



## Immigration Issues

### **BANKS STILL CAN ACCEPT *MATRÍCULA CONSULAR* UNDER TREASURY DEPT. RULE**

The U.S. Treasury Dept. granted a victory to immigrants who use consular identity cards, as well as to the banks who serve them, when it announced on Sept. 18 that recently issued rules allowing banks to accept such documents from persons seeking to open accounts will not be changed. The most common such ID card currently being used in the U.S. is the *matrícula consular* (literally, "consular registration"), which is issued by the Mexican government.

As previously reported, shortly after the Treasury Dept. announced final rules implementing new customer identification and verification requirements as mandated by sec. 326 of the USA PATRIOT Act, the rules were opened for new comments (see "Acceptance of the *Matrícula Consular* in the U.S. is under

Attack," IMMIGRANTS' RIGHTS UPDATE, July 15, 2003, p. 3). The request for new comments, which the department made under pressure from members of Congress who are outspoken immigration restrictionists, asked whether banks should be prohibited from accepting foreign government-issued documents other than passports as acceptable forms of ID.

Those who submitted comments during the 30-day comment period that ended July 31, 2003, overwhelmingly supported acceptance of foreign identity documents. Of the 23,898 comments submitted, 19,770 (or 83 percent of the total) asked that the rules remain unchanged.

The Treasury Dept. nevertheless still had to make a final decision in the face of pressure applied by lawmakers who oppose the use of consular IDs. In deciding to retain the final rules as written, the department concluded that it had already considered all relevant information when it issued the rules in the first place.

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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.

The decision issued by the department on Sept. 18 also warns banks that they are responsible for both assessing risks associated with accepting particular documents and taking steps to minimize those risks. The Treasury Dept. also left intact the rule that allowed financial institutions not to maintain photocopies of ID documents.

The ruling is a tribute to the many immigrants' advocates and financial institutions that submitted comments and made their voices heard. However, the struggle over the acceptability and use of consular ID cards is far from over, as bills prohibiting their acceptance by the federal government are still pending in Congress (see "Commentators Favor *Matricula Consular*, but ID Acceptance Encounters Other Roadblocks," IRU, Sept. 3, 2003, p. 3).

A Treasury Dept. fact sheet explaining the decision is available online at [www.treas.gov/press/releases/reports/js7432.doc](http://www.treas.gov/press/releases/reports/js7432.doc). The fact sheet is entitled "Results of the Notice of Inquiry on Final Regulations Implementing Customer Identity Requirements under Section 326 of the USA PATRIOT Act."

#### **DOJ AND DHS SLOW TO ADDRESS RECOMMENDATIONS PROMPTED BY MISHANDLING OF POST-9/11 IMMIGRATION DETAINEES**

– Of the 21 recommendations made by the Justice Dept.'s Office of the Inspector General (OIG) in its report criticizing the treatment of non-U.S. citizens who were detained and held on immigration charges following the attacks of Sept. 11, 2001, only two had been addressed with enough specificity and completeness for the OIG to consider them "closed" by the time it issued a Sept. 5, 2003, follow-up report analyzing the steps the Depts. of Justice and Homeland Security say they have taken to address the OIG's recommendations.

In its previous report, the OIG took the Justice Dept. to task for policies and procedural breakdowns that resulted in many noncitizen detainees having to languish far longer in detention facilities than was warranted by the nature of their immigration violations, sometimes under conditions of confinement far more harsh than warranted. (For more on the June 2, 2003, report containing the recommendations, see "OIG Report Criticizes the Government's Treatment of 9/11 Detainees," IMMIGRANTS' RIGHTS UPDATE, July 15, 2003, p. 1.) The policy most responsible for prolonging the detainees' suffering came to be known as "hold until cleared." Under it, the Justice Dept. opposed granting release on bond to any of the noncitizens arrested as a result of the 9/11 attack investigation until the detainee was cleared by an FBI background check. As a result of the policy and of the FBI's slowness in completing the background checks, detainees with no suspected ties to any terrorist activity or group received the same kind of treatment as those very few for whom a suspicion of such ties was more well-founded.

The two recommendations that the OIG now considers closed were designed to address the failure by Immigration and Naturalization Service authorities to adequately monitor the conditions under which 9/11-related detainees were held in the Passaic County Jail, a facility in Paterson, New Jersey, that houses immigration detainees under a contract with the federal government. In response to the recommendations, the Bureau of Immigration and

Customs Enforcement (ICE), which now is part of the Dept. of Homeland Security, issued a new detention standard that requires ICE personnel to pay weekly visits to each immigration detainee housed in any facility, be it a DHS-run facility, or one run by the Bureau of Prisons, or one with which the DHS has contracted.

In addition, DHS personnel are to monitor the conditions in which immigration detainees are housed and respond within specified time frames to certain kinds of requests made by detainees. According to the OIG's analysis of the new detention standard, it requires that all detainees "have access to counsel, telephone calls, and visitation privileges consistent with their classification." Furthermore, "ICE has issued an operational order emphasizing the need for its employees to follow all applicable policies, procedures and regulations governing the detention of aliens. This order particularly [notes] the importance of detainees' access to legal representation and consular officials."

