general habeas corpus statute (28 U.S.C. § 2241), would be permitted. The House bill does not place any limitations on the scope of habeas review. Thus, as with the ATA, it is likely that an individual would be able to challenge his or her certification and detention.

**Retroactivity.** There appear to be no practical differences between the retroactivity language contained in the ATA and the House bill. However, the PATRIOT Act includes a provision that prohibits charges of inadmissibility or deportability against individuals who provided support to an organization that the State Dept. later designates as a terrorist organization following the bill’s enactment. Thus, an individual’s previous support of an organization that is later designated to be a terrorist organization

would not retroactively subject him or her to the PATRIOT Act's provisions.

**Asylum Changes.** The proposal would allow the State Dept. to disclose an asylum applicant's confidential information to a foreign government, if the attorney general has reasonable grounds to believe the alien is a terrorist. The information would bar the person from obtaining asylum. Current asylum regulations require such information to be treated as confidential. However, under the proposal, confidentiality may not be breached if the asylum applicant fears persecution because his or her home government considers the applicant to be a terrorist.

**Additional Resources to Northern Border.** The proposal calls for tripling from current staffing levels Border Patrol and INS personnel assigned to each of the states along the northern border. It would also authorize an additional \$50 million to the INS to improve technology and acquire additional equipment for use at the northern border.

**Immigration Benefits to Victims.** The bill contains provisions that would protect the family visa petitions filed by persons killed in the Sept. 11 terrorist attack. Surviving petition beneficiaries must otherwise be eligible and admissible.

#### STATE DEPT. PUBLISHES RULES FOR 2003 DIVERSITY VISA LOTTERY –

The U.S. State Dept. has published a notice detailing application procedures for the 55,000 immigrant visas to be available in fiscal year 2003 under the diversity visa lottery program ("DV-2003"). The application process once again will be a one-month, mail-in procedure; and this time it will run from noon (Eastern Time) of Oct. 1, 2001, to noon of Oct. 31, 2001.

In a separate notice, the State Dept. announced that it is making a handful of changes to the regulations governing the program. The new regulations, which took effect on Aug. 31, 2001, clarify that under no circumstances may a consular officer issue a visa to an individual after the end of the fiscal year for which he or she was registered. The new regulations also reiterate that at the end of that fiscal year, the petition is automatically revoked. In addition, the new rules clarify the signature requirement and implement changes regarding photographs and the basis on which applicants' fulfillment of the training requirement will be evaluated.

The visa lottery was introduced in 1986 as a temporary procedure to increase immigration from countries that, especially since the 1960s, have sent relatively few immigrants to the U.S. In 1988 the program was extended for two years. The Immigration Act of 1990 then created a transitional program for three more years, followed in fiscal year 1995 by a permanent lottery program.

Under the permanent diversity visa program, 55,000 immigrant visas are allocated to the different regions of the world under a formula intended to allocate more visas to areas that have sent relatively few immigrants in the previous five years than to those that have contributed large numbers of immigrants. Natives of countries that have sent more than 50,000 immigrants to the U.S. in the past five years are not eligible, and no one country can receive more than seven percent of the diversity visas issued in a single year. (However, the State Dept. notes that the Nicaraguan and Central American Relief Act of 1997 (NACARA) allocates 5,000 of the DV visas for use in the NACARA program. The reduction, which first took effect with DV-2000, will continue for

as long as it is deemed necessary, including for DV-2003.)

**Eligibility for Lottery.** To be eligible for the visa lottery, the applicant must meet two basic requirements: (1) the applicant must be a native of one of the limited number of countries whose natives qualify for the lottery (*note:* persons from these countries who are already in the U.S. are eligible to apply); and (2) the person must meet either the education or training requirement of the DV program. In addition, the individual must submit a properly completed application within the application period.

Natives of the following regions and countries are eligible to apply for the visas:

- AFRICA – all countries qualify.
- ASIA – all countries (including Israel and the Middle East, Indonesia, Hong Kong S.A.R., which is counted separately from China, and Taiwan) qualify—except China (mainland-born only, including Macau), India, Pakistan, Philippines, South Korea, and Vietnam.
- EUROPE – all countries (extending from Greenland to Russia and including all countries of the former U.S.S.R., and also including components and dependent areas overseas of Denmark, France, and the Netherlands) qualify, except the following: Great Britain (United Kingdom) and its territories (including Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena, and Turks and Caicos Islands; however, Northern Ireland does qualify).
- NORTH AMERICA (which is not considered to include America south of the U.S.) – only the Bahamas qualifies (i.e., Canada does not qualify).
- OCEANIA – all countries qualify (includes Australia, New Zealand, Papua New Guinea, and all countries and islands of the South Pacific).
- AMERICA SOUTH OF THE U.S. BORDER, AND THE CARIBBEAN – all countries qualify except the following: Colombia, Dominican Republic, El Salvador, Haiti, Jamaica, and Mexico.

A *native* of a country is someone who was born in the country or someone who is chargeable to it under Immigration and Nationality Act section 202(b). The rules of chargeability allow the following categories of people to apply for lottery visas as natives of a qualifying country: (1) the spouse of someone born in one of the qualifying countries; (2) the minor dependent child of a parent who was born in a qualifying country; and (3) a person, regardless of age, (a) who was born in a country of which neither parent was a native or resident at the time of the person's birth, and (b) one of whose parents is a native of a qualifying country.

The alternative education and training requirements for the diversity visa program are that applicants either (1) must have a high school education (twelve-year course of elementary and secondary education) or its equivalent or (2) for two of the past five years they must have worked in a job that requires at least two years of training and experience. Under the amended regulations, for applicants who register after July 31, 2001, their work experience will be evaluated using the Dept. of Labor's O\*Net OnLine database. In previous years' programs, the Dictionary of Occupational Titles (DOT) had been used. For applicants who registered for the program before July 31, 2001, O\*Net OnLine will also be used. However, the State Dept. notes, in cases where O\*Net OnLine-based determinations differ from those based on the DOT, and the former disadvantages the applicant, consular

officers are authorized to use the latter.

Though the lottery program imposes no age limits on who can apply, usually persons under 18 will be unable to satisfy the education/work requirement. Persons who are selected for visas can adjust status in the U.S. if they are otherwise qualified for adjustment of status. Finally, persons who are in the process of applying for a visa under a different visa category also can apply for the diversity visa lottery.

A husband and wife can each submit an entry; if either is selected, the other will qualify for a derivative visa. However, no person can submit more than one entry, and the applicant must personally sign the entry. If more than one entry is submitted for any person, that person will be disqualified from the program.

**Application Process.** As noted above, a basic requirement to participate in the visa lottery is that the native of a qualifying country must submit one entry form within the application period. An entry consists of a plain piece of paper with the following information typed or printed in English (entries will be disqualified if they do not provide all of this information):

1. **APPLICANT'S FULL NAME** – Last name, first name and middle name, with the last (sur-/family) name underlined (e.g., Smith, Sara Jane).

2. **APPLICANT'S DATE AND PLACE OF BIRTH**, in the following order – Date of birth: day, month, year (e.g., "15 November 1961"). Place of birth: city/town, district/county/province, country (e.g., "Munich, Bavaria, Germany") (use current name of country if different than at time of birth—e.g., Slovenia, rather than Yugoslavia; Kazakstan, rather than Soviet Union, etc.).

3. **APPLICANT'S NATIVE COUNTRY, IF DIFFERENT FROM COUNTRY OF BIRTH** – If the applicant is claiming nativity based on being a national of a country other than his or her country of birth, this must be clearly indicated on the entry itself and at the upper left corner of the entry envelope. If an applicant is claiming nativity through a spouse or parent, this should be indicated on the entry.

4. **NAME, DATE AND PLACE OF BIRTH OF APPLICANT'S SPOUSE AND CHILDREN**, if any – Applicants must include all of their children, natural as well as all legally adopted and stepchildren, who are under 21 and unmarried. Applicants' spouse and children must be listed even if they no longer reside with the applicant, and regardless of whether they will immigrate with the applicant. The instructions caution that failure to provide all of this information will disqualify the applicant.

5. **APPLICANT'S FULL MAILING ADDRESS** – Make sure the address is complete and clearly written to ensure that the registration notice can be delivered; phone number is optional, but useful.

