



Immigration Issues

INS ISSUES NOTICES AND GUIDANCE TO IMPLEMENT SPECIAL REGISTRATION REQUIREMENTS FOR CERTAIN NONIMMIGRANTS

The Immigration and Naturalization Service has issued two notices augmenting its rules for nonimmigrants who must register with the agency. By adding a new country of designation, these rules expand the class of nationals that must register and provide notice of the airports from which they must depart. The rules became effective Sept. 11 and Oct. 1, 2002, respectively. In addition, on Sept. 5, 2002, the INS issued an internal memo to provide guidance to the field concerning the registration requirements.

Section 262(a) of the Immigration and Nationality Act requires all nonimmigrants aged 14 or older who have not previously been fingerprinted abroad to be registered and fingerprinted if they remain in the United States for 30 days or longer. Section 262(c)

of the INA allows the attorney general to waive these requirements, and the attorney general has used this provision to exempt the majority of nonimmigrants from these registration requirements. However, in 1998, the attorney general designated Iran, Iraq, Libya, and Sudan as countries whose nationals and citizens are subject to registration requirements.

On Aug. 12, 2002, the U.S. Dept. of Justice issued final regulations that expand the special registration requirements. Under the regulations, nonimmigrants from designated countries, as well as other nonimmigrants designated by consular and immigration officials, will be required to be registered, photographed and subjected to certain monitoring upon entry and departure from the U.S. If special registrants remain in the U.S. beyond 30 days, they must report to the INS in person and provide documentation confirming their compliance with the terms of their admission. Thereafter, they must report to the INS annually. (For more infor-

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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,

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.

mation on the proposed and final regulations, see "DOJ Issues Final Rule on Registration of Nonimmigrants," IMMIGRANTS' RIGHTS UPDATE, Sept. 10, 2002, p. 3, and "DOJ Proposes Rules to Monitor Certain Nonimmigrants," IRU, July 29, 2002, p. 2.

Designation of Certain Countries. The notice that took effect on Sept. 11, 2002, applies the expanded special registration requirements of the final regulations to nationals of the four countries previously subject to registration requirements—Iraq, Libya, and Sudan—and adds Syria to this list. The notice also requires that the following individuals be subject to the registration rules as well: those whom consular officers or INS inspectors have reason to believe are actually nationals or citizens from one of the designated countries. The agency's rationale for including this discretionary provision is that there may be cases where individuals present documentation from one country but have actual or dual citizenship from one of the designated countries. The notice states that all special registrants will be advised of their obligation to comply with the registration rules at the time that admission is granted.

Airports for Departure. The registration rules also require nonimmigrants to depart from certain designated airports. The notice that took effect Oct. 1, 2002, provides that special registrants must report to a port of entry officer at the airport from which they are departing unless the INS has specified in the Federal Register that special registrants may not depart from those airports. The INS will provide packets of information to special registrants about how to comply with the rules. These packets will contain the list of airports that special registrants may use, as well as directions, contact numbers, and hours of operation. The notice adds that as new ports of entry are added to the list of those that special registrants may depart from, the INS will publish their names and locations in the Federal Register. The INS will also make the list available at district offices and on its Web site at <http://www.ins.usdoj.gov>.

INS Guidance. In a memo not intended for the media or the general public, on Sept. 5, 2002, Johnny Williams, executive associate commissioner of the INS, provided guidance to the field on the implementation of special registration rules. The memo provides further information regarding the circumstances in which nonimmigrants who are not nationals of the five designated countries will be subject to the special registration requirements.

First, the special registration rules will be applied to individuals who are or are believed to be citizens or nationals of Pakistan, Saudi Arabia, and Yemen, and who are males between 16 and 45 years of age.

Second, individuals will be identified for the special registration requirement by State Dept. consular officers. According to the memo, during primary inspection, INS officers will receive special registration lookouts regarding these individuals through the Interagency Border Inspection System (IBIS). IBIS is a multi-agency database containing lookout information for persons applying for admission to the U.S. IBIS will also identify individuals whom consular officers have determined should be exempted from special registration requirements.

Third, a nonimmigrant of any nationality may be specially registered if an inspecting officer determines or has reason to believe that he or she meets the following criteria (an immigration supervisor must concur with the inspection officer's exercise of

discretion to refer the nonimmigrant for special registration):

- The nonimmigrant has made unexplained trips to Iran, Iraq, Libya, Sudan, Syria, North Korea, Cuba, Saudi Arabia, Afghanistan, Yemen, Egypt, Somalia, Pakistan, Indonesia, or Malaysia; or the individual's explanation for such trips lacks credibility.

- The nonimmigrant has engaged in other travel that is not well explained by the individual's job or other legitimate concerns. Travel is not further defined to include specific countries.

- The nonimmigrant has previously overstayed in the U.S. on a nonimmigrant visa, and monitoring is now appropriate in the interest of national security.

- The nonimmigrant meets characteristics established by current intelligence updates and advisories. The memo does not elaborate on such characteristics.

- Local, state or federal law enforcement agencies have identified the nonimmigrant as requiring monitoring in the interest of national security.

- The nonimmigrant's behavior, demeanor, or answers to questions posed by officers indicate that the individual should be monitored in the interest of national security.

- The nonimmigrant provides information causing the officer to reasonably determine that the individual requires monitoring in the interest of national security.

67 Fed. Reg. 57,032 (Sept. 6, 2002);

67 Fed. Reg. 61,352 (Sept. 30, 2002);

INS Memorandum from Johnny Williams,

HQ/INS 70/28 (Sept. 5, 2002).

TPS NEWLY DESIGNATED FOR LIBERIA AND EXTENDED FOR BURUNDI AND SUDAN

– In three separate notices, Attorney General John Ashcroft has announced the new designation of temporary protected status (TPS) for Liberia and an extension of TPS designation for an additional year for Burundi and Sudan. The designation for Liberia is effective from Oct. 1, 2002, until Oct. 1, 2003; the extension of TPS for nationals of Burundi and Sudan is effective from Nov. 2, 2002, until Nov. 2, 2003. To maintain TPS and work authorization, nationals of Burundi and Sudan must reregister during a designated 60-day period that commenced on Aug. 30, 2002, and will end on Oct. 29, 2002. Nationals of Liberia must register for TPS during a six-month registration period that began on Oct. 1, 2002, and will end on Apr. 1, 2003.

The Immigration and Nationality Act authorizes the attorney general to grant TPS to individuals in the United States who are nationals of countries that are experiencing armed conflict, environmental disaster, or other extraordinary and temporary adverse conditions. TPS may also be granted to individuals of no nationality who last habitually resided in a country whose nationals are eligible for TPS. The attorney general has determined that there is an armed conflict in Liberia that warrants TPS designation for the country. He has also determined that continuing civil war in Burundi and Sudan requires extensions of TPS for both countries. The attorney general estimates that there are between 15,000 and 20,000 nationals of Liberia who are eligible for TPS, and 13 nationals of Burundi and 552 nationals of Sudan who are eligible for reregistration under these extensions.

To be eligible for TPS under the new designation for Liberia, an applicant must

- be a national of Liberia, or have no nationality and have last

habitually resided in Liberia;

- have been "continuously physically present" in the U.S. since Oct. 1, 2002;
- have continuously resided in the U.S. since Oct. 1, 2002;
- be admissible as an immigrant except as provided under INA section 244(c)(2)(A);
- not be ineligible under INA section 244(c)(2)(B) (i.e., must not have committed a felony and two misdemeanors in the U.S. or be ineligible for admission under INA section 208(b)(2), which bars persecutors of others, persons who have committed certain crimes, and security risks); and
- must apply for TPS between Oct. 1, 2002 and Apr. 1, 2003.

To register for TPS under the new designation, an applicant must submit

- Form I-821 (with the \$ 50 filing fee);
- Form I-765 (Application for Employment Authorization);
- two identification photographs (1½ x 1½ inches);
- supporting evidence of identity, nationality, and proof of residence, as provided in 8 C.F.R. section 244.9; and
- a \$50 fee for fingerprinting, unless the applicant is under 14 years of age.

An applicant must file the forms with the local Immigration and Naturalization Service district office that has jurisdiction over the applicant's place of residence. If the applicant wishes only to register for TPS and does not want work authorization, he or she must still submit Form I-765 but need not pay the \$120 filing fee. Applicants seeking employment authorization who cannot pay the filing fee can submit a fee waiver request and affidavit with the work authorization application (for waiver requirements, see 8 C.F.R. section 244.20).

The notice for Liberia states that many Liberians currently in the U.S. have deferred enforced departure (DED) status, but this status expired on Sept. 29, 2002. Thus, "Liberians who have no other lawful immigration status, but who wish to remain and work in the U.S. after Sept. 29, 2002, should apply for TPS benefits."

Information concerning the TPS program for nationals of Liberia may be obtained through the INS National Customer Service Center at 800-375-5283 (TTY: 800-767-1833), or from the INS web site at www.ins.usdoj.gov.

To reregister for TPS under the extensions for Burundi and Sudan, applicants must submit the following:

- Form I-821 (without the \$50 filing fee);
- Form I-765 (Application for Employment Authorization); and
- two identification photographs (1 ½" x 1 ½").