With regard to the other 19 recommendations, the OIG's overall conclusion about the two departments' responses to them was that "the recommendations are not addressed with sufficient specificity, and significant work remains before the recommendations are fully implemented and closed."

For example, as of the time the OIG issued the Sept. 5 follow-up report, the Justice Dept. had not specifically addressed how in the future, after arresting large numbers of noncitizens in connection with a terrorism investigation, it will "more effectively classify detainees at the outset of the investigation, . . . prioritize clearance investigations, and . . . better allocate FBI resources to conduct such investigations." In its analysis of the Justice Dept.'s vague response to the OIG's specific recommendation regarding this set of issues, the OIG says, "[W]e continue to believe that the FBI should develop general criteria and guidance to assist its field offices in making more consistent and uniform assessments of an illegal alien's potential connections to terrorism. We also believe the [Justice Dept.] should not wait until another national emergency to create such criteria."

A PDF copy of the OIG's Sept. 5 report is available online at [www.usdoj.gov/oig/special/03-06/analysis.pdf](http://www.usdoj.gov/oig/special/03-06/analysis.pdf) (an HTML version is also available on the OIG's Web site). The report's full title is "OIG Analysis of Responses by the Department of Justice and the Department of Homeland Security to Recommendations in the OIG's June 2003 Report on the Treatment of September 11 Detainees."

#### **STATE DEPT. PUBLISHES RULES FOR 2005 DIVERSITY VISA LOTTERY**

– The U.S. State Dept. has published a notice detailing application procedures for the 50,000 immigrant visas to be available in fiscal year 2005 under the diversity visa lottery program ("DV-2005"). This year for the first time, applications for the program will be accepted only in electronic form during a 60-day registration period beginning Saturday, Nov. 1, 2003, and extending through Tuesday, Dec. 30, 2003. No procedure has been provided for submitting entries on paper, and no such entries will be accepted. And if more than one entry is received for any applicant, all the applicant's entries will be disqualified, regardless of who submitted the additional entry(ies).

Of concern to anyone interested in submitting a visa lottery entry *who is inside the U.S. without legal immigration status*

should be the fact that the DV-2005 rule contains no restriction on the government's use for enforcement purposes of information it gathers from lottery entrants. Though none of the rules governing past visa lotteries have ever contained such a restriction, the fact that past lotteries relied on paper rather than electronic entries virtually assured that information regarding those millions of entrants who were not selected was of little enforcement value, since authorities lacked the capacity to organize and make use of it. The information in electronic entries, however, should be much more easy to glean and analyze for enforcement purposes.

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, because the Nicaraguan and Central American Relief Act (NACARA) allocates 5,000 of the DV visas per year, beginning with DV-1999, for use in the NACARA program, only 50,000 visas are available for DV-2005.)

**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 enter the DV lottery and, if selected in the lottery, to apply for a DV visa:

- **AFRICA.** All countries qualify.
- **ASIA.** Most countries in Asia, including Indonesia and the countries of the Middle East, qualify. Countries that do *not* qualify are mainland China (i.e., people born in mainland China do not qualify), India, Pakistan, Philippines, South Korea, and Vietnam; however, persons born in Hong Kong SAR, Macau SAR, and Taiwan *do* qualify.
- **EUROPE.** Most European countries, including their overseas components and dependent areas, qualify. However, Russia does *not* qualify, nor does the United Kingdom (except Northern Ireland *does* qualify), nor the U.K.'s dependent territories (i.e., Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena, and Turks and Caicos Islands).
- **NORTH AMERICA.** Only The Bahamas qualifies; Canada and Mexico do *not* qualify.
- **OCEANIA.** All countries qualify (includes Australia, New

Zealand, Papua New Guinea, and all countries of the South Pacific).

• **SOUTH AMERICA, CENTRAL AMERICA, AND THE CARIBBEAN.** All countries qualify except the following: Colombia, Dominican Republic, El Salvador, Haiti, and Jamaica.

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 sec. 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 (12-year course of elementary and secondary education) or its equivalent, or (2) for two of the past five years must have worked in a job that requires at least two years of training and experience to perform. The work experience of applicants will be evaluated using the U.S. Dept. of Labor's O\*Net OnLine database. (Applicants can find a link to a Labor Dept. list of qualifying occupations at the State Dept.'s Consular Affairs Web site: [www.travel.state.gov](http://www.travel.state.gov).)

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 (if otherwise eligible) will qualify for a derivative visa. However, no person can submit more than one entry. If more than one entry is submitted for any person, that person will be disqualified from the program.