6. **PHOTOS** – A recent (less than 6 months' old) 1½" x 1½" (37 mm square) photograph of the applicant, with the applicant's name printed across the back of the photo. Under the new regulations, the entry must also include recent photographs of the applicant's spouse and children (natural as well as legally-adopted children and stepchildren). Photographs must be submitted even if the spouse or child no longer resides with the applicant and regardless of whether they will accompany or follow to join the applicant in the U.S. Each family member must be represented in separate photographs, as group photographs will not be accepted. The name and birth date of each family member must be printed

on the back of the photograph. Each photograph must be attached to the entry by clear tape. *Do NOT* use staples or paperclips. The back of the entry may be used if there is not enough room on the front to accommodate the photographs.

7. **THE APPLICANT'S SIGNATURE** – Applicants who do not personally sign their applications will be disqualified. As clarified by the new rules, the signature must be made in the applicant's "usual and customary" manner, in his or her native alphabet. As before, an initialed signature or block printing of the applicant's name will not be accepted. Should applicants sign their name in the Roman alphabet and their native language employs a different alphabet, they must also sign in the native alphabet.

The entry must be mailed (regular mail or air mail only; no faxes, registered mail, hand delivery, express mail, etc.) in a regular or business-size envelope. The envelope must be between 6 and 10 inches long (15 to 25 cm) and between 3½ and 4½ inches wide (9 to 11 cm). No postcards will be accepted, nor will envelopes placed inside express or oversized mail packages be accepted. The qualifying country or area of which the applicant is a native, followed by the applicant's full name and address as shown on the application, must be printed or typed in English on the front of the envelope in the top left-hand corner, followed by the applicant's name and full return address. Both the country of nativity and the country of the address must be shown, even if they are the same. The address to which the application should be mailed is the same for all applicants, except that the zip code differs depending upon the geographic area of the applicant's native country. Address the envelope as follows:

If the qualifying country is in **ASIA** –

DV-2003 Program  
Kentucky Consular Center  
2002 Vista Crest  
Lexington, KY 41902 U.S.A.

If the qualifying country is in **SOUTH AMERICA, CENTRAL AMERICA, OR THE CARIBBEAN** – use the same address as for Asia, except use 4004 Vista Crest as the street number and 41904 as the zip code.

If the qualifying country is in **EUROPE** – same address, except use 3003 Vista Crest as the street number and 41903 as the zip code.

If the qualifying country is in **AFRICA** – same address, except use 1001 Vista Crest as the street number and 41901 as the zip code.

If the qualifying country is in **OCEANIA** – same address, except use 5005 Vista Crest as the street number and 41905 as the zip code.

If the qualifying country is the **BAHAMAS** – same address, except use 6006 Vista Crest as the street number and 41906 as the zip code.

No fee is charged for sending in a visa lottery entry. The entries will each be numbered and selected at random for "registration." No advantage can be gained by sending an application early in the application period, since all applications actually received during the application period will have an equal chance of being randomly selected within their regions. Persons whose applications are selected for registration will be notified by mail

about the next steps to take to apply for visas between April and July 2002. The State Dept. selects more entries than there are visas available, and registrants who are notified that their entries have been selected must act promptly to apply for an immigrant visa. DV-2003 will end either when all visas available under the program have been issued or on Sept. 30, 2003, whichever is sooner.

66 Fed. Reg. 39,811-14 (DV-2003 rules); 66 Fed. Reg. 39,435-37 (notice of new DV rules) (Aug. 1, 2001).

#### **INS ISSUES INTERIM RULE TO IMPLEMENT V-VISA PROVISION OF LIFE**

**ACT** – The Immigration and Naturalization Service has issued an interim rule to implement the provision of the Legal Immigration Family Equity Act of 2000 (LIFE Act) that created a new V nonimmigrant classification for certain spouses and children of lawful permanent residents. The U.S. State Dept. previously issued regulations for applicants for V visas outside the United States (*see* “State Dept. Informs, Issues Regulations Regarding New V and K Visas,” IMMIGRANTS’ RIGHTS UPDATE, May 10, 2001, p. 3); the INS regulations now establish a procedure for individuals residing in the country to apply for V status.

A spouse or child of an LPR is eligible to apply for V status if he or she is the beneficiary of a family-based second preference (F2A) immigrant visa petition that was filed on or before Dec. 21, 2000, and that has been pending for at least three years. A child who is eligible to immigrate as a derivative beneficiary of a petitioned-for spouse or child who meets the above-described requirements also is eligible for V status.

In addition to meeting the above requirements, applicants must either not yet have an immigrant visa number available to them (in other words, not yet have a current priority date) or, if a visa number is available, they must have a pending application for adjustment of status or for an immigrant visa.

Individuals in the U.S. may apply for V status by filing Form I-539 (Application to Change Nonimmigrant Status) with the INS, together with the filing fee (currently \$120) or a request for a fee waiver. Applicants between the ages of 14 and 79 must also submit the fingerprinting fee (currently \$25), and they must comply with the instructions specific to V status applicants on Supplement A to Form I-539. Applicants must submit with the application Form I-693 (Medical Examination of Aliens Seeking Adjustment of Status), completed by a civil surgeon. Applicants are not required to submit the vaccination supplement to Form I-693. The applications should be submitted to:

U.S. Immigration and Naturalization Service  
P.O. Box 7216  
Chicago, IL 60680-7216

Individuals outside the U.S. may apply to the U.S. State Dept. for a V visa. Although the regulation does not address this point, according to the American Immigration Lawyers Association, the INS has clarified in a liaison conference that derivative children may apply on the same Form I-539 as their parent, and only one fee should be submitted for that form.

In order to qualify for V status, individuals must be admissible. Three grounds of inadmissibility do not apply to these applicants: INA sections 212(a)(6)(A) (for being present in the

U.S. without having been admitted or paroled), 212(a)(7) (for not having a valid passport or visa), and 212(a)(9)(B) (the three- and ten-year bars for individuals seeking admission after having been unlawfully present in the U.S. for a period of time). Many other grounds of inadmissibility may be waived under the INA’s existing nonimmigrant waivers. Applicants for V status are not subject to the requirement of having an enforceable affidavit of support (Form I-864) until the time that they apply for adjustment of status. However, the INS may request that they submit a non-binding affidavit of support (Form I-134) to satisfy the public charge ground of inadmissibility.

Although the three- and ten-year bars for unlawful presence do not apply to V status applicants, these bars do apply to these individuals when they later seek to adjust to LPR status. This anomaly is probably an unintended result of the complicated process by which Congress enacted the LIFE Act. The original version of the LIFE Act contained special provisions for the adjustment of persons with V status that included an exemption from the unlawful presence bars. However, these provisions were deleted from the act by the LIFE Act Amendments, which instead created a temporary extension of the special adjustment provisions of INA section 245(i). Since any person with V status who is not eligible for regular adjustment would be eligible for adjustment under the extended section 245(i), it is likely that Congress deleted the act’s special V status adjustment provision as unnecessary.

Thus, although persons with V status may travel and reenter the U.S. (if they obtain a V visa from the State Dept.), individuals who have been unlawfully present in the U.S. may suffer serious consequences if they do so. Individuals who obtain V status in the U.S. after having been unlawfully present in the country for more than six months, and who then depart from and return to the U.S., will be subject to the 3-year bar when they seek to adjust. Individuals in this situation who have more than one year of unlawful presence will be subject to the 10-year bar.

Individuals in immigration proceedings who are eligible for V status may request that the immigration judge (or the Board of Immigration Appeals, for cases on appeal) administratively close the case to allow them to apply for V status with the INS. The rule states that “if the alien appears eligible for V nonimmigrant status, the immigration judge or the Board, whichever has jurisdiction, shall administratively close the proceeding.” In cases where the individual has a pending motion for reopening or reconsideration before the BIA, the rule states that the BIA should continue the motion indefinitely. The supplemental information to the rule notes that, for individuals with final orders of removal, the statute does not have a provision allowing untimely motions to reopen to apply for V status, but individuals can request that the INS join in such a motion to reopen as a matter of discretion.