An applicant must file both forms with the local INS district office that has jurisdiction over the applicant's place of residence. If the applicant wishes only to reregister and does not want work authorization, a filing fee is not required. However, all applicants seeking an extension of work authorization must submit the \$120 filing fee or a fee waiver request and affidavit with the work authorization application (for waiver requirements, see 8 C.F.R. section 244.20). Information concerning the extensions may be obtained through the INS National Customer Service Center at 800-375-5283, or from the INS web site at www.ins.usdoj.gov.

Applicants for an extension of TPS do not need to submit new fingerprints or the accompanying \$50 fee. Children who are TPS beneficiaries and who have reached the age of 14 but were not previously fingerprinted must pay the \$50 fingerprint fee with

their application for extension.

TPS registrants who need to travel outside the U.S. during the coming year must receive "advance parole" from their local INS office prior to departing the country. Failure to do so may jeopardize their ability to be allowed back into the U.S. Advance parole, which allows non-U.S. citizens to travel abroad and return to the U.S., is issued on a case-by-case basis. Individuals who are granted TPS may apply for advance parole by filing Form I-131 at their local INS district office. However, individuals who have accrued more than 180 days of unlawful presence in the U.S. should not travel abroad because even with advance parole they will be subject to the 3- or 10-year "unlawful presence" bars to admission when they seek to return to the U.S.

Some nationals of Burundi, Liberia, or Sudan may qualify for late initial registration for TPS under 8 C.F.R. section 244.2(f)(2). To apply for late initial registration, an applicant must

- be a national of the designated country;
- have been "continuously physically present" in the U.S. since the start of the original designation period (Nov. 9, 1999, for Burundi and Sudan, Oct. 1, 2002, for Liberia);
- have continuously resided in the U.S. since Nov. 9, 1999 (for Burundi or Sudan), or Oct. 1, 2002 (for Liberia);
- be admissible as an immigrant except as provided under INA section 244(c)(2)(A); and
- not be ineligible under INA section 244(c)(2)(B) (i.e., they must not have committed a felony and two misdemeanors in the U.S. or be ineligible for admission under INA section 208(b)(2), which bars persecutors of others, persons who have committed certain crimes, and security risks).

An applicant for late initial registration must also show that during the initial registration period (Nov. 9, 1999, through Nov. 2, 2000, for Burundi and Sudan; Oct. 1, 2002, through Apr. 1, 2003, for Liberia), 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 or change of status pending or subject to further review or appeal;
- was a parolee or had a pending request for an extension; or
- was the spouse or child of an individual who is currently eligible to be a TPS registrant.

An applicant for late initial registration must enroll no later than 60 days from the termination of the conditions described above.

67 Fed. Reg. 55,875-77 (Aug. 30, 2002) (Burundi);

67 Fed. Reg. 55,877-79 (Aug. 30, 2002) (Sudan);

67 Fed. Reg. 61,664-67 (Oct. 1, 2002) (Liberia).

SENATE AT IMPASSE ON HOMELAND SECURITY BILLS – As the U.S. Congress adjourned until after the upcoming November election, proposals to establish a Dept. of Homeland Security remained at an impasse. Under all the proposals under consideration, the new department would merge all or part of 22 agencies, representing the biggest government reorganization in 50 years.

The House of Representatives passed a homeland security bill in July 2002. Two competing proposals have been introduced in the Senate, one by Sen. Joseph Lieberman (D-CT) and the other by Sens. Phil Gramm (R-TX) and Zell Miller (D-GA). The Gramm-Miller bill has the Bush administration's support. After

the Senate passes a homeland security bill, a final version reconciling the House and Senate versions will have to be drafted in a conference committee, approved by both chambers of Congress, and then signed by the president.

Civil service and collective bargaining issues are at the heart of the current disagreement, with Democrats siding with labor and Republicans siding with the president, who wants broad management powers. Immigration issues have not been at the forefront of the recent discussions, but immigrants have a good deal to be concerned about. The Immigration and Naturalization Service will be reorganized no matter which bill passes, and immigration services and enforcement will likely be housed in an agency whose principal mission is to combat terrorism. This departmental orientation will put noncitizens at grave risk of civil rights violations, but neither bill currently before the Senate goes far enough to protect against such violations. The Gramm-Miller bill contains no civil rights or privacy protections, and the Lieberman bill's protections are weak.

The new agency will be huge and invested with an unprecedented concentration of government powers. Checks and balances provided by oversight, investigations, and public reporting of civil rights and privacy violations will be essential to prevent abuse of these powers. Because of the department's mandate, noncitizens will be regarded as possible terrorists, placing them at particular risk of civil rights violations. The proposed legislation includes few protections or mechanisms to redress abuses. Government measures implemented after Sept. 11, 2002, including secrecy, closed hearings, prolonged detentions, and racial profiling, directly affect noncitizens. Post-Sept. 11 initiatives to combat terrorism include the creation and sharing of databases with massive personal information and the use of new and untested methods of identification, including biometric measures. The chances are high that mistaken information will be inputted into the databases and distributed, but such errors will be difficult and cumbersome to correct. Such erroneous information is very likely to lead to false accusations, as well as unnecessary invasions of privacy.

NILC has joined with other national organizations in an ad hoc group that is working to encourage government officials to incorporate strong civil rights protections in creating the new agency. These groups include the American Civil Liberties Union, the Leadership Conference on Civil Rights, the Mexican American Legal Defense and Educational Fund, the National Council of La Raza, the Open Society Policy Institute, People for the American Way, Human Rights Watch, and the American Immigration Lawyers Association.

Civil rights and privacy are not the only concerns for immigrants, as INS reorganization is also in question. Many immigrants' rights advocates fought unsuccessfully to keep immigration functions out of the Homeland Security Dept. altogether because they have nothing to do with antiterrorism. Even the Lieberman bill would house these functions in the new department, but—importantly—would keep immigration services and enforcement together in a separate division in the agency. The Gramm-Miller bill, in contrast, would separate the Border Patrol and inspections from immigration services. This separation may make coordination difficult, relegating immigration services to a poor and distant relative of the agency's antiterrorism efforts.

Both the Lieberman and the Gramm-Miller bills transfer the care and custody of unaccompanied immigrant minors to the Office of Refugee Resettlement. But, unlike the Lieberman bill, Gramm-Miller does not provide for pro bono representation of children and appointment of guardians ad litem, who are persons appointed to represent the best interests of a child in a legal proceeding. By failing to make provisions for the latter, the government would be charging itself with the responsibility. Unfortunately, the government's track record in protecting unaccompanied immigrant children is dismal. Without these provisions, the government would be simultaneously responsible for deporting and protecting children—an impossible conflict of interest to negotiate.

ADVOCATES OPTIMISTIC ABOUT IMMIGRANT STUDENT BILL—Against great odds, legislation to expand access to higher education for undocumented students quietly came close to a major breakthrough in Congress in recent weeks. Although Congress has adjourned until after the November election, it is still possible that the Development, Relief, and Education for Alien Minors (DREAM) Act will eventually become law. Based on progress to date, advocates are optimistic about the legislation's chances either in the post-election lame duck session or next year.

Congress has been considering two bipartisan proposals during this term: the DREAM Act (S. 1291) in the Senate and the Student Adjustment Act (H.R. 1918) in the House of Representatives. Both bills have provisions that would restore states' ability to determine their own residency requirements for purposes of in-state tuition. They would also provide an opportunity for technically "undocumented" students of good moral character who grew up in the United States to adjust to a lawful immigration status.

The DREAM Act made significant progress when the Senate Judiciary Committee approved its passage in late June of 2002 (see "Immigrant Student Bill Passes Senate Judiciary Committee, IMMIGRANTS' RIGHTS UPDATE, July 29, 2002, p. 7). Both to celebrate this first victory and to engender more support for the bill, over 250 students and advocates from across the nation visited Washington, DC, for Immigrant Student Day on July 17, 2002. The participants, the majority of whom were immigrant students, made 75 congressional visits. In addition, the press conference that covered the event generated dozens of articles that were reported in media outlets throughout the country. The positive feedback that advocates in Washington, DC, received from Capitol Hill staff, as well as the visits that advocates continued to make after July 17, indicated that the collective efforts to educate lawmakers and the public about the DREAM and Student Adjustment Acts were largely successful.

Immigrant Student Day also had a synergistic effect among the various supporters of both acts. Local and national groups continued to communicate about their work in the months following the event, and all were poised to move forward for a final long-shot push when Congress returned from its summer break in September.

Also during July, the case of four undocumented students from Arizona, dubbed the "Wilson Four," generated national attention. The students, who were in upstate New York to compete in an international solar boat competition, were held for question-

ing at the Canadian border during a field trip to Niagara Falls. When it was discovered that they had unlawful status in the U.S., they were ordered to appear before an immigration judge. The four students came to Washington, DC, on July 17 to join the other students making the case for passage of the DREAM and Student Adjustment Acts. When their case was brought before the IJ on Sept. 24, 2002, he granted a one-year continuance, in part to give the federal government time to pass legislation—such as the DREAM Act—that could prevent them from being deported.