**Application Process.** A basic requirement to participate in the visa lottery is that the native of a qualifying country must submit one electronic diversity visa entry form within the application period. The form is accessible only at [www.dvlottery.state.gov](http://www.dvlottery.state.gov). According to the State Dept.'s notice, "Failure to complete the form in its entirety will disqualify the applicant's entry." The entry form requires that the applicant provide the following information:

1. **APPLICANT'S FULL NAME.** Last/family name, first name, and middle name.
2. **APPLICANT'S DATE OF BIRTH.** Day, month, year.
3. **APPLICANT'S GENDER.** Male or female.
4. **CITY/TOWN OF BIRTH.**
5. **COUNTRY OF BIRTH.** The name of the country should be that which is currently in use for the place where the applicant was born.
6. **PHOTOS.** All required photographs must be submitted electronically, as attachments to the electronic entry form. The digital file for each submitted photo may be produced either by photographing the subject with a digital camera or by electronically scanning a photographic print. Each digital photo file must be in

the JPEG format; it must be of either a color or grayscale image (no monochrome images accepted); if it is a digital photo, its resolution must be 320 pixels wide by 240 pixels high and its color depth must be either 24- or 8-bit color, or 8-bit grayscale. Any scans of photographic prints submitted must be 2 inches by 2 inches (50mm x 50mm) square and scanned at a resolution of 150 dots per inch (dpi), with a color depth of 24- or 8-bit color, or 8-bit grayscale. The maximum acceptable size of each photo file is 62,500 bytes.

One "recent" photo each is required of the applicant and of the applicant's spouse and all his or her children (natural as well as legally-adopted children and stepchildren), except that no photo is required of any child who is already a lawful permanent resident or a citizen of the U.S. A photo for each non-LPR and non-U.S. citizen family member must be submitted, even for members who no longer reside with the applicant and regardless of whether they will accompany or follow to join the applicant in the U.S. Group or family photos are not acceptable; a separate photo must be attached for each family member.

The subject of each photo must be directly facing the camera, with the head not tilted (i.e., tilted neither down, up, nor to the side). About 50 percent of the photo's area should be taken up by the head. The photo should be shot against a neutral, light-colored background, and the face should be in focus. The person photographed may not wear a hat, dark glasses, or other paraphernalia that might obscure the face. A photo in which the subject is wearing a head covering or hat is acceptable only when the item is worn for religious reasons, and even in such a case the headwear must not obscure any part of the face. Any photo depicting the DV lottery entrant wearing tribal, military, airline, or other headwear not specifically religious in nature will be rejected.

7. MAILING ADDRESS. Address, city/town, district/country/province/state, postal code/zip code, country.

8. PHONE NUMBER. Optional.

9. E-MAIL ADDRESS. Optional.

10. COUNTRY OF ELIGIBILITY, IF APPLICANT'S NATIVE COUNTRY IS 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, that information must be submitted in the entry. If an applicant is claiming nativity through a spouse or parent, this should be indicated in the entry.

11. MARRIAGE STATUS. Is the entrant married? Answer *Yes* or *No*.

12. NUMBER OF APPLICANT'S CHILDREN WHO ARE UNMARRIED AND UNDER 21 YEARS OF AGE.

13. SPOUSE INFORMATION. Name, date of birth, gender, city/town of birth, country of birth, photograph.

14. CHILDREN INFORMATION (for each child for whom a photo is required (see number 6, "PHOTOS," above)). Name, date of birth, gender, city/town of birth, country of birth, photograph.

No fee is charged for submitting a visa lottery entry. Applicants will be selected at random from among all qualified entries. Every entry received during the lottery registration period will have an equal random chance of being selected within its region. Persons whose applications are selected for registration will be notified by mail between May and July 2004 about the next steps to take to apply for an immigrant visa. Spouses and unmarried

children under age 21 of successful visa applicants may also apply for visas to accompany or follow to join the principal applicant, but processing of entries and issuance of diversity visas to successful applicants and their eligible family members *must* occur by midnight on Sept. 30, 2005 (DV-2005 visas will be issued between Oct. 1, 2004, and Sept. 30, 2005).

The State Dept. notice also reminds readers that in order to receive a visa, randomly selected applicants must meet all eligibility requirements under U.S. law. Such requirements include those relating to special processing established in response to the events of Sept. 11, 2001. These requirements may significantly increase the level of scrutiny and time necessary to process applications for natives of some countries listed as eligible for DV-2005.

The notice takes pains to state that the DV program is operated entirely by the U.S. government and that no outside entity is sanctioned by the State Dept. to help prepare entrants' computerized entries. In terms of its chances of being selected in the random selection process, each properly completed electronic entry form has an equal chance of being selected, regardless of whether it is submitted directly by a private party or through the a paid intermediary.

However, *receipt of more than one entry per person will disqualify the person from registration, regardless of the extra entry's source.* 68 Fed. Reg. 51627-32 (Aug. 27, 2003).

**TPS EXTENDED FOR NATIONALS OF BURUNDI AND SUDAN**—The secretary of Homeland Security has published notices in the Federal Register extending for 12 months the designations of Burundi and Sudan as countries whose nationals and residents currently in the United States qualify for temporary protected status (TPS). The designations of Burundi and Sudan, both of which were due to expire on Nov. 2, 2003, now will be in effect until Nov. 2, 2004. A 60-day reregistration period for each program began Sept. 3, 2003, and will remain in effect until Nov. 3, 2003.

TPS is granted to persons in the U.S. from countries that are designated because they are experiencing armed conflict, environmental disaster, or certain other conditions that prevent the return of their nationals. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. The U.S. attorney general first designated Burundi and Sudan for TPS in Nov. 1997 based upon ongoing armed conflict occurring within those two countries, redesignated each country for TPS in Nov. 1999 (to allow later-arriving persons to apply for relief), and subsequently extended the designations each year.