The INS will grant V status to eligible individuals in two-year, renewable increments, unless the applicant is a child who will reach age twenty-one within two years, in which case V status will be granted only up until the day before the child’s twenty-first birthday. In cases where an individual applying for renewal of V status has a current priority date but has not applied for adjustment of status, the INS will issue a one-time six-month extension of V status to allow the individual to apply for adjustment. There are three V subcategories: V-1 (for the spouse of an

LPR), V-2 (for a child of an LPR who is the beneficiary of a visa petition), and V-3 (for a derivative child of a V-1 or V-2).

V status terminates thirty days after an individual's Form I-130 visa petition, application for adjustment of status, or application for an immigrant visa is denied or revoked (if the denial or revocation of the visa petition is appealed, it is considered still pending until the denial or revocation is administratively final). If a previously-approved I-130 petition is withdrawn, V status also terminates (the supplementary information to the rule notes that the spouse or child of an abusive LPR who has withdrawn an I-130 may be eligible to self-petition). Moreover, although the statute does not expressly address this issue, the regulations take the position that V status terminates if the individual becomes no longer eligible for an immigrant visa under the family 2A preference. Thus, a spouse who divorces, or a child who marries or reaches age 21, loses the status.

If the petitioning LPR relative becomes a U.S. citizen, the beneficiary(ies) no longer qualify under the 2A family preference, and the INS will not extend their V status when it expires. However, individuals in this situation may apply for adjustment of status, since they are immediate relatives of U.S. citizens.

The rule provides that individuals in V nonimmigrant status are authorized to work incident to their status but that they must obtain an employment authorization document from the INS. They may do so by submitting Form I-765 (Application for Employment Authorization) with the application fee (currently \$100) or with a request for a fee waiver to the same INS Chicago post office address provided above.

In order to travel abroad and then reenter the U.S., individuals who were granted V status in the U.S. by the INS must apply for a V visa abroad. Such individuals may be granted a V nonimmigrant visa even though they have applied for adjustment of status or an immigrant visa, since the V visa category allows "dual intent"; whereas many nonimmigrant categories require the individual to have residence abroad and are not available to persons who intend to become LPRs, the V category does not. A V visa is not required for individuals who travel to contiguous territories or adjacent islands, have another valid visa, and are eligible for automatic revalidation. Again, it must be noted that individuals granted V status after having been unlawfully present in the U.S. for more than six months may be barred from adjusting to LPR status if they travel outside the U.S.

The interim rule took effect on Sept. 7, 2001. The INS invites public comments to the rule, which must be submitted on or before Nov. 6, 2001. 66 Fed. Reg. 46,697-705 (Sept. 7, 2001).

**EOIR ISSUES INTERIM RULE FOR MOTIONS TO REOPEN NACARA SUSPENSION AND CANCELLATION CASES PURSUANT TO LIFE ACT AMENDMENTS**—The Executive Office for Immigration Review has issued an interim rule governing motions to reopen deportation and removal proceedings to apply for suspension of deportation or special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), for individuals who became eligible for this relief as a result of the Legal Immigration Family Equity Act Amendments of 2000 (LIFE Act Amendments). The deadline for such motions to reopen is Oct. 16, 2001. The rule also implements provisions of the Victims of Trafficking and Violence Prevention Act of 2000 (VTVPA) that

made additional categories of immigrants eligible for NACARA suspension or cancellation.

Section 1505(c) of the LIFE Act Amendments amended NACARA to provide that individuals who are otherwise eligible for NACARA suspension or cancellation are not made ineligible by INA section 241(a)(5). This statute allows the Immigration and Naturalization Service to reinstate a removal order to an immigrant who has reentered the United States illegally after having been removed or having departed voluntarily under an order of removal. The statute further provides that an individual whose removal order is reinstated under this provision "is not eligible for and may not apply for any relief" under the INA. In addition to making section 241(a)(5) inapplicable to applicants for NACARA suspension and cancellation, the LIFE Act Amendments also created a special motion to reopen for individuals who can benefit from this change. However, such motions must be filed within a time period set by the statute, and this period ends on Oct. 16, 2001.

Under the interim rule, motions to reopen under section 1505(c) of the LIFE Act Amendments must establish that the applicant:

1. is *prima facie* eligible for suspension of deportation or special rule cancellation of removal under NACARA;
2. was or would be ineligible for NACARA suspension or cancellation because of INA section 241(a)(5), but for the enactment of the LIFE Act Amendments;
3. has not been convicted of an aggravated felony; and
4. is within one of the eight categories specified in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by NACARA, the LIFE Act Amendments, and the VTVPA.

The eight categories referenced in the fourth requirement listed above include the six original eligibility categories for suspension and special rule cancellation that were added to IIRIRA section 309(c)(5)(C)(i) by NACARA for: (1) Salvadorans who entered the U.S. on or before Sept. 19, 1990, applied for temporary protected status (TPS) or registered for benefits under *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (*ABC*) on or before Oct. 31, 1991, and were not apprehended at time of entry after Dec. 19, 1990; (2) Guatemalans who entered the U.S. on or before Oct. 1, 1990, registered for *ABC* benefits on or before Dec. 31, 1991, and were not apprehended at time of entry after Dec. 19, 1990; (3) Guatemalans or Salvadorans who applied for asylum with the INS on or before Apr. 1, 1990; (4) nationals of the former Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia, who entered the U.S. on or before Dec. 31, 1990, and who applied for asylum on or before Dec. 31, 1991; (5) the spouse or child of a person described in categories 1 through 4, where such person is *prima facie* eligible for and has applied for NACARA suspension or special rule cancellation; and (6) an unmarried son or daughter of a person described in categories 1 through 4, where such person is *prima facie* eligible for and has applied for NACARA suspension or special rule cancellation. In addition, the unmarried son or daughter, if age 21 or older, must have entered the U.S. on or before Oct. 1, 1990.

In addition to the above six categories, the VTVPA added two

new ones to section 309(c)(5)(C)(i): (7) a noncitizen who was issued an Order to Show Cause or was in deportation proceedings before Apr. 1, 1997, and who applied for suspension of deportation as a battered alien under former INA section 244(a)(3); and (8) a noncitizen who (i) was the spouse or child of a person described in categories 1 through 4, either (A) at the time a decision is rendered to suspend deportation or cancel removal of that person, (B) at the time the person filed an application for suspension or cancellation, or (C) at the time the person registered for ABC, applied for TPS, or applied for asylum; and (ii) has been battered or subjected to extreme cruelty (or, the spouse has a child who has been battered or subjected to extreme cruelty), by the person described in categories 1 through 4.

Only one special motion to reopen is available under section 1505(c) of the LIFE Act Amendments, and it must be filed with the immigration court or the Board of Immigration Appeals, depending on which forum last had jurisdiction over the case. The motion must establish that the applicant meets each of the rule's eligibility requirements. It must also include a copy of Form I-881 (Application for Suspension of Deportation or Special Rule Cancellation of Removal). In cases where applicants seek to reopen based on category 7 (based on having applied for suspension of deportation under the pre-IIRIRA INA provision for abused spouses and children), they must attach a copy of the previously-filed Form EOIR-40 (Application for Suspension of Deportation). Individuals applying to reopen based on categories 5 or 6 (being a spouse, child, or unmarried son or daughter of someone in categories 1 through 4) must include proof that their parent or spouse is prima facie eligible for and has applied for NACARA suspension or cancellation. The front page of the motion to reopen and any envelope containing the motion should include the notation "Special LIFE 1505(c) Motion." There is no filing fee for the motion to reopen.

The supplemental information to the rule explains that it does not extend the Sept. 11, 1998, deadline for motions to reopen under NACARA section 203. That was the deadline by which individuals with final orders of deportation or removal who because of NACARA became eligible for suspension or special rule cancellation had to file a motion to reopen (for more information about this requirement, see "EOIR Issues Interim Rule for NACARA Motions to Reopen," IMMIGRANTS' RIGHTS UPDATE, June 17, 1998, p. 3). The only persons who can move to reopen under the new interim rule are persons who have final orders of removal and deportation that have been reinstated or persons who have been newly issued final orders based on their having returned to the U.S. after having been removed or having departed voluntarily under an order of removal that was subject to reinstatement. The supplemental information also states that, for cases where the motion to reopen is denied, the INS "will evaluate the facts of the case" to determine whether reinstatement of the prior order is required.