Efforts to pass the DREAM Act received an unexpected boost when a bellicose anti-immigrant member of Congress attempted to use his clout with the Immigration and Naturalization Service against an honors student who is a potential beneficiary of the legislation. The student, Jesús Apodaca, had crossed the Arizona desert with his family when he was 12 years old. He overcame great adversity to attain a 3.93 grade point average and win an Education Excellence Award signed by President Bush. In Aug. 2002, Apodaca was brave enough to share his story with a *Denver Post* reporter, who published a profile of him and his efforts to continue his education. Unfortunately, the newspaper story included Apodaca's real name and other information sufficient to identify and locate his family. A few weeks later, Rep. Tom Tancredo (R-CO) personally intervened with the INS district director in an apparent effort to have Apodaca and his family deported, forcing the terrified family to flee their home and go into hiding.

The *Denver Post* story about Rep. Tancredo's mean-spirited efforts struck a nerve in the Colorado Latino and immigrant communities and their allies. A broad coalition of immigrants' rights advocates in the state came together to prevent the family's deportation, express their outrage, and voice support for the DREAM Act. The story remained front page news and a hot topic on television and radio for more than a week.

Although some politicians in Colorado initially expressed support for Rep. Tancredo, by the end of the week all of the most prominent elected officials had come out in favor of a private bill designed to protect the family. Introduced by Sen. Ben Nighthorse Campbell (R-CO), the bill would apply only to the Apodaca family, granting them permanent residence status and thereby allowing them to remain in the U.S. without fear of deportation. The national attention received by this case has also animated DREAM Act supporters, both Republicans and Democrats, to make one last effort to pass the legislation this year.

For a moment a few weeks ago it appeared that something might be worked out by House and Senate negotiators that could accomplish this goal, but that particular opportunity has passed. The key to success next year or in the lame duck session that will follow the election will be the continued focus of immigrant students and their allies: whether candidates hear about immigrant students during their campaigns; whether educators and others continue to speak out; and whether the new and incumbent members of Congress are visited by their constituents after the election.

BIA CLARIFIES HARDSHIP STANDARD FOR NON-LPR CANCELLATION OF REMOVAL – The Board of Immigration Appeals has issued an *en banc* precedent decision that clarifies the “exceptional and ex-

tremely unusual” hardship standard that is a requirement for cancellation of removal for non-lawful permanent residents under section 240A(b) of the Immigration and Nationality Act. The unanimous opinion sustains the appeal of a Mexican woman who is the sole support of her six children, four of whom are U.S. citizens, and who was denied cancellation by an immigration judge. The decision distinguishes the BIA's prior ruling in *Matter of Andazola*, 23 I. & N. Dec. 319 (BIA 2002), where the BIA had found the standard not met by a single Mexican mother of two U.S. citizen children (for more information regarding that decision, see “BIA Rules on Standard for Non-LPR Cancellation,” IMMIGRANTS' RIGHTS UPDATE, July 29, 2002, p. 6).

The adult respondent in this case, a Ms. Recinas, is a 39-year-old Mexican national who has lived in the U.S. since 1988. She has two older children, ages 15 and 16, who are Mexican nationals, and four U.S. citizen children, ages 12, 11, 8, and 5. Her parents are both LPRs, and her five siblings are U.S. citizens. She is divorced and has no immediate family living in Mexico.

At her removal hearing, the IJ found that Recinas did not meet the “exceptional and extremely unusual” hardship standard for cancellation. The IJ also found that the two non-U.S. citizen children did not qualify for cancellation because they have no “qualifying” relative (a spouse, parent, or child who is a U.S. citizen or LPR and who would suffer hardship as a result of a respondent's removal). Recinas appealed from the IJ's ruling, resulting in this decision of the BIA.

On appeal, the BIA found that this case “presents a close question” but concluded that it is “on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard” is met. The BIA noted that “the hardship standard is not so restrictive that only a handful of applicants, such as those with a serious medical condition, will qualify for relief.” “Keeping in mind that this hardship standard must be assessed solely with regard to the qualifying relatives in this case,” the BIA found the following factors relevant:

- Recinas raised her family in the U.S. since 1988, and the four U.S. citizen children do not speak Spanish well and cannot read or write in Spanish.
- The citizen children are solely dependent on Recinas for their support, unlike the respondent in *Andazola*.
- Recinas's ability to work and support her children depends upon the assistance her mother has provided in caring for the children, and with no family in Mexico she would have an especially difficult time finding employment and providing a safe home for her children.

In addition to these factors, the BIA also considered that factors relating to hardship to Recinas herself “may also be considered to the extent that they affect the potential level of hardship to her qualifying relatives.” One factor is that Recinas and all the children would lose the support of their strong family ties to the various family members with U.S. citizen or LPR status. The BIA noted that, in addition to her citizen children, Recinas's LPR parents are “qualifying relatives” for her under the statute. While the BIA did not address the hardship that Recinas's removal would cause her parents, the BIA did note that they “form part of the strong system of family support that the respondent and the minor qualifying relatives would lose if they are removed from the United States.” The BIA also noted that the non-U.S. citizen

children, although without a qualifying relative, "also cannot be ignored." "In considering the hardship that the United States citizen children would face in Mexico, we must also consider the totality of the burden on the entire family that would result when a single mother must support a family of this size," the BIA held. The BIA also found it relevant that Recinas has no prospects for lawful immigration through her U.S. citizen siblings or LPR parents because of the backlog on visa availability for Mexican nationals for these visa categories.

The BIA concluded that, while the kinds of hardship factors in this case "are more different in degree than in kind" from those in *Andazola*, the total level of hardship in this case is greater and satisfies the standard.

With respect to the two minor respondents, the BIA found that the IJ was correct in finding that they do not have a qualifying relative. However, the BIA also noted that this decision will result in Recinas receiving cancellation and adjusting to LPR status, and that it is likely that soon she will constitute a qualifying relative for these children. Because the children soon will have a qualifying relative, the BIA remanded their cases to the IJ, to be held in abeyance pending a disposition of Recinas's status.

Matter of Recinas, 23 I. & N. Dec. 467, Int. Dec. 3479 (BIA Sept. 19, 2002).

BIA REMANDS IJ GRANT OF ASYLUM FOR MORE COMPLETE FACTUAL FINDINGS – A three-member panel of the Board of Immigration Appeals has sustained an appeal of the Immigration and Naturalization Service from a grant of asylum to an Iraqi family, finding the immigration judge's decision to be inadequate. The BIA noted that the decision was conclusory and "did not make any specific findings of fact, did not include any explicit credibility determinations, and did not meaningfully discuss the documents that had been offered into evidence."

In its decision, the BIA notes that as of the date of the decision (Sept. 12, 2002) it has the option to independently evaluate the administrative record and make findings of fact, but that it will lose this power as to new appeals under the regulations that take effect on Sept. 25, 2002 (for more information about these regulations, see "Attorney General Issues Final Rule to Reform BIA," IMMIGRANTS' RIGHTS UPDATE, Sept. 10, 2002, p. 1). The BIA remanded the case for further factual findings, noting "that it is more important than ever for Immigration Judges to include in their decisions clear and complete factual findings of fact that are supported by the record and are in compliance with controlling law."

Matter of S-H-, 23 I. & N. Dec. 462, Int. Dec. 3478 (BIA Sept. 12, 2002).

ABA PUBLISHES NEW MANUALS FOR INS DETAINEES – The American Bar Association's Commission on Immigration Policy, Practice and Pro Bono has published a series of three manuals outlining how individuals may seek redress for injuries they incur while confined by the Immigration and Naturalization Service. The manuals are titled:

- *A Legal Guide for INS Detainees: How to Complain Effectively, Step by Step*

- *A Legal Guide for INS Detainees: Actions Brought Against INS or Other Law Enforcement Officials for Personal Injury or Property Damage or Loss*

- *A Legal Guide for INS Detainees: Petitioning for Release from Indefinite Detention*

Two of the manuals outline how individuals may file grievances with government agencies, and include instructions on filing Federal Tort Claims Act (FTCA) and *Bivens* actions. An FTCA claim allows individuals to sue for money damages for injuries caused by negligent acts of government employees. A *Bivens* action allows individuals to recover damages from federal agents for violations of their constitutional or federal statutory rights.

The third manual, *Petitioning for Release from Indefinite Detention*, informs individuals about how to seek release from indefinite detention under *Zadvydas v. Davis, et al.*, 121 S. Ct. 2491 (June 28, 2001). In *Zadvydas*, the U.S. Supreme Court held that the INS could not indefinitely detain individuals who have been ordered removed from the U.S. but who cannot be repatriated to their homelands. For more information on the *Zadvydas* case, see "Supreme Court Holds That INA Does Not Authorize Indefinite Detention," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2001, p. 8.

Two of the manuals were published in collaboration with the Washington office of the law firm of Hogan and Hartson LLP. To order a hard copy of these materials, e-mail your request to nugentc@staff.abanet.org. Hard copies may also be ordered, and the manuals themselves downloaded, at: www.abanet.org/immigprobono/publications.html.