On Mar. 1, 2003, the authority to make TPS designations was transferred to the secretary of Homeland Security as part of the legislation creating that department, and the secretary has now decided to extend the designations for Burundi and Sudan for a further 12 months. The notice regarding Burundi explains that, in that country, "The conflict between the government forces and rebel groups continues unabated in many areas . . . Rebel attacks on the military are followed by army reprisals against civilians suspected of cooperating with the insurgents. Rebels reportedly often kill persons for suspected collaboration with the government and for their refusal to pay 'taxes' to the rebels." The current notice extending the designation for Sudan explains that

"civil war continues to endanger thousands of Sudanese civilians" and thus to justify the extension of the TPS designation.

To register for the 12-month extension, nationals of either Burundi or Sudan (and individuals of no nationality who last habitually resided in either Burundi or Sudan) previously granted TPS must reregister during the registration period that began on Sept. 3, 2003, and ends on Nov. 3, 2003. Such persons need only file Form I-821, Application for Temporary Protected Status (without the filing fee), Form I-765, Application for Employment Authorization, and two identification photographs (1½ inches by 1½ inches).

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

Applicants for either the Burundian or the Sudanese TPS extension must submit their applications to the BCIS district office that has jurisdiction over their place of residence.

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

- Be a national of Burundi or Sudan (or a person with no nationality who last habitually resided in one of these countries);
- Have been continuously physically present in the U.S. since Nov. 9, 1999;
- Have continuously resided in the U.S. since Nov. 9, 1999; and
- Be admissible as an immigrant, except as otherwise provided under Immigration and Nationality Act sec. 244(c)(2)(A), and not ineligible under INA sec. 244(c)(2)(B).

Each applicant for late initial registration must also be able to show that during the initial registration period (from Nov. 4, 1997, to Nov. 3, 1998) or during the registration period for the redesignation (Nov. 9, 1999, to 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 any relief from removal pending or subject to further review or appeal;
- Was a parolee or had a request for parole pending; or
- Was the spouse or child of an individual currently eligible to be a TPS registrant.

68 Fed. Reg. 52405–07 (Sept. 3, 2003) (Burundi);

68 Fed. Reg. 52410–12 (Sept. 3, 2003) (Sudan).

**TPS FOR SIERRA LEONE TO TERMINATE MAY 3, 2004** – The designation of Sierra Leone as a country whose nationals (and persons of no nationality who last habitually resided there) may be eligible for temporary protected status (TPS) in the United States will expire on Nov. 2, 2003, and the secretary of Homeland Security has determined that conditions in Sierra Leone have improved to the point that nationals of the country no longer need TPS.

The secretary is therefore terminating Sierra Leone's TPS designation, effective May 3, 2004. Persons with TPS granted under the program for Sierra Leone will automatically retain their TPS status and employment authorization until May 3 of next year, whereupon their immigration status will revert to what it was prior to their being granted TPS, unless they have acquired another status in the interim. The six-month grace period (between Nov. 2 and May 3) is being granted to provide for "an orderly transition," according to the Federal Register notice announcing the termination.

The automatic extension of employment authorization applies to anyone who received an employment authorization document (EAD) under the TPS program for Sierra Leone. These EADs were issued on either Form I-766 (Employment Authorization Document) or Form I-688B (Employment Authorization Card), and they bear an expiration date of Nov. 2, 2003. On its face, the I-766 will contain, under "Category," the notation "A-12" or "C-19"; or the I-688B will contain, under "Provision of Law," the notation "274A.12(A)(12)" or "274A.12(C)(19)."

Despite the expiration date these EADs bear, employers are required to accept them as proof of employment eligibility until May 3, 2004. The Federal Register notice suggests that workers who opt to use the EADs as proof of work authorization when completing the I-9 employment eligibility verification process should "also present to their employer a copy of this Federal Register notice regarding the automatic extension." Under the antidiscrimination provision of the law that requires employers to verify their employees' eligibility to work in the U.S., employers should accept any of the EAD variations described in the previous paragraph without requesting further documentary proof of the bearer's work authorization. For example, they should not request proof that the bearer is a citizen of Sierra Leone. Employers with questions regarding the automatic extension of work authorization may call the U.S. Dept. of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) employer hotline at 1-800-255-8155 or 1-800-362-2735 (TDD). Employees or job applicants may call the OSC employee hotline at 1-800-255-7688 or 1-800-237-2515 (TDD) for information regarding the automatic extension.

According to the Federal Register notice, Sierra Leoneans with TPS "are urged to use the time before [May 3] to apply for any other immigration benefits they are eligible for or, in the alternative, prepare for and arrange their return to Sierra Leone." The notice notes that individuals who believe that it would be unsafe for them to return to Sierra Leone might consider applying for asylum, withholding of removal, or protection under Article 3 of the Convention Against Torture.