The supplemental information also notes that, although the LIFE Act Amendments exempt NACARA suspension and cancellation applicants from reinstatement of removal, the INS considers that they are still subject to other bars to eligibility—specifically under INA section 240A(c) or former section 244(f) (bars for crewmen, certain nonimmigrants subject to a two-year foreign residence requirement, individuals inadmissible or deportable on

terrorist grounds, persons who participated in persecution, and persons previously granted suspension, cancellation, or a 212(c) waiver), section 240B(d) or former section 242B(e)(2) (bars for failing to depart the U.S. within a period specified for voluntary departure), and former section 242B(e)(1), (3), and (4) (bars to individuals who, after receiving oral and written notices, failed to appear at removal or deportation hearings, or failed to appear for deportation, or failed to appear for an asylum hearing).

Individuals who do not have a final order do not need a motion to reopen. The supplemental information notes that persons who were previously deported or removed and who then returned to the U.S. illegally do not need a motion to reopen if the INS has not reinstated their prior order. Rather, they may apply for suspension or special rule cancellation and are no longer subject to reinstatement under INA section 241(a)(5).

The supplemental information also notes that a provision the VTVPA made certain categories of battered immigrants who are not covered by this rule eligible to submit motions to reopen. The Dept. of Justice plans to issue regulations in the near future to implement this provision.

66 Fed. Reg. 37,119–25 (July 23, 2001).

**BIA TERMINATES REMOVAL PROCEEDINGS FOR RESPONDENT WITH REDUCED SENTENCE** – The Board of Immigration Appeals has terminated removal proceedings for Min Song, an individual whose one-year sentence for theft was decreased to 360 days. The reduced sentence, the BIA ruled, effectively removed Song from the reach of provisions in the Immigration and Nationality Act relating to the definition of "aggravated felony."

Song, a native Korean who had been admitted to the U.S. as a lawful permanent resident in 1981, was convicted of theft and sentenced to a year in prison in the late 1980s. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the INA's definition of "aggravated felony" to include theft offenses for which the term of imprisonment is at least one year. Individuals found removable for aggravated felony convictions are also rendered ineligible for any relief from removal. Thus, based on his theft conviction, Song was placed in removal proceedings and subsequently ordered removed by the immigration court.

On appeal, Song challenged the immigration court's finding that his aggravated felony conviction made him ineligible for relief under the INA. Prior to filing his appellate brief, Song applied for and obtained an order vacating and revising his previous sentence *nunc pro tunc* to 360 days. *Nunc pro tunc* orders are used by courts to revise prior judgments or orders in matters where the court originally had jurisdiction. The new order replaces the original and is considered to have the same status, notwithstanding the modification.

In his appellate brief, Song presented new evidence demonstrating that his criminal sentence had been reduced to 360 days. As Song's new conviction was for a term of less than one year, the BIA determined that he could no longer be considered an aggravated felon. In reaching its decision, the BIA relied on *Matter of Martin*, 18 Int. Dec. 226 (1982), in which it ruled that where an individual is resentenced for a crime, the new sentence determines whether or not he or she is deportable.

The BIA distinguished its ruling in *Matter of Roldan-Santoyo*,

Int. Dec. 3377 (BIA 1999), which held that the IIRIRA provision defining "conviction" for immigration purposes precludes the BIA from giving effect to expungements or other post-conviction state rehabilitative orders. In this case the definition of "conviction" is not at issue; the sentence reduction did not eliminate the fact that there was a conviction, but rather changed the term of imprisonment such that the conviction falls outside the definition of an aggravated felony.

*Matter of Song*, 23 I. & N. Dec. 173 (BIA 2001).

#### **AG EXTENDS TPS DESIGNATION FOR NATIONALS OF BURUNDI, SIERRA LEONE, SUDAN**

– The attorney general has issued separate notices extending the designations of Burundi, Sierra Leone, and Sudan as countries whose nationals and residents currently in the United States are eligible for temporary protected status (TPS). The attorney general's action marks the fifth consecutive year in which the status has been extended for nationals of those three countries.

TPS is granted to persons from countries that are designated by the attorney general as experiencing ongoing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. Former Attorney General Janet Reno, on Nov. 4, 1997, originally designated TPS for the three nations because of ongoing armed conflicts. In consultation with the U.S. State Dept., her successor has now determined that extensions for another year are warranted because of the persistence of such conflicts.

The extensions for all three countries will take effect on Nov. 2, 2001, and will remain in effect until Nov. 2, 2002. To obtain TPS under the extensions, nationals of these countries (and individuals of no nationality who last habitually resided in them) must apply for the extension during the reregistration period that began on Aug. 31, 2001, and ends Nov. 29, 2001. Persons previously granted TPS under the Burundi, Sierra Leone, or Sudan program need only file Form I-821 without the fee and also submit Form I-765, Application for Employment Authorization. Those who seek work authorization under the extensions must submit the \$100 fee with the I-765 form. Applicants who do not seek work authorization must still file the I-765 but need not pay the fee. In addition, applicants for the extensions of TPS must include two 1½" x 1½" identification photographs. Child beneficiaries of TPS who have reached 14 years of age but were not previously fingerprinted must submit the \$25 fingerprinting fee.

Under these extensions, late initial registration is also possible for individuals who did not register during the initial periods of TPS for the three countries that ended on Nov. 3, 1998. To register under this provision, a person must

- be able to demonstrate "continuous physical presence" and "continuous residence" in the U.S. since Nov. 9, 1999, and
- be admissible as an immigrant, except as otherwise provided under Immigration and Nationality Act section 244(c)(2)(A), and not be ineligible under section 244(c)(2)(B).

An individual who applies for late initial registration must also be able to show that during the registration period beginning Nov. 9, 1999, and ending Nov. 2, 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 relief from removal or change of status pending or subject to further review or appeal;
- was a parolee or had a pending request for reparole; or
- was the spouse or child of an individual currently eligible to register for TPS.

Late initial registration applicants must register no later than 60 days from the expiration or termination of the above-listed conditions. Last, they must follow the same instructions as persons applying for extensions, except late initial registrants must also submit the \$50 fee with the Form I-821 as well as a \$25 fingerprinting fee.

The AG estimates that there are no more than 1,000 nationals of Burundi, 6,102 of Sierra Leone, and 1,903 of Sudan who have been granted TPS and are eligible for reregistration. At least 60 days prior to Nov. 2, 2002, the AG will review the three countries' TPS designations to determine whether conditions for designation continue to be met.

66 Fed. Reg. 46,027–29 (Burundi), 46,029–31 (Sierra Leone), and 46,031–33 (Sudan) (Nov. 9, 2000).

#### **PRESIDENT ORDERS DED FOR LIBERIANS EXTENDED ANOTHER YEAR**

– President George W. Bush has directed the attorney general to extend deferred enforced departure (DED) for Liberians currently in the U.S. and to make the relief available for another one-year period beginning Sept. 29, 2001. From 1991 through 1999, Liberia was designated for temporary protected status (TPS). In 1999, former President Bill Clinton determined that conditions in Liberia had improved to an extent warranting termination of TPS. However, he also found that serious political and economic problems warranted extending DED to Liberians, and the status was extended again in 2000. This order extends DED designation for Liberians, granting them permission to remain in the U.S. as well as employment authorization during the DED period. In order to qualify for DED under the extension, eligible Liberian nationals must have been present in the U.S. as of Sept. 29, 2001.

However, the president's directive excludes from DED eligibility any of the following categories of Liberian nationals:

- those who are ineligible for temporary protected status for reasons outlined in Immigration and Nationality Act section 244(c)(2)(B);
- those whose removal the AG determines is in the U.S.'s interest;
- those whose presence or activities in the U.S. the secretary of state has reasonable grounds for believing would have adverse consequences for U.S. foreign policy;
- those who have returned or do return voluntarily to Liberia or their country of last habitual residence outside the U.S.;
- those who were deported, excluded, or removed prior to the date of the presidential memorandum; and
- those who are subject to extradition.