Litigation

SETTLEMENT PRELIMINARILY APPROVED IN CLASS ACTION FOR SUSPENSION APPLICANTS – The U.S. District Court for the Northern District of California has preliminarily approved a settlement agreement in *Barahona-Gomez v. Ashcroft*, a class action lawsuit challenging the actions of Executive Office for Immigration Review officials purporting to implement the 4,000-person cap on suspension/adjustment grants imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Under the settlement, class members in the Ninth Circuit who were denied suspension under the "stop-time rule," but who could have been granted suspension had their cases been resolved prior to the rule's Apr. 1, 1997, effective date, will be able to have their cases decided without regard to the stop-time rule.

This litigation challenged directives that were issued by then-Chairman Paul W. Schmidt of the Board of Immigration Appeals and Chief Immigration Judge Michael J. Creppy on Feb. 13, 1997. These directives instructed the BIA and the immigration courts not to grant further suspension applications pending additional guidance. These officials issued the directives because of their concern that, under their interpretation of IIRIRA section 309(c)(7) (which established the aforementioned yearly cap of 4,000 on the number of persons who can adjust to lawful permanent residence by means of suspension of deportation), the EOIR had nearly reached the cap for the fiscal year that began on Oct. 1, 1997. The directives had the most severe impact on applicants served with an Order to Show Cause (OSC) before accumulating seven years' continuous physical presence in the United States, which is a requirement for suspension applications. For these individuals,

the directives imposed more than a mere delay in the resolution of their cases. They faced the loss of their eligibility for suspension, since under the BIA's interpretation of IIRIRA section 309(c)(5) they would no longer be eligible once the stop-time rule took effect on Apr. 1, 1997.

Soon after, the plaintiffs in *Barahona* filed suit in federal district court, seeking injunctive relief against the postponement of their cases. On Mar. 28, 1997, the district court issued a preliminary injunction and provisional class certification for individuals who may have been ordered deported after being denied suspension based on IIRIRA section 309(c)(5). Six months later, the court modified the injunction to require the government to notify class members when their suspension applications are denied based on the new rule for calculating accumulated continuous physical presence. The government appealed both rulings, and the Ninth Circuit ultimately upheld the injunction (see "9th Circuit Affirms Preliminary Injunction in Class Action Case for Suspension Applicants," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 10). The parties then began settlement discussions, resulting in the proposed settlement.

Under the settlement, eligible class members who could have been granted suspension during the period between Feb. 13 and Apr. 1, 1997, before this new restriction took effect, will be given the opportunity to apply for "renewed suspension" under the standards that existed prior to Apr. 1, 1997. The agreement specifically sets forth the criteria that individuals must meet in order to qualify for relief and the procedures for obtaining it. These are summarized in the notice to the class approved by the court and presented in full in the settlement agreement itself. Both the notice to the class and the full settlement agreement may be downloaded from the NILC Web site at www.nilc.org. The following is only a summary of these provisions.

Class Members Eligible for Relief. The class in this case is limited to individuals who applied for suspension of deportation and whose hearings took place within the geographical jurisdiction of the U.S. Court of Appeals for the Ninth Circuit. Even if otherwise qualified, class members are not eligible for benefits under the settlement if they have already become lawful permanent residents, or if they already have had or will have their cases reopened for adjudication or re-adjudication of suspension applications without regard to the stop-time rule by order of the Ninth Circuit, the BIA, or an immigration judge. The following five categories of class members are eligible for relief.

1. Individuals whose cases were reserved for decision or scheduled for a merits hearing on a suspension application by an IJ between Feb. 13, 1997, and Apr. 1, 1997, where the hearing was continued until after Apr. 1, 1997 (except, as described below, in certain cases where the individual requested the continuance), and for which either

(a) no IJ decision has been issued;

(b) an IJ decision was issued denying or pretermittting suspension based on the stop-time rule, and either (i) no appeal was filed; (ii) an appeal was filed, and the case is pending with the BIA; or (iii) an appeal was filed, and the BIA denied the appeal based on the stop-time rule; or

(c) the IJ granted suspension after Apr. 1, 1997, and the Immigration and Naturalization Service filed a notice of appeal, motion to reconsider, or motion to reopen challenging the individual's

eligibility for suspension based on the stop-time rule.

Individuals in the categories listed above do *not* qualify for relief under the settlement if: (1) the hearing was continued at the request of the individual; (2) the individual was represented by an attorney; and (3) the transcript of the hearing was prepared following an appeal and makes clear that the continuance was requested by the respondent. In any case where the EOIR determines that an individual is not eligible for relief under the settlement because of this restriction, the agency will send written notice of this determination to the individual and counsel. The class member will then have 30 days to file a claim disputing this determination. The settlement provides for a dispute resolution mechanism which must be used before the federal court can hear the issue. A stay of deportation will be in place if the dispute resolution mechanism is timely invoked.

2. Individuals whose cases were pending at the BIA (either on direct appeal from the IJ decision, or on a motion to reopen) between Feb. 13, 1997, and Apr. 1, 1997, where the notice of appeal (or the motion to reopen) was filed on or before Oct. 1, 1996, and which were, or would be (but for the settlement agreement), denied on the basis of the stop-time rule, whether or not the decision of the BIA denying suspension solely on the basis of the stop-time rule has already been issued. (Note that individuals who are otherwise class members because their case was pending at the BIA between Feb. 13, 1997, and Apr. 1, 1997, but whose notice of appeal to the BIA was filed *after* Oct. 1, 1996, will not be eligible for relief, unless they fall under another category of those eligible.)

3. Individuals whose cases were taken under submission by an IJ following a merits hearing before Feb. 13, 1997, where no decision issued until after Apr. 1, 1997.

4. Individuals for whom an IJ denied or pretermittted suspension between Oct. 1, 1996, and Mar. 31, 1997, on the basis of the stop-time rule, *and* the individual filed a notice of appeal with the BIA.

5. Individuals for whom an IJ granted suspension of deportation before Apr. 1, 1997, and the INS appealed based only on the stop-time rule or IIRIRA section 309(c)(7) (the 4,000 cap).

Procedures for Obtaining Relief under the Settlement. Under the settlement, eligible class members can apply for and be granted "renewed suspension," which means the relief of suspension of deportation as it existed on Sept. 29, 1996, before amendment by the IIRIRA or any subsequent statute. As part of the process of applying for renewed suspension, class members will have the opportunity to present new evidence of the hardship they would face were they to be deported.

The procedures by which such eligible class members may apply for and be granted relief depend upon the status of the case. In cases currently pending before an IJ, the EOIR will send written notice to eligible class members of the opportunity to apply for relief under the settlement. In cases of eligible class members that are currently pending before the BIA, the BIA will remand the case to the IJ to schedule a hearing for renewed suspension. In those cases where an IJ previously granted suspension to a class member and the INS appealed based only on the stop-time rule or the 4,000 cap, the BIA will dismiss the appeal and thereby reinstate the IJ's decision granting suspension.

In cases of eligible class members where the BIA or an IJ

denied suspension and no appeal was filed, the EOIR will on its own motion reopen the case to allow the class member to apply for suspension. In such cases the EOIR will send written notice to the class member's last known address. If the class member subsequently fails to appear for a noticed hearing, the case will be administratively closed for a period of time after which the case could be reopened and an appropriate order issued, including an *in absentia* order of deportation. This order could, in turn, be subject to reopening for lack of notice.

Class members who are subject to final deportation orders but are eligible to apply for renewed suspension under the settlement may file a motion to reopen their case to apply for renewed suspension. This will be necessary in cases where the BIA or the IJ will not, on their own, be reopening the case. Principally, this will be an issue in cases where a motion to reopen has already been denied. This motion is not subject to the normal time and number limitations on motions to reopen, nor does it require a filing fee. However, the motion to reopen must be filed within 18 months of the date that an advisory statement announcing and describing the settlement is published in the Federal Register (this period will be extended for 6 months if at least one class member files such a motion within the last 6 months of the 18-month period).

Stay of Deportation. A stay of deportation will be in effect for class members eligible for relief under the settlement and who are subject to final orders of deportation. The stay will expire upon the reopening of a class member's case under the terms of the settlement agreement. The stay is also dissolved 30 days after any individual receives written notice that the EOIR has determined that he or she is not eligible for relief under the settlement, due to the presence of three factors: (1) the hearing was continued at the request of the individual; (2) the individual was represented by an attorney; and (3) the transcript of the hearing was prepared following an appeal and makes clear that the continuance was granted at the request of the respondent. The stay is not dissolved after 30 days only if the individual notifies the EOIR within the 30-day period that he or she is invoking the settlement's dispute resolution procedure. The stay will also be dissolved for any other individuals who are not eligible class members but who currently benefit from the stay of deportation in place due to the pending litigation.

An eligible class member who files a motion to reopen under the settlement may also request a stay of deportation from the EOIR, and this filing will cause him or her to be presumed to be an eligible class member for purposes of the stay of deportation. However the presumption and stay can be dissolved by order of the EOIR in not less than seven days if the individual has not filed prima facie evidence of eligibility for relief under the settlement by that time.