68 Fed. Reg. 52407–10 (Sept. 3, 2003).

**CLEARACT: BILL TO REQUIRE LOCAL LAW ENFORCEMENT TO ENFORCE IMMIGRATION LAW DEBATED IN SUBCOMMITTEE** – In a contentious hearing before the House Judiciary Subcommittee on Immigration, Border Security and Claims, lawmakers clashed over a proposal that would, among other things, require state and local police to enforce civil immigration law or risk the loss of federal funds. The proposal, titled the Clear Law Enforcement for Crimi-

nal Alien Removal (CLEAR) Act, was introduced by Rep. Charlie Norwood (R-GA) and, as of Oct. 16, had garnered 106 cosponsors in the House of Representatives. No companion legislation has yet been introduced in the Senate; however, Sen. Jeff Sessions (R-AL) has indicated that he plans to introduce similar legislation. (For more about Rep. Norwood's bill, see "Sweeping Legislation Introduced to Require Local Police to Enforce Immigration Law," IMMIGRANTS' RIGHTS UPDATE, Sept. 4, 2003, p. 1.)

Testimony presented during the Oct. 1, 2003, subcommittee hearing and the accompanying debate was deeply split along partisan lines. The chair, Rep. John Hostettler (R-IN), opened the hearing by stating that the legislation is needed to address the "immigration crisis" facing the United States. Other Republicans, including Rep. Norwood, linked the legislation to national security exigencies raised by the terrorist attacks of Sept. 11, 2001, and alleged that large numbers of "criminal aliens" remain at large because the federal government lacks sufficient resources to apprehend and deport them. The only Republican to express opposition to the bill was Rep. Jeff Flake (R-AZ). Flake introduced a letter from Americans for Tax Reform (ATR) president Grover Norquist, American Conservative Union president and conservative lobbyist David Keene, and former representative from Georgia Bob Barr on behalf of the ATR that cited the CLEAR Act as "bad policy that is not really needed."

All the Democratic lawmakers present at the hearing voiced vehement opposition to the bill. Ranking Member Sheila Jackson Lee (D-TX) described the legislation as an "unfunded mandate" that would exacerbate the budget problems now facing nearly all of the states. Other Democrats, including Reps. Zoe Lofgren, Howard Berman, and Loretta Sanchez, all of California, introduced letters from police departments around the country expressing strong disagreement with the CLEAR Act's provisions.

Testifying on behalf of the legislation were three witnesses: John Morganelli, district attorney for Northampton County, PA; James R. Edwards, adjunct fellow at the Hudson Institute and author of a paper published by the Center for Immigration Studies on police enforcement of immigration law; and Kris Kobach, associate professor of law at the University of Missouri-Kansas City, congressional candidate for the Third District in Kansas, and a former advisor to U.S. Attorney General John Ashcroft. Many view Kobach as a leading architect of some of the draconian immigration-related policies that were instituted after 9/11, including the National Security Entry-Exit Registration System (NSEERS) program, under which non-U.S. citizens from certain countries must register with the government.

The only witness called by the subcommittee's Democrats was Gordon Quan, a member of the Houston City Council and currently the city's mayor pro tem as well as an immigration lawyer in private practice. Houston has in place a police department general order prohibiting police from stopping or questioning individuals based solely on officers' suspicion that they are in the U.S. illegally. Quan was questioned at length about the general order.

The next step for the Norquist bill is likely to be mark-up, in which the subcommittee amends the bill prior to reporting it to the full committee. If a subcommittee votes not to report legislation to the full committee, the bill dies.

Opposition to the CLEAR Act bill is mounting throughout the country as local communities are mobilizing to urge their local city councils and police departments to voice their disagreement with the bill. For more information on advocacy efforts or to be placed on an e-mail list to receive regular updates on the legislation, contact Lynn Tramonte at the National Immigration Forum at 202-347-0040.

#### **DEADLINES APPROACHING FOR RE-REGISTRATION UNDER "CALL-IN" SPECIAL REGISTRATION PROGRAM**

– The "call-in" special registration program required certain male citizens or nationals of 25 countries who were inspected and admitted to the United States as nonimmigrants before Sept. 30, 2002, to report in person to an office of the Immigration and Naturalization Service during a specified period of time (for more details, see "DOJ Expands 'Call-In' Special Registration, Grants Extensions of the Registration Periods for All Groups," IMMIGRANTS' RIGHTS UPDATE, Feb. 21, 2003). The program also requires that these individuals re-register in person at an immigration office within 10 days of the yearly anniversary of their original registration. For example, an individual who registered on Nov. 25, 2002, would have to re-register between Nov. 15 and Dec. 5, 2003. Individuals subject to special registration are also required to register at a port of entry at the time they depart the U.S.

The one-year re-registration requirement is now approaching for individuals who registered in Group I (certain nationals of Iran, Iraq, Libya, Sudan, and Syria, who were required to register between Nov. 15 and Dec. 16, 2002, or during an extension between Jan. 27 and Feb. 7, 2003) and Group II (certain nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen, who were required to register between Dec. 2, 2002, and Jan. 10, 2003, or during an extension between Jan. 27 and Feb. 7, 2003). Because the deadline for each individual subject to the program depends upon the date he or she registered, each person is subject to his or her own deadline.