## **Litigation**

**9TH CIRCUIT UPHOLDS BIA RULING THAT EXPUNGEMENTS DO NOT ELIMINATE THE IMMIGRATION EFFECTS OF CONVICTIONS** – The Ninth Circuit Court of Appeals has upheld a decision of the Board of

Immigration Appeals refusing to recognize a state law expungement of a criminal conviction as having an effect on immigration proceedings. The decision came on a petition for review filed by a lawful permanent resident with a single conviction for theft. The decision means that, in the Ninth Circuit, the only state expungements recognized for immigration purposes are those for first-time drug offenses where the defendant would have been eligible for an expungement under the Federal First Offender Act (FFOA) had he or she been prosecuted federally.

The petitioner in this case, a Mr. Murillo-Espinoza, was admitted to the U.S. as an LPR in 1961. In 1995 he was convicted for theft in Arizona and sentenced to three years' probation and 6 months' incarceration in a county jail. He subsequently violated probation and was sentenced to 18 months of imprisonment. Because Murillo-Espinoza's probation violation amounted to a theft violation for which he received a sentence of over a year, the Immigration and Naturalization Service charged him with being removable for having an aggravated felony conviction. The immigration judge ordered him removed, and Murillo-Espinoza appealed.

While his case was on appeal, Murillo-Espinoza obtained a state court order vacating the judgment of guilt and dismissing the theft charge. He then moved to terminate removal proceedings, and the BIA remanded the case to the IJ to determine the effect of the expungement. Subsequently, the BIA ruled in *Matter of Roldan-Santoyo*, Int. Dec. 3377 (BIA 1999), *vacated sub nom. Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), that the definition of "conviction" enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) precludes the BIA from giving immigration effect to expungements or any other state procedures that erase a defendant's record of guilt for rehabilitative purposes. In this case the IJ, and subsequently the BIA, found that under *Roldan* Murillo-Espinoza remained convicted of an aggravated felony for immigration purposes, notwithstanding the expungement.

On appeal to the Ninth Circuit, Murillo-Espinoza argued that INA section 101(a)(48)(A), which contains the statute's definition of "conviction," concerns only the requirements that define circumstances in which an individual is considered to have been convicted in the first place. He argued that the section does not concern the effect of any post-conviction relief. With one modification, the statute codifies the definition of "conviction" that the BIA set out in *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988). That definition was intended to serve as a uniform rule for determining when the myriad different procedures used by different states should be considered to result in a conviction for immigration purposes. The *Ozkok* definition consisted of a three-pronged test, and section 101(a)(48)(A) adopts verbatim the first two parts of this test. They provide that "conviction" means "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge had ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed." The third *Ozkok* prong, which Congress did not include in the statute, allowed certain "deferred adjudications" (procedures whereby a state court suspends criminal proceedings pending compliance

with probation or other conditions) never to be considered convictions. Murillo-Espinoza argued that, by deleting the third prong of the *Ozkok* definition, Congress simply intended to ensure that all deferred adjudications are treated as convictions, unless and until the conviction is subsequently vacated.

The Ninth Circuit noted that the plain language of the statute "could well be interpreted" in this manner. However, the court found that the BIA's contrary interpretation in *Roldan* was a permissible construction of the statute and concluded that under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, the court was required to defer to the BIA on this issue. The court ruled that, despite the expungement, Murillo-Espinoza was deportable based on the aggravated felony and that therefore the court had no jurisdiction over the petition for review. The petitioner has filed a petition for rehearing in the case.

As noted above, the decision does not apply to certain state expungements of first-time drug offenses. In *Lujan-Armendariz*, the appeals court overturned the specific holding of *Roldan*. Ruling that the IIRIRA did not repeal the FFOA, the court cited equal protection grounds in holding that the BIA must recognize expungements granted to drug offenders under state laws, where the defendants could have been prosecuted under federal law and qualified for an expungement under the FFOA.

*Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. Aug. 14, 2001).

**9TH CIRCUIT REJECTS BIA'S REQUIREMENT THAT APPLICANTS FOR HUMANITARIAN EXCEPTION IN ASYLUM CASES MUST SHOW ONGOING DISABILITY** – A divided panel of the Ninth Circuit Court of Appeals has held that the Board of Immigration Appeals erred in requiring an asylum applicant to show that he has an ongoing disability in order to qualify for the humanitarian exception articulated in *Matter of Chen*. In reversing the BIA's denial of asylum, the court ruled that the BIA impermissibly departed from the plain language and clear intent of the regulation codifying the exception, as well as the agency's own case law and Ninth Circuit precedent.

The appeal arises from the asylum application of Jaswant Lal and his family. Lal is an Indo-Fijian who was a prominent member of the Fijian Labor Party, a nonviolent organization comprised of Hindu Fijians of Indian descent. Lal served as the branch secretary for the party and distributed posters, coordinated events in his region, and, on election day, provided transportation services. In 1987 Lal's party won a majority of seats in the Fijian Parliament. In 1988, however, the Fijian military staged a coup and subsequently persecuted Labor Party members.

After the coup, soldiers dragged Lal from his home at gunpoint, detained him for three days, and beat and tortured him. Lal was forced to endure unspeakable acts of torture: he was stripped of his clothes, urine was forced into his mouth, he was cut with knives and singed with burning cigarettes. He was also deprived of food and water. When he asked for a drink, officials gave him meat that he could not eat because of his religious beliefs. After Lal was released, soldiers returned to the Lals' home and, in the presence of Lal, sexually assaulted his wife. During the next four years, the government detained Lal at least three times. His house was set ablaze twice and placed under constant surveillance. The Lals' son was mocked and taunted and, because of his race and religion, was denied placement in a well-known school. On three

occasions, the Lals were intercepted in their attempts to flee Fiji. The family ultimately escaped and applied for asylum in the U.S.

Under the regulations governing asylum, once the applicant establishes past persecution (on account of race, religion, nationality, membership in a particular social group, or political opinion), he or she is accorded a rebuttable presumption of a well-founded fear of future persecution. The Immigration and Naturalization Service may rebut the presumption by showing, through a preponderance of the evidence, that conditions in the applicant's country of origin "have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return."

The immigration judge found Lal credible and ruled that he had suffered past persecution. Finding that no evidence was presented to rebut Lal's fear of future persecution, the IJ granted asylum. The government appealed the grant to the BIA.

Relying solely on a State Dept. report on country conditions in Fiji, the BIA ruled that conditions there had sufficiently changed such that Lal no longer had a well-founded fear of future persecution. The BIA also held that, because Lal did not suffer from an ongoing disability, he did not qualify for the *Matter of Chen* humanitarian exception to the rule regarding changed country conditions.

*Matter of Chen* is a BIA decision involving a Chinese man who suffered extreme persecution during the Cultural Revolution in China. Although Chen no longer feared persecution from the Chinese government, the BIA carved out an exception based on general humanitarian principles and waived the requirement that an individual who has suffered past persecution must also demonstrate a well-founded fear of future persecution. That holding was later codified in asylum regulations.

In its analysis, the Ninth Circuit acknowledged that it must defer to the BIA's interpretation of its own rules. However, it also noted that such deference is due only where the agency's reading is consistent with the rule's plain language and intent and has practical consequences that are neither arbitrary nor unreasonable. Because its requirement of an ongoing disability treats torture victims differently based on an arbitrary distinction (whether "one has the good fortune to recover from [one's] injuries" or not), the BIA's approach is not due deference, the court held. Quoting the regulation itself, the court stated that a person who has been persecuted and seeks asylum qualifies for the humanitarian exception if he or she has "compelling reasons for being unwilling to return to his or her country . . . arising out of the severity of the past persecution." According to the BIA, the Ninth Circuit stated, Lal's experience of persecution was not sufficiently severe to qualify him for the exception "because he does not, for example, have a permanent limp or suffer a loss of hearing." Such an interpretation does not comport with the regulations, the court ruled.

The court buttressed its conclusion by relying on *Matter of Chen*. According to the court, cases resulting in regulations codifying a rule created by their holdings may be referred to for insight into the regulations' intent and history. The Ninth Circuit noted that *Chen* never refers to permanent disability as a requirement for the humanitarian exception. The court also examined previous BIA cases as well as Ninth Circuit precedent that had applied the *Matter of Chen* exception. Although ongoing mental

or physical disability may be a factor in determining the severity of an applicant's past persecution, the court held, neither past BIA cases nor Ninth Circuit case law has treated lasting disability as a requirement for granting the exception.