The court has scheduled a fairness hearing on Dec. 6, 2002, in Oakland, Calif., in order to determine whether to give final approval to the settlement. Any class member who wishes to object to the settlement must do so no later than Nov. 15, 2002. The notice to the class explains the procedures for objecting.

Barahona-Gomez v. Ashcroft, No. C97-0895 CW (N.D.Cal.).

9TH CIRCUIT FINDS NO JURISDICTION TO REVIEW BIA REFUSAL TO RE-OPEN DEPORTATION PROCEEDINGS *SUA SPONTE*—In a split decision, a three-judge panel of the U.S. Court of Appeals for the Ninth

Circuit has ruled that the court does not have jurisdiction to review a ruling of the Board of Immigration Appeals declining to use its *sua sponte* authority to grant a late motion to reopen. A majority of the panel concluded that the BIA's power to reopen a case *sua sponte* (or on its own motion) at any time is not subject to any meaningful standard. Rather, the authority is committed to the agency's nonreviewable discretion.

The respondents in this case, the Ekimian family, were first admitted to the United States as nonimmigrant visitors from Armenia in Nov. 1993. In Dec. 1993 they applied for asylum with the Immigration and Naturalization Service. In 1995 the father was hired as a physical education instructor and educator at a private school, and later that year the school filed a petition for a labor certification on his behalf. However, the U.S. Dept. of Labor (DOL) took almost two years to approve the petition. In the meantime, after the INS denied the family's asylum application, an immigration judge also denied the application in deportation proceedings, and in April 1997 the BIA denied the Ekimians' appeal and ordered the family deported.

The family then filed a petition for review of the BIA's order. In Sept. 1997 the DOL approved the labor certification petition, and in October the INS approved the school's immigrant visa petition. In Nov. 1997, while the petition for review was pending, the Ekimians filed a motion to reopen deportation proceedings to apply for adjustment based on having an approved visa petition with a current priority date. In Dec. 1997, the Ninth Circuit denied the petition for review of the asylum denial and order of deportation.

In Feb. 1999, the BIA denied the motion to reopen as untimely, because it was filed more than 90 days after the BIA's April 1997 final order. The BIA also declined to reopen the case on its own motion. The decision did not discuss the fact of the approved petition and the immediate availability of immigrant visas for the family, nor did it discuss whether deportation would cause hardship to the family. The Ekimians then filed a petition for review of this decision.

Ruling on this appeal, a majority of the panel found that there were no standards against which the BIA's denial of *sua sponte* reopening could be judged. The court concluded that, despite the BIA's finding in *Matter of J-J-*, 21 I. & N. Dec. 976 (BIA 1997) that 8 C.F.R. section 3.2(a) allows the BIA to reopen proceedings "in exceptional circumstances," there is no statutory, regulatory, or case law definition of the term governing the BIA's *sua sponte* reopening power. The majority concluded that the power is vested in the BIA's nonreviewable discretion.

Judge Myron Bright, Senior Circuit Judge for the Eighth Circuit, sitting on the panel by designation, dissented. Noting the general presumption in favor of judicial review of all agency decisions, Judge Bright argued that prior decisions afforded sufficient administrative and judicial case law to assess whether exceptional circumstances warranted reopening. He argued that the court should reverse and remand the BIA decision, citing the agency's abuse of discretion in failing to consider the approved visa petition. The BIA also abused its discretion, Judge Bright argued, in failing to consider that deportation would bar the family from immigrating for ten years.

Ekimian v. INS, No. 99-70322
(9th Cir. Sept. 12, 2002).

9TH CIRCUIT FINDS BIA MUST REVIEW STATE DEPT. COUNTRY REPORTS CITED BY *PRO SE* APPLICANT SEEKING REOPENING FOR CAT RELIEF –

Relying on the principle that procedural restrictions should be liberally construed with respect to *pro se* litigants, the Ninth Circuit Court of Appeals has ruled that the Board of Immigration Appeals erred in failing to consider U.S. State Dept. country reports that were referenced in a *pro se* litigant's motion to reopen his case to obtain relief under the Convention Against Torture (CAT). The court ruled that when a *pro se* claimant refers in his motion to recent State Dept. reports with enough specificity for them to be identified, the BIA is obligated to consider them, even if the applicant has not attached them on appeal or provided an exact citation.

The petitioner in this case, a Mr. Abassi, had applied for asylum and withholding of deportation from Afghanistan and was denied both claims by the immigration judge, in a decision that the BIA upheld. Abassi subsequently moved to reopen his case under the CAT. In order to establish a CAT claim, an applicant must demonstrate that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. A fact-finder assessing a claim brought under the CAT may consider evidence that human rights are flagrantly violated within the proposed country of removal, as well as other relevant information.

In his motion to reopen, Abassi alleged that upon his return to Afghanistan he would be interrogated, tortured, or possibly killed at the hands of the government, because Afghans deported from other countries and returned to Afghanistan were customarily treated that way. Abassi did not submit any documentation to support his claim. Instead he stated, "I reasonably believe and recent country reports indicate that this may in fact be true." The State Dept. publishes country reports and profiles of country conditions throughout the world. It is to these reports that Abassi referred when he submitted his appeal.

Stating that Abassi had not presented any evidence to establish a prima facie claim under the CAT, the BIA rejected Abassi's motion. The BIA had reviewed the State Dept.'s 1994 country report for Afghanistan that Abassi had included in his original asylum and withholding case. However, it did not consider a more recent country conditions report. The BIA concluded that Abassi had not submitted any evidence of the country's abusive treatment towards returning deportees, and Abassi filed a petition for review of the BIA's decision.

Ruling on the petition for review, the Ninth Circuit reversed the BIA's denial of Abassi's motion under an abuse of discretion standard. The court relied on the principle that procedural restrictions must be liberally construed with respect to *pro se* litigants. The court found that, by mentioning the reports with sufficient specificity to identify them, Abassi adequately placed the relevant country conditions report before the BIA for consideration. The court stated that, although applicants have the burden of proving their case, they need not attach to their appeals government reports that are easily available to the BIA. Nor does a *pro se* litigant need to follow proper legal citation format when making reference to a report. In so ruling, the Ninth Circuit made clear that the BIA need not take administrative notice of particular reports when they are not mentioned in a motion, nor need it track down or sort through multiple documents. It need only

consider the most recent, relevant portion of the country report, if the *pro se* litigant references it.

Abassi had also separately moved to reopen his case to apply for adjustment of status due to his marriage to a U.S. citizen. The BIA had dismissed this motion as untimely, as it was filed more than 90 days after the BIA's final order in this case. The 90-day limit does not prevent the BIA from reopening a case *sua sponte* (on its own motion), and Abassi appealed the BIA's refusal to do so. The court of appeals dismissed this claim for lack of jurisdiction, following *Ekimian v. INS*, No. 99-70322 (9th Cir. Sept. 12, 2002), in which the court found that the court of appeals may not review the BIA's decision not to invoke its *sua sponte* reopening authority (see "9th Circuit Finds No Jurisdiction to Review BIA Refusal to Reopen Deportation Proceedings *Sua Sponte*," p. 8).

Abassi v. INS, No. 01-70846 (9th Cir. Sept. 23, 2002).

DISTRICT COURT GRANTS HABEAS PETITION TO PREVENT LIFE-THREATENING REMOVAL –

The federal district court in Arizona has permanently enjoined the removal of a habeas petitioner until such time as the government can show that she is not likely to be murdered were she to be removed to Colombia. The court based its ruling on the constitutional duty of the government to protect an individual whom the government has affirmatively placed in danger.

The petitioner in this case, Maria Rosciano, is a Colombian national who became a lawful permanent resident of the United States in 1984. In 1996 her brother was murdered because of his role in a failed drug transaction. After that murder, the Federal Bureau of Investigation used confidential agents to befriend Rosciano in an effort to learn the identity of "El Indio," a major drug lord involved in the failed drug transaction. Ultimately, in 1997, Rosciano was arrested after the FBI informants arranged a drug purchase on Rosciano's property from persons introduced to them by her.

After the arrest, Rosciano fully cooperated with the authorities, both by helping convict the drug sellers she had put in contact with the informants and by providing information about the identity of El Indio. She called relatives in Colombia, and eventually her sister provided a name, which Rosciano passed on to authorities. Her sister in Colombia was informed that El Indio would seek revenge, and, shortly after, she died in a suspicious accident when her car's brakes failed.

Rosciano pled guilty to the drug charge, and federal prosecutors asked that she be given a shorter sentence for her cooperation and because "the risk of danger as a result of her assistance is high." However, the prosecutors declined to help her obtain a visa, assuring her that she was unlikely to face deportation if the judge in the criminal case recommended that she not be deported (which he did).

On the completion of her criminal sentence in 1999, the INS initiated removal proceedings against Rosciano. The immigration judge found that Rosciano's "life is in danger from the drug traffickers in her native Colombia and that it is likely she will be killed if returned to Colombia because she helped United States law enforcement officials learn the identity of a major trafficker and she helped convict two other traffickers." Nonetheless, the IJ concluded that she did not qualify for withholding of removal because her conviction was for a particularly serious crime. The Board of Immigration Appeals affirmed the IJ's decision ordering

her removal.