## **Litigation**

#### **9TH CIRCUIT UPHOLDS NATIONWIDE INJUNCTION OF REMOVALS TO SOMALIA**

– The U.S. Court of Appeals for the Ninth Circuit has upheld a nationwide permanent injunction prohibiting the government from conducting removals to Somalia. The ruling comes on appeal from the federal district court in Seattle. The decision affirms that federal courts can issue a nationwide injunction in habeas corpus proceedings, that immigration law restrictions on federal court jurisdiction do not prohibit such an order, and that both immigration law and international law prohibits forcible removal of a person to a country where the government has not agreed to accept the person.

The petitioners in this case are Somali nationals subject to final orders of removal. They argued that they cannot be removed to Somalia because there is no government in that country to accept their removal and offer them protection. The district

court found that section 241(b) of the Immigration and Nationality Act, which governs the determination of the country or countries to which respondents may be deported, requires that a government accept a person before the person can be removed to that country. The court rejected the U.S. government's contentions that acceptance is not required where the removal is made to a country where the individual was born and that where there is no government to reject a person, "acceptance" has occurred. The court also certified a nationwide class and entered a permanent injunction (for more on the district court proceedings, see "District Court Enjoins Removals to Somalia," IMMIGRANTS' RIGHTS UPDATE, Feb. 21, 2003, p. 10).

On appeal, the court of appeals first addressed the government's contention that the district court lacked jurisdiction. The court rejected the government's argument that the plaintiffs' claims should be barred for failure to exhaust administrative remedies. The court found that the exhaustion requirement for judicial review of removal orders of INA sec. 242(d)(1) does not apply to petitioners' habeas action, because the petitioners are not seeking review of their removal orders, but rather challenge the statutory authority of the government to remove them to a country that has not accepted them. The court also found that the doctrine of prudential exhaustion does not require exhaustion in this case.

The court also rejected the government's contention that jurisdiction is barred by INA sec. 242(g), which bars courts from considering "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien," except by petition for review. In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the Supreme Court narrowly construed sec. 242(g) to apply only to challenges to discretionary decisions of the attorney general as to whether to proceed with removal cases, as when the attorney general decides whether to grant deferred action. In contrast, the Ninth Circuit noted that in this case the petitioners raise a purely legal challenge in contending that the attorney general does not have statutory authority to remove them to Somalia. The court also noted that both the Ninth Circuit and the Supreme Court have rejected the government's claim that sec. 242(g) eliminates habeas jurisdiction. *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *INS v. St. Cyr*, 533 U.S. 289 (2001).

Turning to the merits, the court determined that the plain language of INA sec. 241(b)(2) requires that in every case a country must be willing to accept a person before that person can actually be removed to that country. The court found this interpretation also supported by the case law interpreting the similar language of the statutory predecessor to sec. 241(b), former INA sec. 243(a) (1995). The court also found that the INS's own operating instructions and regulations establish a policy of only removing non-U.S. citizens to countries that are willing to accept them. And the court also upheld the district court's conclusion that interpreting the statute in this manner avoids violating international law, applying the principle that a statute should be construed, where possible, so as to avoid violating international law.

In reaching these conclusions, the court disagreed with the

majority opinion in *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), in which the Eighth Circuit concluded that sec. 241(b) does not require that Somalia consent to a petitioner's removal. The court found more persuasive the dissent of Judge Bye in *Jama*.

The court also upheld the district court's certification of a nationwide class and issuance of a nationwide injunction. The court rejected the government's contention that INA sec. 242(f)(1), which limits the power of courts "to enjoin or restrain the operation of" the provisions of Part IV of Title II of the INA, applies in this case. The court concluded that this statute is not applicable because the petitioners "seek not to enjoin the *operation* of [sec. 241(b)] but *violations* of the statute" (emphasis in original). Because the petitioners seek "to enjoin conduct that allegedly is not even authorized by the statute," the court found that sec. 242(f)(1) is not implicated in this case.

Finally, the court upheld the district court's grant of the habeas petitions of three of the individual petitioners.

*Ali Ali v. Ashcroft*, No. 03-35096 (9th Cir. Sept. 17, 2003).

#### **9TH CIRCUIT RULES COURT CAN STAY THE PERIOD FOR VOLUNTARY DEPARTURE PENDING REVIEW OF A REMOVAL ORDER**

The U.S. Court of Appeals for the Ninth Circuit has ruled that it has equitable jurisdiction to stay the voluntary departure period of a petitioner seeking review of a removal order. The decision resolves an issue that was left open by the court's decision in *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166 (9th Cir. 2003) (for a summary of *Zazueta-Carrillo*, see "9th Circuit Finds Filing of Petition for Review Does Not Suspend Deadline for Voluntary Departure Granted by BIA," IMMIGRANTS' RIGHTS UPDATE, Apr. 8, 2003, p. 5). In *Zazueta-Carrillo*, the court held that the filing of a petition for review does not stay the period for voluntary departure, but left open the question of whether the court could grant a petitioner's motion to stay this period. The most recent decision answers this question in the affirmative but leaves open the question of whether the court can grant a motion to stay voluntary departure filed after the expiration of the period for voluntary departure.