The court was careful to distinguish the Lal case from *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). In *Aguirre-Aguirre*, the Supreme Court admonished the Ninth Circuit for substituting its own interpretation of a statute for the BIA's. However, according to the lower court, the Supreme Court did not then proceed to blindly defer to the BIA. Rather, the Court carefully examined the statute in question and decided whether the BIA's approach was consistent with the plain language of the statute. Having followed the approach laid out by the High Court, the Ninth Circuit rejected the BIA's interpretation of the humanitarian exception rule in *Lal*.

The Ninth Circuit next addressed the BIA's decision on country conditions. The BIA had based its reversal of the IJ's grant of asylum on a State Dept. report indicating that widespread human rights abuses in Fiji had diminished. The Ninth Circuit held that assessing whether or not a particular applicant's fear is rebutted by changed country conditions requires "individualized analysis" focusing on "the specific harm suffered and the relationship of the particular information contained in the relevant country reports." As the BIA failed to undertake such an analysis, the court rejected the BIA's determination as insufficient. Accordingly, it reversed the BIA's decision on asylum and found Lal eligible for withholding of deportation.

*Lal v. INS*, 255 F.3d 998 (9th Cir. July 3, 2001).

#### **9TH CIRCUIT DISMISSES HABEAS PETITION CHALLENGING EXPEDITED REMOVAL**

— In an important case of first impression, the Ninth Circuit Court of Appeals held that it lacks jurisdiction to review the merits of an expedited removal order and affirmed a federal district court's dismissal of a Chinese businesswoman's habeas corpus petition.

Using a B1 (business) visa that she had previously used to enter the U.S., Meng Li attempted to travel to New York in June 1997. At an interim stop in Anchorage, Alaska, the Immigration and Naturalization Service detained Li after it determined that she had attempted to enter the U.S. through fraudulent means. The determination subjected Li to expedited removal, and she was consequently ordered removed and barred from entering the country for five years. Alleging that her entry was lawful, Li filed a habeas corpus petition in federal district court. She sought an order admitting her into the U.S. and voiding the five-year bar. Ruling that it lacked jurisdiction to review expedited removal orders, the district court dismissed Li's habeas petition. Li then filed an appeal with the Ninth Circuit.

Created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), expedited removal applies to individuals who misrepresent themselves or present fraudulent documents in attempting to enter the U.S. Under expedited removal, the INS may issue nonreviewable orders of removal against such persons, who are then barred from returning to the U.S. for five years.

As the Ninth Circuit noted, the IIRIRA provides for very limited judicial review of expedited removal orders. Habeas corpus review is restricted to questions about (1) whether the petitioner

is an alien, (2) whether the petitioner was removed under the statutory provision (8 U.S.C. § 1225(b)(1)) authorizing expedited removal, and (3) whether the petitioner can prove that he or she is a lawful resident or has been admitted as a refugee or granted asylum. The Ninth Circuit found that such issues were irrelevant to Li, who only wished to challenge the INS's determination that she had attempted to enter the U.S. fraudulently, triggering the applicability of section 1225(b)(1). However, the court noted, the IIRIRA permits judicial review only to examine whether 1225(b)(1) was invoked at all, and not whether it was properly invoked. Therefore, the court held, its inquiry is limited to whether a removal order "in fact was issued and whether it relates to the petitioner." Because Li contested neither issue, the district court acted properly in dismissing the habeas petition for failing to raise any issue within its authority to review, the appeals court ruled.

In reaching its ruling, the Ninth Circuit noted that Congress clearly intended to limit habeas authority for judicial review of expedited removal orders. In doing so, it distinguished the case before it from *Magana Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). Unlike Li's case, *Magana Pizano* involved the challenge of an ordinary removal order. There, the Ninth Circuit held that because Congress had not explicitly restricted it, the more general habeas review under 28 U.S.C. 2241 remains available.

The Ninth Circuit also dismissed Li's due process claims. Citing the Supreme Court's holding in *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), the court held that since Li is a nonresident alien who had not secured legal admission to the U.S., she has no constitutional basis to challenge her removal.

Judge Hawkins issued a lengthy dissent, in which he questioned his colleagues' reading of the IIRIRA provisions limiting judicial review of expedited removal. If the majority's reading is correct, Hawkins wrote, then it "means that [the] INS can issue an expedited removal order for any alien seeking to enter the U.S. (other than a permanent resident, refugee, or asylum-seeker) for any reason, including clearly improper grounds such as racial or ethnic bias, and the courts cannot review the legal basis of that order." On the contrary, he asserted, a careful reading of the statutory provisions regarding review "grounded in the overall expedited removal provisions of the IIRIRA," in concert with Ninth Circuit precedent interpreting similar review provisions, leads to the opposite conclusion. Hawkins also noted that local INS agents' errors likely led to the application of expedited removal against Li, and "not any misconduct by [her]."

*Meng Li v. Eddy*, 259 F.3d 1132 (9th Cir. Aug. 8, 2001).

## Employment Issues

**FEDERAL OFFICIALS DENOUNCE DISCRIMINATION FOLLOWING TERRORIST ATTACKS** – On behalf of Attorney General John Ashcroft, Assistant Attorney General for Civil Rights Ralph F. Boyd Jr. has issued a statement condemning any acts or threats of violence or discrimination against Arab or Muslim Americans or Americans of South Asian descent, stating that such acts "are not just wrong and un-American, but also are unlawful and will be treated as such." His Sept. 13, 2001, statement reminded everyone that Arab, Muslim, and South Asian Americans were among those

injured and killed in the Sept. 11, 2001, terrorist attacks and that people belonging to those groups are also involved in many of the rescue and relief operations.

In a similar call for tolerance, Cari M. Dominguez, chair of the U.S. Equal Employment Opportunity Commission (EEOC), issued a statement on Sept. 14, 2001, urging "all employers and employees across the country to promote tolerance and guard against unlawful workplace discrimination based on national origin or religion." She asked employers to be vigilant regarding incidents of discrimination against or of harassment or intimidation of Arab American or Muslim employees. Specifically, Dominguez urged employers to remind their employees about policies against harassment based on religion, ethnicity, or national origin; to inform them of the procedures they have in place for addressing workplace discrimination and harassment; and to provide training and counseling as appropriate.

The EEOC's Dominguez also encouraged employees to report any such employment discrimination and reminded them that Title VII of the Civil Rights Act of 1964 (Title VII) protects workers from employment discrimination based on religion, ethnicity, birthplace, culture, or linguistic characteristics. It also protects workers from being discriminated against because they are married to or associate with anyone of a given national origin or ethnic or religious group. In addition, Title VII prohibits workplace discrimination against individuals because they have certain physical, linguistic, or cultural traits closely associated with a particular national origin group—for example, a traditional Arab style of dress. Finally, it is also unlawful employment discrimination to treat an individual differently because of the perception or belief that the person is a member of a particular national origin group, based on the person's speech, mannerisms, or appearance.

The EEOC has jurisdiction over employment discrimination cases involving employers that have at least 15 employees. Individuals who work for smaller employers that have between 4 and 14 employees may also file employment discrimination cases under the antidiscrimination provisions of the Immigration Reform and Control Act of 1986. Such complaints may be filed with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). For more information about the EEOC, visit their web site at [www.eeoc.gov](http://www.eeoc.gov). For more information about the OSC, visit their web site at [www.usdoj.gov/crt/osc/](http://www.usdoj.gov/crt/osc/), or call the OSC's worker hotline at 1-800-255-7688.

### NLRB CERTIFIES UNION DESPITE IMMIGRATION-RELATED OBJECTIONS BY EMPLOYER

– In certifying Local 1027 of the Chicago and Northeast Illinois District Council of Carpenters as the collective bargaining representative of workers at Superior Truss and Panel, Inc., the National Labor Relations Board (NLRB) adopted the hearing officer's recommendations rejecting three objections raised by the employer against the election after a majority of the workers voted for the union on Feb. 21, 2001. The newly unionized workers include a number of immigrants.

The employer had alleged that some of the workers who voted in the election were undocumented, pointing as evidence to "no-match letters" it had received from the Social Security Administration (SSA), each informing the employer that the Social Security numbers submitted by the workers named in the letter did not match valid SSA accounts. However, the NLRB noted that the

employer had received several no-match letters starting as early as May 1999, yet this was the first time the employer had raised any questions regarding workers' immigration status. Moreover, the employer had submitted the workers' names to the NLRB on its list of all its employees who were eligible to vote in the union election. Finding that the employer had not submitted any evidence to substantiate that any of the workers were indeed undocumented, the NLRB rejected the employer's argument.