Rosciano then filed a habeas petition in federal district court under 28 U.S.C. section 2241. The district court granted a temporary restraining order, then a preliminary injunction, and finally a permanent injunction. The court based its ultimate resolution of the case on the government's duty to Rosciano under the Fifth Amendment to the U.S. Constitution.

The court found that if the government were to remove Rosciano to Colombia, this would "place her in a more dangerous situation than that in which the government found her." The court noted that it was uncontested that "if removed to Colombia, Petitioner faces a grave risk of death as punishment for having assisted the government in its investigation into the identity of El Indio." In reaching its ruling, the court relied on *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). In that case, a police officer had arrested a woman for drunk driving, impounded her car, and then left her alone in an area with a high crime rate at 2:30 a.m., where she was subsequently raped. The Ninth Circuit found that the police officer had violated the woman's substantive due process rights by placing her in greater danger as a result of his actions. Similarly, in *Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082 (9th Cir. 2000), the court found that police officers who ejected a drunken driver from his car on a cold night violated the Fifth Amendment. The driver, who was wearing only jeans and a t-shirt, was abandoned by the officers and died of hypothermia.

The district court in this case rejected the government's claim that Rosciano's cooperation with authorities was voluntary and therefore not the government's responsibility. The court found this argument contrary to Ninth Circuit precedent, noting that in *Munger* the driver had voluntarily consumed the alcohol (i.e., voluntarily undertaken the action that placed him in a perilous situation). The court also found that government actions—first, its running a sting operation to cause her arrest, and, second, its refusing to help her obtain a visa and instead erroneously representing that a judicial recommendation against deportation would protect her—affirmatively placed Rosciano in greater danger.

The court also discussed *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996). In *Wang* the Ninth Circuit found that substantive due process prohibited the deportation of the petitioner, after a long pattern of governmental misconduct resulted in a situation where his removal to China would place his life in danger. The court in this case concluded that, while the circumstances in *Wang* are distinguishable, the appellate court decision does provide support for the court's ruling.

Rosciano v. Sonchik, No. CIV 01-472 PHX-FJM
(D. Az. Sept. 10, 2002).

Employment Issues

COURT DENIES MOTION TO DISMISS IN RETALIATION CASE WHERE WORKER WAS REPORTED TO INS – A federal court in northern California has denied the defendants' motion to dismiss a federal retaliation lawsuit brought under the Fair Labor Standards Act (FLSA), rejecting their argument that the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 122 S. Ct. 1275 (2002), barred the plaintiff's claim. The plaintiff in *Singh v. Jutla, et al.* filed this case after defendants reported him to the Immigra-

tion and Naturalization Service in retaliation for the plaintiff filing an underlying wage claim. The defendants' action resulted in the INS detaining the plaintiff for close to 16 months because he had an outstanding final order of removal or deportation.

In refusing to extend *Hoffman* to the present case, the court noted that the *Hoffman* Court reaffirmed its holding in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), that undocumented immigrants can be considered employees under the National Labor Relations Act (NLRA). The court also noted that case law before and after *Hoffman* has consistently held that the FLSA applies equally to all employees, regardless of immigration status. Moreover, in *Hoffman* the Supreme Court only barred back pay under the NLRA, and its decision did not preclude other traditional remedies, including declaratory and injunctive relief. Therefore *Hoffman* should not, the court held, be extended to disallow the compensatory and punitive damages at issue in this case.

The court also distinguished this case from *Hoffman*, in which the Supreme Court focused on the worker's wrongdoing because there was no evidence that the employer knew he was undocumented. The court acknowledged that awarding back pay to an undocumented worker hired by an unknowing employer conflicts with immigration policy. However, it also cited the dissenting opinion in *Hoffman*, which cautioned that "were the [NLRB] forbidden to assess back pay against a knowing employer . . . this perverse economic incentive, which runs directly counter to the immigration statute's basic objective, would be obvious and serious." In the present case, the plaintiff alleged that the defendants not only knowingly hired him but actively recruited him in India, promising him a place to live, an education, and an opportunity to join the defendants' business. Instead, the defendants allegedly put him to work and refused to pay any wages for about three years.

Accordingly, the court held that allowing the plaintiff to proceed with his FLSA retaliation claim properly balances the policies enunciated in both federal labor and immigration laws, because to prohibit the plaintiff from pursuing such a claim would provide employers with an economic incentive to seek out and hire undocumented workers. The court noted that while employers who take advantage of these incentives run the risk of being sanctioned by the INS—a risk they might consider worth taking—"it is the employees who face the most significant and immediate immigration sanctions."

The plaintiff is represented by the National Immigration Law Center, together with the Legal Aid Society-Employment Law Center of San Francisco, and the law firm of Brobeck, Phleger & Harrison LLP.

Singh v. Jutla, et al., 214 F. Supp. 2d 1056 (N.D. Cal. 2002).

COURTS CONTINUE REJECTING DEFENDANTS' POST-HOFFMAN INQUIRIES INTO PLAINTIFFS' IMMIGRATION STATUS – Since the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, which barred undocumented workers from receiving back pay under the National Labor Relations Act, defendants have been attempting to inquire into plaintiffs' immigration status in a variety of employment cases. (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). Fortunately, the courts

have limited the impact of *Hoffman* by refusing to allow blanket inquiries into workers' immigration status, consistently holding that such inquiries have a chilling effect on their willingness to speak out against unlawful employment practices (see "*Hoffman*: Lower Courts Limit Impact of High Court's Decision Barring Undocumented Worker from Receiving Back Pay," IMMIGRANTS' RIGHTS UPDATE, May 30, 2002, p. 8).

A federal court in Illinois recently denied the defendants' motion to compel discovery concerning the plaintiffs' citizenship status in an action under the Fair Labor Standards Act (FLSA) involving the recovery of overtime wages. In *Cortez v. Medina's Landscaping*, defendants served discovery requests concerning the plaintiffs' immigration status after the Supreme Court decided *Hoffman* and after the discovery period for the case had closed. In denying the defendants' motion to compel, the court made clear that "*Hoffman* does not hold that an undocumented alien is barred from recovering unpaid wages for work actually performed." The court also reminded the defendants that the holding in *Hoffman* has been the rule in the Seventh Circuit since 1992, when the appellate court decided *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992). The court noted that even then the Seventh Circuit had "expressly distinguished back pay for labor 'not performed' and unpaid wages for labor 'actually performed.'" Therefore, *Hoffman* does not give defendants in the Seventh Circuit (which encompasses Illinois, Indiana, and Wisconsin) a new avenue by which to probe into plaintiffs' immigration status or authorization to work.

Similarly, a federal court in the Eastern District of New York granted the plaintiff's motion for a protective order prohibiting the defendant from seeking discovery of the plaintiff's immigration documents, Social Security number, and passports. The plaintiff in *Flores v. Amigon d/b/a La Flor Bakery* brought a claim for unpaid overtime wages, alleging violations of state and federal laws. Following the reasoning set forth in *Flores v. Albertsons, Inc.*, 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. Apr. 9, 2002), and *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002), the court distinguished *Hoffman* as a case that limits back pay only for work "not performed." In holding that *Hoffman* does not apply to cases involving claims of unpaid wages for "work performed," the court noted that enforcing the FLSA's provisions actually furthers the policy goals of the Immigration Reform and Control Act of 1986 (which prohibits employers from knowingly hiring undocumented workers). Specifically, "If employers know that they will not only be subject to civil penalties . . . and criminal prosecution . . . when they hire illegal aliens, but . . . will also be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance."

Further, the court found that while the discovery rules under the Federal Rules of Civil Procedure are to be construed generously and broadly, a protective order is necessary to counter the chilling effect of discovery requests regarding the plaintiffs' immigration status. If such requests are allowed, the court ruled, they would "effectively eliminate the FLSA as a means of protecting undocumented workers from exploitation and retaliation." In granting the protective order, the court noted that most undocumented immigrants would withdraw their claims or be deterred from filing any claims at all if they were forced to disclose

information about their immigration status. The "potential for prejudice far outweighs whatever minimal probative value such information would have," the court observed.

Another federal court in Illinois recently rejected an attempt by the defendant to obtain documents from the plaintiffs relating to their authorization to work in the U.S. In *De La Rosa v. Northern Harvest Furniture*, the plaintiffs brought a class action lawsuit alleging violations of Title VII of the Civil Rights Act of 1964, the FLSA, and the Illinois Minimum Wage law. The defendant employer sought to compel the plaintiffs to produce documents showing their work authorization during the time they worked for the defendant and at present.

The plaintiff employees were fired in March 2001 and were offered reinstatement in August of that year. The court found that, "when appropriate, post-termination back pay would cover the period after an employee is terminated and before the employer offers reinstatement." Thus, the plaintiffs were not required to provide proof of their work authorization, either during the time they worked for the defendant or currently, because both of those time periods fall outside the only potentially relevant timeframe—that between termination and the offer of reinstatement. The court did not decide whether the plaintiffs would have to provide proof of work authorization for the time period between the date they were fired and the date of the reinstatement offer because the defendants did not ask for that information.