The new decision establishes that the court has equitable jurisdiction to grant such a request and that the traditional standard for granting a stay of removal also applies to a stay of voluntary departure. Under this standard, a petitioner must show either (1) "a probability of success on the merits and the possibility of irreparable injury" or (2) "that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor." *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998). "These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified." *Id.*

In this case, the government did not contend that the petitioner failed to meet this standard, arguing only that the court lacked jurisdiction to stay the period for voluntary departure. The court therefore granted the motion for a stay of voluntary departure pending review of the removal order.

*El Himri v. Ashcroft*, No. 03-71152 (9th Cir. Sept. 19, 2003).

**9TH CIRCUIT OVERTURNS BIA DENIAL OF VAWA SUSPENSION BASED ON NARROW INTERPRETATION OF "EXTREME CRUELTY"**

— The U.S. Court of Appeals for the Ninth Circuit has decided several issues of first impression in reversing a ruling of the Board of Immigration Appeals denying suspension of deportation and adjustment to an applicant under a provision of the Violence Against Women Act (VAWA). The decision establishes that the determination of whether an applicant has established that she has been "subjected to extreme cruelty" is not discretionary, and that the court of appeals has appellate jurisdiction to review a denial by the BIA on this basis. The ruling also clarifies that the statute's requirement of "extreme cruelty" must be interpreted in the context of a professional understanding of domestic violence. In addition, the court found that the BIA's decision to deny adjustment as a matter of discretion because the petitioner's marriage was not viable was contrary to controlling precedent, and that this decision is reviewable by the court because it is contrary to law.

The petitioner in this case, Laura Luis Hernandez, is a Mexican national who married Refugio Gonzalez, a lawful permanent resident, in 1990 and shared an apartment with him in Mexicali. Soon after the marriage, Gonzalez's behavior changed, and he began drinking heavily and abusing Hernandez, both verbally and physically. In several instances he seriously beat and injured her, ultimately causing Hernandez to fear that he would kill her and to flee to her sister's home in Los Angeles.

Two weeks after Hernandez fled, Gonzalez obtained the phone number of Hernandez's sister and began calling every day. When Hernandez eventually agreed to speak with him, Gonzalez begged her forgiveness, promised to change, and urged her to return to Mexico. He then came to Los Angeles and urged her to return with him, promising to see a marriage counselor, whereupon Hernandez ultimately agreed to return to Mexico. Back in Mexico, Gonzalez refused to see the counselor that Hernandez found, and after a brief period he returned to his prior pattern of abusive and violent behavior.

Several months after the return to Mexico, Gonzalez attempted to stab Hernandez with a knife. Hernandez managed to block the attack, but her hand was sliced to the bone. Although Hernandez was seriously injured, Gonzalez did not let her go to the hospital, but rather kept her at home. When he left for work two days later, Gonzalez padlocked the door in order to keep Hernandez at home. However, she had an extra key to the padlock and was able to unlock it with the help of a neighbor. Hernandez then went to the hospital, but because of the delay in obtaining treatment she suffered permanent nerve damage to her hand.

Hernandez then fled again to the United States, this time going to stay with a friend in Huron, California. After several months, she moved to Salinas, where she eventually met another man and began living with him. She remained married to Gonzalez and had no further contact with him. In 1995, Hernandez was apprehended by the Immigration and Naturalization Service and placed in deportation proceedings.

At her deportation hearing, Hernandez applied for suspension of deportation under the VAWA, and also for adjustment of status. In support of the suspension application, Hernandez testified as to the history of abuse that she suffered, also exhibiting scars she had on her head and hand from other injuries she had

suffered. The adjustment application was based upon an I-130 visa petition that had been filed by Gonzalez about one year after he and Hernandez were married. Hernandez testified that on Aug. 11, 1992, she received a letter indicating that her petition had a priority date. Hernandez was unaware whether the INS sent any further communication regarding the petition after she left Gonzalez.

The immigration judge denied the suspension application, finding Hernandez not credible and concluding that she had failed to establish that she was a victim of domestic violence. The IJ also denied the adjustment application, finding that Hernandez had failed to establish that her I-130 visa petition had been approved.

On appeal from this decision, the BIA reversed the IJ's negative credibility determination. However, the BIA upheld the denial of suspension, finding that Hernandez had failed to establish that she was "battered or subjected to extreme cruelty in the United States," as was then required by the VAWA suspension statute. The BIA also upheld the denial of adjustment, finding that Hernandez had failed to establish that a visa was immediately available to her or that her visa petition had been approved. The BIA also stated that it would deny the application in the exercise of discretion because Hernandez's marriage had deteriorated and was no longer viable. Hernandez filed a petition for review of the BIA's decision with the court of appeals.