The employer also argued that the union had unfairly interfered with the election by having an attorney present during one of the union-sponsored campaign meetings. At this meeting, the attorney apparently explained to workers who were complaining of national origin discrimination by a supervisor that they should document these problems in case they decided to file a lawsuit after the election. The employer also took issue with a letter the attorney wrote to the employer after the election objecting to the employer's threats to discharge workers about whom the employer had received a no-match letter from the SSA in June 2000. The NLRB held that there was no evidence that the attorney promised to or actually filed a lawsuit before the election. On the other hand, the attorney's letter to the employer clearly demonstrated the union's intent to file a charge of an unfair labor practice because the employer threatened to fire those workers who appeared on an old no-match letter, and the NLRB stated that filing such charges against an employer during an organizing campaign is permissible because it is necessary to preserve the electoral process.

Finally, the NLRB rejected the employer's third argument, in which he challenged the election ballots because they were only in English, though there were Spanish translations of the notice of election with sample ballots in Spanish. The NLRB held that translating the notice was sufficient and that the translation only had to be understandable, not flawless, to pass muster.

*Superior Truss & Panel, Inc. and Chicago & Northeast Illinois Dist. Council of Carpenters, AFL-CIO, Local Union 1027*, Case 13-RC-20518, 334 NLRB No. 115, 2001 NLRB LEXIS 559, Aug. 2, 2001.

**FEDERAL COURT FINDS INS SELECTIVELY PROSECUTED LATINO EMPLOYER** – A federal court in the Eastern District of Kentucky has dismissed with prejudice the criminal indictment against the Latino owner of a chain of restaurants who the government accused of smuggling and harboring undocumented workers in violation of 8 U.S.C. section 1324(a)(1)(A). The Immigration and Naturalization Service brought criminal charges against Mr. Correa-Gomez after it raided two of his restaurants, where the INS detained fourteen undocumented workers, nine of whom had presented false documents at the time they were hired. The others claimed someone other than the defendant had hired them or that they lied to the defendant about their immigration status. Correa-Gomez moved to dismiss the indictment, alleging that the government had engaged in selective prosecution against him in violation of his due process rights because it brought criminal charges against him while not against similarly situated non-Latino employers.

In deciding whether Correa-Gomez had been selectively prosecuted, the court followed the guidance in *United States v. Armstrong*, 517 U.S. 456, 465 (1966), in which the Supreme Court held that there is a presumption that prosecutors carry out their

broad discretion in a regular and proper fashion unless a defendant presents "clear evidence to the contrary" that the prosecutor has made his or her decision based on "an unjustifiable standard such as race, religion, or other arbitrary classification" in violation of the defendant's due process rights. The court relied on the two-prong test set forth in *Armstrong* that requires the defendant to show (1) that the federal prosecutory policy had a discriminatory effect and (2) that it was motivated by a discriminatory purpose. The court held that "discriminatory effect" can be established by showing that "similarly situated" individuals of a different race or national origin were not prosecuted although they engaged in the same conduct and committed the same basic crime. "Discriminatory purpose," on the other hand, can be established through a practical inquiry as to whether the prosecutor made the decision to prosecute in part "because of," not "in spite of," the adverse effects it would have on a specific group of people.

Finally, the court noted that the Sixth Circuit had adopted a three-prong test to analyze whether a defendant has been unconstitutionally singled out for prosecution. Specifically, a defendant is selectively prosecuted when (1) he is singled out for prosecution as a person belonging to an identifiable group, even though similarly situated individuals have not been prosecuted; (2) the prosecution was started with a discriminatory purpose; and (3) the prosecution of the defendant will have a discriminatory effect on the group he belongs to.

In holding that the government had singled out Correa-Gomez for prosecution, the court found the evidence established that between 1996 to 2000, the INS had conducted 17 raids against employers in the Eastern District of Kentucky that resulted in the apprehension of 218 undocumented workers and six fines, six warnings, and no criminal prosecutions of employers. Of the 218 workers detained, 199 had presented false documents and the remainder had no paperwork at all. Over 82 percent of the owners whose businesses were raided were non-Latino, and none of them was criminally prosecuted, whereas Correa-Gomez was prosecuted. The court further noted that in order to convict an individual of a crime under section 1324(a), the government has to prove beyond a reasonable doubt that the defendant acted with the required mental state, and it noted that employers can assert the affirmative defense that they complied with the employment eligibility verification process by asking workers to present their documents and completing the required I-9 form for each worker. The completion of the form creates a rebuttable presumption that the employer acted in good faith when it accepted documents that appeared to be genuine on their face. While the INS gave all other business owners the benefit of that presumption, the court held that the INS had not provided the defendant with the same benefit.

The court therefore found that Correa-Gomez had established that the prosecution's decision to bring charges against him but not against others who were similarly situated was discriminatory. Moreover, the court found that while prosecuting this defendant would have a deterrent effect on other business owners, it would have a chilling impact on Latino business owners. The court stated that the prosecution of Correa-Gomez was particularly suspect, since the INS was not willing to proceed against him administratively. The court said it was convinced that Correa-

Gomez should never have been prosecuted.

*United States of America v. Correa-Gomez*, No. 5:01-CR-32, 2001 U.S. Dist. LEXIS 13757 (E.D. Ky. Aug. 31, 2001).

**CALIFORNIA AND CONNECTICUT APPROVE LAWS BENEFITTING IMMIGRANT WORKERS** – In a victory for limited English–proficient (LEP) workers in California and Connecticut, two bills have recently been signed into law that should advance the employment rights of workers in these states as well as serve as model legislation for other states across the country.

On July 6, 2001, Governor John G. Rowland of Connecticut signed into law House Bill No. 6657, designed to provide information to LEP workers about their rights under Connecticut wage and hour and unemployment laws. “An Act Prohibiting Employment Exploitation of Immigrant Labor,” enacted as Public Act No. 01-147, repeals Section 31-4 of the Connecticut General Statutes, which provided that the state labor commissioner could appoint special agents on a case-by-case basis to inform non–English-speaking workers, in those workers’ own languages, of their rights. The new law strengthens that provision by specifically requiring the labor commissioner to produce and distribute printed materials describing the rights of immigrant and LEP workers in order to help such workers protect themselves from unfair exploitation by employers who, for example, might withhold wages owed the workers or commit other similar violations. Public Act No. 01-147 states that the labor commissioner’s educational materials must be printed in Spanish, French, and any other language determined to be spoken by a primary group of immigrant workers in Connecticut. The funds for these materials will come from a civil penalty of \$300 per violation levied against employers who violate this law. Connecticut’s new law went into effect on Oct. 1, 2001.

The California bill, which Governor Gray Davis signed into law on Sept. 12, 2001, provides LEP workers with limited protection against “English-only” rules—i.e., rules that require workers to speak only English while on the job or in the workplace. Assembly Bill No. 800 amends Section 12951 of the California Government Code, relating to employment discrimination, by providing that it is an unlawful employment practice for employers to institute an English-only rule unless (1) it is justified by a business necessity and (2) the employer notifies its workers of when and under which circumstances the English-only rule applies and what the consequences for violating the rule are. “Business necessity” is defined as “an overriding legitimate business purpose” that is necessary for the safe and efficient operation of the business. Such a necessity exists only when there is no lesser discriminatory alternative to the English-only restriction that would accomplish the same business purpose. The new law also sets forth a statement of legislative intent that this new law incorporates the California Constitution’s protections against discrimination based on national or ethnic origin, while also acknowledging that, under California’s constitution, English is the state’s official language.

**SUPREME COURT TO HEAR BACK PAY CASE INVOLVING UNDOCUMENTED WORKER** – The U.S. Supreme Court has granted an employer’s petition for writ of certiorari in a labor case involving workers, including an undocumented immigrant, who had been discharged

in retaliation for engaging in union organizing activities.