Cortez v. Medina's Landscaping, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002); *Flores v. Amigon d/b/a La Flor Bakery*, 02 CV 838 (SJ) (E.D.N.Y. Sept. 19, 2002); *De La Rosa v. Northern Harvest Furniture*, 2002 WL 31007752 (Sept. 4, 2002).

DEFENDANT'S FAILURE TO RAISE PLAINTIFFS' FAILURE TO "MITIGATE DAMAGES" PRECLUDES INTRODUCING IMMIGRATION STATUS EVIDENCE AT TRIAL

— In an action brought under the Fair Labor Standards Act (FLSA), a federal judge in Illinois has granted the plaintiffs' pre-trial motion to prohibit the defendants from asserting a defense that would have allowed the introduction of evidence regarding the plaintiffs' immigration status or their inability to mitigate damages. In *Rodriguez v. The Texan, Inc.*, the plaintiffs filed a motion *in limine* seeking to preemptively "head-off any argument that the plaintiffs' status as illegal aliens precludes them from recovering certain damages under the principles articulated in *Hoffman*."

(A motion *in limine* is a pretrial device intended to keep certain evidence from being introduced at trial. "*Hoffman*" refers to *Hoffman Plastic Compounds v. NLRB*, 122 S. Ct. 1275 (2002), a U.S. Supreme Court decision that bars undocumented workers from claiming back pay as a remedy under the National Labor Relations Act for unfair labor practices committed by an employer.)

Under the "mitigation of damages" doctrine, plaintiffs must attempt to minimize their economic damages (e.g., by looking for work) after being terminated from their employment. Had the defendants affirmatively alleged in their answer to the complaint that the plaintiffs failed to mitigate their damages (that is, had the defendants pled the failure as a defense), they might have been able to introduce evidence at trial concerning the plaintiffs' immigration and work authorization status. Under *Hoffman*, such evidence may bear directly on the plaintiffs' ability to obtain back pay.

The plaintiffs relied on cases from several courts of appeals (the First, Fifth, Eighth, Eleventh, and the District of Columbia Circuits) in arguing that defendants must raise the failure to mitigate damages as an affirmative defense in order to escape liability. The court agreed with the plaintiffs, finding that in the Second Circuit, a defendant's failure to raise an affirmative defense results in a waiver of that defense. In this case, the court held, the defendants never formally alleged that the plaintiffs failed to mitigate their damages. The court also noted that "it surely comes with ill grace for an employer to hire alien workers and then, if the employer itself proceeds to violate the Fair Labor Standards Act . . . for it to try to squirm out of its own liability on such grounds."

Rodriguez v. The Texan, Inc., 2002 U.S. Dist. LEXIS 17379 (N.D. Ill. Sept. 16, 2002).

9TH CIRCUIT ALLOWS WORK-AUTHORIZED EMPLOYEES TO PROCEED WITH RICO LAWSUIT AGAINST AGRICULTURAL EMPLOYERS – In the

second case of this type brought in federal court, the U.S. Court of Appeals for the Ninth Circuit has reversed a district court decision dismissing a class action by lawfully documented farm workers against their agricultural employers under the Racketeer Influenced and Corrupt Organizations Act (RICO). The workers alleged that the growers depressed their wages by conspiring to hire undocumented workers at below-market wages through an "illegal immigrant hiring scheme."

According to the documented workers, the two growers named in the suit knowingly hired undocumented workers because they were willing to accept significantly lower wages due to their economic situation and reluctance to assert their workplace rights. The plaintiffs claimed that the defendants hired undocumented workers—who can easily be exploited—in order to depress all workers' wages. The plaintiffs also pointed to investigations by the Immigration and Naturalization Service finding that half of the growers' workforce is undocumented. They further alleged that the defendants have been the target of INS raids and worksite enforcement operations. The complaint also alleged that the defendants used a temporary agency, the Selective Employment Agency, Inc., as a front to knowingly hire the undocumented workers and then "loan" them to the growers. The district court found that the plaintiffs lacked standing to bring the RICO suit and that it lacked jurisdiction over the temporary agency.

In reversing the district court's decision, the Ninth Circuit stated that in order to bring a RICO claim, an individual must show that his or her business or property were injured because of the defendant's RICO violations. In the present case, the plaintiffs argued that they suffered injury to their property—namely, their wages—because of the growers' scheme to hire undocumented workers to depress the plaintiffs' wages. The court relied heavily on two cases that were decided after the district court's decision to dismiss the complaint: *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000) (holding that the plaintiffs, who were milk producers, had standing to sue defendant cheese producers who had illegally fixed the price of cheese, thereby artificially lowering the price of milk), and *Commercial Cleaning Servs. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001) (holding that documented workers had standing to sue under RICO for allegations that the defendants hired undocumented workers in order to undercut their business rivals and

gain an economic advantage).

The court focused on three factors to determine whether the alleged actions were the "cause" of injury to the plaintiffs' property. First, the court considered whether there were other, more direct victims of the alleged wrongful conduct who could bring a lawsuit against the defendants. The court found that these plaintiffs were indeed direct victims of the alleged wrongdoing and that they were the appropriate parties to bring the suit. "[U]ndocumented workers cannot 'be counted on to bring suit for the law's vindication,'" it noted.

Second, the court assessed whether it would be difficult to ascertain the amount of damages attributable to the defendants' wrongful actions, distinguishing between the uncertainty of the fact of damage and the uncertainty in the amount of the damage. Specifically, the court found that the plaintiffs had stated a plausible claim that their wages were indeed lowered because of the defendants' scheme, and that they should be given a chance to make their case by presenting expert testimony and other relevant evidence.

Third, the Ninth Circuit considered whether complicated rules would have to be adopted to apportion the damages in order to avoid the risk of multiple recoveries against defendants. It determined that there did not seem to be such a risk, since no other potential plaintiffs had been identified and the defendants did not appear to argue that such risk exists.

Finally, because the plaintiffs had filed suit against the temporary employment agency in state court, the Ninth Circuit remanded the case. The remand gives the plaintiffs the chance to show that the allegations of wrongdoing formulated against the agency under state conspiracy theories are part of the same case as the federal RICO claims, and that they arose out of a "common nucleus of operative fact." With such a showing, the federal court could then decide whether it has supplemental jurisdiction over claims against that defendant.

Mendoza et al., v. Zirkle Fruit Co., et al.,
301 F.3d 1163 (9th Cir. 2002).

EMPLOYEE CAN MAKE ADA CLAIM WITHOUT PLEADING WORK AUTHORIZATION, BUT ACTION COULD LEAD TO ADVERSE INFERENCE ABOUT IMMIGRATION STATUS – A federal judge in New York has ruled that

a worker was not required to state in his complaint that he is authorized to work in the United States in order to bring a claim under the Americans with Disabilities Act (ADA).

Antonio Lopez, the plaintiff in *Lopez v. Superflex, Ltd.*, was fired after he began receiving kidney dialysis treatment. At a pretrial conference held after *Hoffman Plastic Compounds v. National Labor Relations Board* was decided, Lopez amended the complaint and withdrew his claims for back pay and reinstatement. In allowing Lopez to proceed with his ADA claim, the court noted that the "[p]laintiff's decision to withdraw his back pay and reinstatement claims does not itself constitute an admission that the plaintiff lacks work authorization." However, it warned that "his refusal to answer any questions about his status could lead to an adverse inference as to his status."

Because no information regarding Lopez's immigration status had been entered into evidence at that point, the court refused to address whether undocumented workers have standing to bring claims under the ADA after *Hoffman* (defendants argued

that they do not). The court cautioned, however, that “if *Hoffman Plastic* does deny undocumented workers the relief sought by plaintiff [and Lopez is found to be undocumented], then he would lack standing.” The court also noted that if Lopez were to admit being in the U.S. illegally, or were to refuse to answer questions regarding his immigration status, then the issue of his standing would be considered before the court. In that case, “it could result in a judicial finding that plaintiff is illegally residing in the United States and therefore subject to deportation.”

This decision is troubling because it appears to be adopting the reasoning of the Fourth Circuit Court of Appeals, which has held that undocumented workers are not covered by Title VII or the Age Discrimination in Employment Act (ADEA). (See *Egbuna v. Time Life*, 153 F.3d 184 (4th Cir. 1998) (in a failure-to-hire case, the court held that individuals who are not authorized to work are not “qualified” for employment and therefore cannot bring an action under Title VII); and *Reyes-Gaona v. NCGA*, 250 F.3d 861 (4th Cir. 2001) (a Mexican national applying for a job as a temporary worker under the H2-A program was not covered by the ADEA, since it does not protect individuals in a foreign country).) This reasoning conflicts with that adopted by other federal courts of appeal, and with the Equal Employment Opportunity Commission’s interpretation of *Hoffman*. According to the EEOC, *Hoffman* “in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work.” (For a fuller explanation of the EEOC’s view of *Hoffman*, see “Federal Agencies Clarify Limited Impact of *Hoffman Plastic* Decision,” IMMIGRANTS’ RIGHTS UPDATE, July 29, 2002, p. 13.)

Finally, this is the first post-*Hoffman* decision to call into question whether undocumented workers are protected by a particular statute—in this case, the ADA. Indeed, even under the National Labor Relations Act (NLRA)—the statute at issue in *Hoffman*—it is clear that undocumented workers continue to be protected and therefore can organize, join, elect, and participate in a union.