The union filed a charge with the National Labor Relations Board (NLRB), which found the employer had violated the National Labor Relations Act of 1935 (NLRA). However, during attempts to resolve a dispute as to the amount of back pay due the illegally fired workers, the employer learned about the undocumented immigrant and his improper use of a birth certificate to obtain his job. The employer contested that worker’s eligibility for back pay. The case made its way to the D.C. Circuit Court of Appeals, which ruled that, despite his undocumented status, the worker was entitled to back pay up to the date the employer learned of his immigration status and false use of documents (see “D.C. Circuit Affirms the Right of Undocumented Workers to Receive Back Pay,” IMMIGRANTS’ RIGHTS UPDATE, Feb. 28, 2001, p. 12). The employer appealed that ruling, and now the Supreme Court will decide whether the NLRB’s award of back pay was appropriate. The Court granted the certiorari petition on Sept. 25, 2001.

*Hoffman Plastic Compounds, Inc. v. NLRB*, No. 00-1595, 2001 U.S. LEXIS 5348 (Sept. 25, 2001).

**WORKERS’ RIGHTS TRAININGS SLATED FOR SEATTLE & NEW YORK** – In collaboration with other community-based organizations and unions, NILC will be providing two all-day Immigrant Workers’ Rights trainings for advocates this fall. One will be in *Seattle* on *Mon., Oct. 29, 2001*, and the other in *New York City* on *Fri., Nov. 30, 2001*. For more information, contact Marielena Hincapié at 510-663-8282, ext. 305, or via email at hincapie@nilc.org.

## Immigrants & Welfare Update

**CONGRESS CONSIDERS EXPANDING NUTRITIONAL ASSISTANCE FOR IMMIGRANTS** – As Congress works on a \$50-90 billion “stimulus package” designed to address the economic downturn aggravated by the September 11 attacks, it is also considering legislation addressing nutrition assistance programs. One proposal, which is related to the stimulus package, would address the rapidly developing shortfall in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) that threatens to prevent hundreds of thousands of women and children from obtaining basic nutrition assistance. The second proposal would restore food stamps to lawfully present immigrants.

**WIC Shortfall.** The WIC program provides nutritious foods, nutrition education, and access to health care for low-income pregnant women, new mothers, infants, and children under five years old who are at nutritional risk. WIC vouchers can be used only to purchase particular foods specifically tailored to the special dietary needs of program participants, such as milk, infant formula, juice, cereal, cheese, and eggs. WIC is one of the few federal safety net programs available to individuals without regard to immigration status.

WIC is highly sensitive to the economy; when the economy experiences a downturn, applications for WIC go up. But unlike some other safety net programs, WIC is not an entitlement. Congress appropriates money based on its estimate of the likely need, and if the money runs out, otherwise eligible women and children are turned away. This year, the Bush Administration’s budget request was developed in the spring, and subsequent congressional action has not accounted for the changed economic cir-

cumstances. Even before the September 11th events, WIC applications had increased markedly above the initial budget projections. The attacks and subsequent economic shock have exacerbated the problem. Under the administration's budget, states next year will be forced to turn away at least 350,000 otherwise eligible women and children, according to the Center on Budget and Policy Priorities (CBPP). The CBPP reports that at least \$250 million in additional funds will be needed in fiscal 2002.

To date, the House has passed an agriculture appropriations bill that provides the same amount of funding requested by the administration, while the Senate is scheduled to vote on its version later this month. The Senate Appropriations Committee bill includes about \$110 million more than the president requested. However, even if the Senate bill passes and prevails in conference later this month, there will be a \$140 million shortfall. Advocates are now working hard to ensure that the Senate passes the full amount allocated by the Appropriations Committee, and that the stimulus package includes the remaining \$140 million as an emergency supplement.

**Food Stamps.** Under current law, the Food Stamp Program imposes more restrictions on immigrants' eligibility than any other federal, state, or local program. The rules are complicated, but most lawfully present immigrants are ineligible for federal food stamps, including many who have lived in the U.S. for decades. All U.S. residents face job losses as a result of the September 11th attacks, but many immigrants remain unable to rely on the same safety net because of restrictions on the principal safety net programs.

Advocates believe that the farm bill represents one of the best hopes for restoring food stamps to lawfully present immigrants. The farm bill is one of the few major proposals likely to pass this year that is not directly related to the aftermath of the September 11th attacks. As passed on Thursday, October 4, 2001, the House's version of the bill, H.R. 2646, contains about \$70 billion in new spending over the next 10 years on items supported by agriculture interests. It also reauthorizes the Food Stamp Program and includes about \$3.25 billion in new spending on food stamps and nutrition. But the House-passed bill does not include any restorations of immigrants' eligibility for food stamps.

Advocates hope to do better in the Senate, where Senator Tom Harkin (D-IA), chair of the Senate Agriculture Committee, and Richard Lugar (R-IN), the ranking minority member, are working together to craft a bipartisan bill that soon will be presented to the committee. Although variables remain, there is a reasonable chance that restorations of immigrants' eligibility for food stamps could be part of the Lugar-Harkin proposal. The Lugar-Harkin proposal will likely be finalized this week.

Updated information on the status of these proposals is available through the Food Research and Action Center's web site at [www.frac.org](http://www.frac.org).

#### **NEW YORK EXTENDS IMMIGRANTS' ELIGIBILITY FOR HEALTH PROGRAMS**

– The New York Dept. of Health has extended coverage under the state's Family Health Plus program to all individuals who are permanently residing in the U.S. under color of law (PRUCOLs) and "qualified" immigrants, regardless of their date of entry. Family Health Plus provides health coverage to persons who do not qualify for Medicaid.

The Dept. of Health extended the program in response to the efforts of advocates and the New York Court of Appeals decision in *Aliessa v Novello*, 96 N.Y. 2d 418 (2001), in which New York's highest court decided that the state's failure to provide health coverage to all legal immigrants violated the equal protection clauses of the federal and state constitutions (see "N.Y. Law Restricting Immigrants' Eligibility for State Medical Aid Found Unconstitutional," IMMIGRANTS' RIGHTS UPDATE, June 29, 2001, p. 15).

Health coverage for immigrants in New York City has been further extended in the wake of the September 11th disaster. The Dept. of Health and New York City Medicaid offices have established a Disaster Relief Medicaid program, which provides four months of Medicaid to income-eligible individuals, regardless of their immigration status. Income eligibility for the program is higher than for Medicaid, and the program uses a simplified application process.

For New York City residents already receiving health coverage, redetermination for Medicaid and Child Health Plus A & B has been temporarily waived. Persons scheduled for redetermination before Jan. 31, 2002, will have their eligibility automatically redetermined for an additional year.

**NILC INITIATES PUBLIC CHARGE MONITORING PROJECT** – The National Immigration Law Center has started a project to monitor possible abuses of public charge rules by the Immigration Naturalization Service, immigration judges, and State Dept. employees. Individuals who may have been improperly denied admission to the U.S. or a green card are encouraged to use the Public Charge Monitoring form enclosed with this issue to report their experiences to NILC.

Public charge is an immigration law term used to describe persons who depend primarily on the government for their support. A public charge finding can adversely affect individuals' ability to immigrate to the U.S. or to obtain a green card. In May 1999, the INS issued guidance clarifying that immigrants' use of health care and other non-cash benefits will normally not put them at risk of being considered a public charge. Nonetheless, rumors in immigrant communities persist that INS officers, IJs, and consular officials are asking immigrants about the use of benefits and using that information to deny entry to the U.S. or applications for green cards.

The information gathered by the monitoring project will be used to determine the scope of the problem and to develop a response. Individuals interested in additional information about the project should contact NILC staff attorney Sara Campos at 510-663-8282, ext. 304.

#### **DISASTER ASSISTANCE INFORMATION INCLUDED WITH THIS ISSUE OF IMMIGRANTS' RIGHTS UPDATE**

– To assist service providers who may be rendering aid to immigrants in the wake of the September 11 terrorist attack, information about immigrant eligibility for disaster assistance has been included in this issue of the IMMIGRANTS' RIGHTS UPDATE. Excerpted from the National Immigration Law Center's forthcoming GUIDE TO IMMIGRANT ELIGIBILITY FOR PUBLIC BENEFITS, "Disaster Assistance" describes the types of emergency aid provided, the agencies that administer aid services, and immigrants' eligibility for the assistance.



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