Lopez v. Superflex, Ltd.,
2002 U.S. Dist. LEXIS 15538 (S.D.N.Y. August 21, 2002).

Immigrants & Welfare Update

IMMIGRANT DRIVER’S LICENSE RESTRICTIONS CHALLENGED IN SOME STATES – Nationwide, approximately 63 bills introduced during the 2001–02 state legislative sessions addressed immigrants’ ability to obtain a driver’s license. Although almost 50 of these proposals sought to limit access for immigrants, only 8 states passed restrictive laws. Of the 15 proposals that sought to expand access, 2 states, New Mexico and South Carolina, passed such laws.

Since Apr. 2002, a number of states that failed to pass restrictive legislation have attempted to restrict licenses through administrative policies. And at least two states, Texas and Rhode Island, are seeking to expand access to drivers’ licenses for immigrants. A proposed rule in Texas would allow driver’s license applicants who have never been issued a Social Security number (SSN) to submit an affidavit instead. Similarly, an emergency

regulation in Rhode Island permits the state’s motor vehicles agency to accept an individual taxpayer identification number (ITIN) from applicants who do not have a valid SSN.

Administrative policies intended to restrict access to drivers’ licenses for immigrants were proposed or adopted in at least six states. In most cases, the restrictive policies were withdrawn or face legal challenges.

A summary of the restrictive administrative actions initiated since April 2002 follows:

- **Connecticut.** A regulation was proposed to eliminate employment authorization documents as a form of identification. After the state attorney general determined that the proposed regulation would violate the equal protection clauses of the U.S. and Connecticut constitutions, it was withdrawn.

- **Indiana.** The Indiana Bureau of Motor Vehicles (BMV) issued a new policy that requires six documents to prove identity and Indiana residence. The new policy also creates a lawful presence requirement. After pressure from advocates, the Indiana BMV amended its rule to require only four documents to establish identity and residence. A class action lawsuit has been filed, challenging the administrative rule based on various procedural, statutory, and constitutional grounds.

- **Iowa.** The state’s department of transportation issued a policy requiring that the words “Nonrenewable – Documentation Required” appear on the face of licenses for all non-U.S. citizens. This policy was withdrawn in Sept. 2002.

- **Minnesota.** An administrative rule was filed, creating a lawful presence requirement, eliminating licenses and IDs from other states as acceptable primary documents to prove identity, and requiring that licenses expire with immigration visas. The rule also requires non-U.S. citizens whose visa expires within 60 days to apply for a temporary license, and that the words “status check” and the visa expiration date be indicated on the face of licenses issued to temporary residents. The rule also eliminates the provision of state law that allows exemptions from the requirement to have the license bear a photograph. A petition has been filed with the Minnesota Court of Appeals, challenging the rule on procedural, statutory, and constitutional grounds.

- **Pennsylvania.** The Pennsylvania Dept. of Transportation issued a policy that limits the documents that immigrants and refugees can use to prove their identity.

- **Tennessee.** An executive order issued by the state’s governor requires that the words “NONE PROVIDED” appear on the licenses of applicants who submit an affidavit stating that they have never been issued an SSN.

For a complete list of state proposals and their status, see the NILC Web site at www.nilc.org/immspbs/DLs/2001-02_State_DL_Proposals_10.02.PDF. For a table of the current state policies on issuing drivers’ licenses, see the NILC Web site at www.nilc.org/immspbs/DLs/2001-02_State_DL_Requirements.PDF.

HHS ISSUES GUIDANCE ON THE FIVE-YEAR BAR IN MEDICAID AND SCHIP

– The U.S. Department of Health and Human Services’s (HHS’s) Centers for Medicare and Medicaid Services (CMS) has published a “question and answer” guidance document, confirming the agency’s interpretation of the five-year bar on federal Medicaid and the State Children’s Health Insurance Program (SCHIP).

The five-year bar applies to most “qualified” immigrants who enter the United States on or after Aug. 22, 1996, the date that the federal welfare law passed. Consistent with previous guidance issued by HHS and other federal agencies, the CMS clarified that persons who physically entered the U.S. prior to Aug. 22, 1996, and remained continuously present in the U.S. until they secured “qualified” immigrant status are not subject to the five-year bar. This rule applies equally to persons who were in the country without documents prior to Aug. 22, 1996.

Citing the U.S. Dept. of Justice’s “Interim Guidance” on verification (see below), the CMS explained that a single absence of more than 30 days or aggregate absences of more than 90 days interrupt continuous presence. Once the immigrant obtains qualified immigrant status, there is no requirement that he or she remain continuously present.

The CMS listed the exemptions from the five-year bar for refugees, asylees, Cuban and Haitian entrants, Amerasian immigrants, persons granted withholding of deportation, victims of trafficking, veterans and active duty military personnel and their spouses and children, as well as certain Native Americans. The agency also confirmed that the five-year bar does not apply to emergency Medicaid services.

If the five-year bar applies, the clock begins to run on the date that the person obtained qualified immigrant status. Many states, however, provide medical coverage to some or all qualified immigrants who are subject to the federal five-year bar. See the National Immigration Law Center’s *Guide to Immigrant Eligibility for Federal Programs* (4th ed. 2002) for descriptions of these state-funded programs (see www.nilc.org/pubs/Guide_promo.htm for ordering information).

The CMS guidance, “Questions and Answers on the Application of the Five-Year Bar,” was released on Sept. 11, 2002, and is available at www.cms.gov/immigrants. HHS previously clarified these rules in the context of the Temporary Assistance for Needy Families (TANF) program. See “TANF Program Policy Questions,” available at www.acf.dhhs.gov/programs/ofa/polquest/. And the Social Security Administration, in its Program Operations Manual System (POMS), illustrates the rule as it applies to the Supplemental Security Income (SSI) program. See SI 00502.135 B.1, available on the web at policy.ssa.gov/poms.nsf/poms?OpenView (click on “SI – Supplemental Security Income,” then “SI 005 – Eligibility,” then “SSI Alien Eligibility”). These federal agency interpretations follow the attorney general’s “Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,” (62 Fed. Reg. 61,344, 61,414–15 (Nov. 17, 1997)).

Although most of these federal documents have existed for several years, state agencies commonly fail to ensure that immigrants who were in the country prior to Aug. 22, 1996, but had not yet obtained qualified status have access to these federal services. The CMS’s guidance document is a welcome reminder and clarification of existing law.

HHS ISSUES FINAL REGULATIONS GRANTING SCHIP TO FETUSES – The U.S. Dept. of Health and Human Services (HHS) has published final regulations granting states the option of providing health

insurance coverage to fetuses through the State Children’s Health Insurance Program (SCHIP). The regulations achieve this end by amending the definition of a low-income child eligible for SCHIP to include “the period from conception to birth.” The rule extends eligibility to fetuses without regard to the immigration status of their mothers. By doing so, it provides a potential source of prenatal care coverage for women who are not “qualified” immigrants (including undocumented women) and those who are subject to the five-year bar on federal Medicaid and SCHIP.

HHS stated that the intent of the rule is to expand the availability of prenatal care, but many health and women’s rights groups are concerned that this is an effort to advance the Bush administration’s anti-abortion position by establishing a legal precedent for recognizing the fetus as a person. These groups may challenge the new regulation in court, arguing that Congress limited SCHIP benefits to “children” and fetuses are not children.

Whatever the outcome of any such litigation, there is no legal basis for distinguishing among fetuses based on immigration status. As the preamble to the final rule points out, SCHIP eligibility is determined by the immigration status of the child, not the child’s parents, and a fetus does not have any immigration status. The preamble also clarifies that neither the fetus nor the pregnant woman can be required to provide a Social Security number.

The impact this regulation will have depends on whether states decide to take the option of providing this coverage with federal funds. Many states with large immigrant populations already provide prenatal care to some or all low-income women who are ineligible for federally funded care. States choosing to secure federal reimbursement for these services should ensure that women receive or continue to receive comprehensive care, during and following a pregnancy.

The regulations and accompanying preamble leave unresolved a number of questions regarding the scope of coverage and practical questions about how the regulation will be implemented. For example, HHS allows states to determine whether a fetus meets the residency requirements for the state program, which could present a barrier to migrant workers and others who have difficulty proving their residency. The regulation also leaves it to the states to determine whether and to what extent a woman may receive care for conditions not directly related to the pregnancy, such as broken bones or an illness. However, the rule notes that there must be some connection between the woman’s health care need and the well-being of the child.

The administration’s public support for prenatal and preventive care strengthens the case for passage of the Immigrant Children’s Health Improvement Act (ICHIA), which would provide states with the option of covering lawfully present pregnant women and children, regardless of their date of entry into the United States. Under current law, immigrants—including many pregnant women and children who entered the country on or after Aug. 22, 1996—are barred for five years from securing federally funded SCHIP or Medicaid. The passage of the bill would ensure not only that lawfully present women receive comprehensive care during and immediately following their pregnancy but also that lawfully present children receive coverage. 67 Fed. Reg. 61,955–74 (Oct. 2, 2002).

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