At the Ninth Circuit, the government argued that the determination of whether Hernandez had suffered "extreme cruelty" is a discretionary one which the court lacks jurisdiction to review because of the bar to review of discretionary determinations of section 309(c)(4)(E) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The government likened this issue to the determination of "extreme hardship" for suspension eligibility, which the Ninth Circuit found to be a discretionary determination in *Kalaw v. INS*, 133 F.3d 1147 (9th Cir. 1997). The court rejected this contention, finding that the inquiry into whether an individual has been "battered" and whether she has been subjected to "extreme cruelty" are both factual determinations—one physical, the other psychological—that can be assessed and resolved "on the basis of objective standards." The court found that, "[u]ltimately, the question of whether an individual has experienced domestic violence in either its physical or psychological manifestation is a clinical one, akin to the issue of whether an alien is a 'habitual drunkard,' which *Kalaw* established was clearly nondiscretionary."

Turning to the merits of the suspension application, the court noted that although the VAWA cancellation statute was amended in 2000 to delete the requirement that an applicant have been battered or subjected to extreme cruelty "in the United States," this requirement still applies to the VAWA suspension statute under which Hernandez applied. It was undisputed that all of the acts of battery against Hernandez took place in Mexico. However, the court concluded that the actions taken by Gonzalez to lure Hernandez back to him "made up an integral stage in the cycle of domestic violence" and constitute "extreme cruelty." The court cited scholarly authorities regarding the nature of domestic violence, indicating that the batterer's apologies and efforts to convince the victim that the violence has ended contributes to creating emotional dependence and is an integral part of the cycle



of domestic violence. The court also noted that the statute does not require that the abuser be in the United States, since it only requires that the victim be "subjected to extreme cruelty in the United States."

The court also found support for this interpretation in the regulations. 8 CFR sec. 204.2(c)(1)(vi) states that "[p]sychological or sexual abuse . . . shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are part of an overall pattern of violence."

Concluding that Hernandez had established that she was subjected to "extreme cruelty," the court remanded the case to the BIA to determine whether she had also established the "extreme hardship" requirement for suspension and whether she merited relief in the exercise of discretion.

With respect to the adjustment application, the court reversed the BIA, finding that Hernandez's testimony that her petition had been given a priority date established that the petition was approved and a visa was available at the time she applied for adjustment. The court also rejected the BIA's alternative ground for denying adjustment—that in the exercise of discretion the BIA would deny the application because the marriage was no longer viable. The court found that this ground is directly contrary to prior BIA precedent and court decisions finding that adjustment cannot be denied solely on the basis of the nonviability of a marriage. The court also rejected the contention that this determination is discretionary and therefore not reviewable. According to the court, "The BIA has no discretion to make a decision that is contrary to law." Moreover, the court added, "[I]f the BIA were truly at liberty to disregard the law merely by labeling its conclusions discretionary, serious constitutional problems would arise." The court thus concluded that "[w]hen the BIA acts where it has no legal authority to do so, it does not make a discretionary decision."

*Hernandez v. Ashcroft*, No. 02-70988 (9th Cir. Oct. 7, 2003).

### 3RD CIRCUIT FINDS CAT DENIAL REVIEWABLE BY HABEAS PETITION —

The U.S. Court of Appeals for the Third Circuit has ruled that federal district courts have jurisdiction to review denials of relief under the Convention Against Torture (CAT) by means of petition for habeas corpus. The decision comes on appeal from a district court's dismissal of a habeas petition for lack of jurisdiction.

The petitioner in this case, Christopher Ogbudimkpa, is a Nigerian national who entered the U.S. on a student visa in 1982. In 1985 he was ordered deported for overstaying his visa and working without authorization. The Immigration and Naturalization Service did not carry out his deportation, and in 1994 he was convicted and sentenced for state criminal drug charges. On release from prison in 1996, he was transferred to INS custody.

In 1999, the Board of Immigration Appeals granted Ogbudimkpa's motion to reopen to apply for relief under Article 3 of the CAT. At his reopened hearing, Ogbudimkpa testified that he would be imprisoned, tortured, and possibly executed were he to be returned to Nigeria, because members of his extended fam-

ily include a past president of Nigeria and a major in the police or army. The immigration judge found Ogbudimkpa's testimony credible but concluded that he had not demonstrated that it was "more likely than not" that he would be tortured in Nigeria. The BIA affirmed the IJ's decision, and Ogbudimkpa then filed pro se a "motion for emergency stay of removal" in district court.

The district court treated the motion as a petition for writ of habeas corpus under 28 USC sec. 2241. The government moved to dismiss, contending that the district court lacked jurisdiction and that Ogbudimkpa should have filed a petition for review in the court of appeals. Ogbudimkpa then moved for transfer of the case to the court of appeals, which the district court granted.

In the court of appeals, the government moved to dismiss the case, arguing that jurisdiction was barred by section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, a transitional rule that bars court of appeals jurisdiction over petitions for review in cases of non-U.S. citizens who are deportable because of certain criminal convictions. In district court the government had argued that this provision would not apply to Ogbudimkpa because he had not been charged with deportability based on his convictions. In the court of appeals, the government argued that the bar applies to any noncitizen with an applicable criminal conviction. Unaware of the prior district court proceedings and shifting government arguments, the court granted the motion to dismiss in an unpublished decision, suggesting that Ogbudimkpa might file a petition for habeas corpus. Ogbudimkpa then filed a habeas petition in district court.

In district court, the government again contended that habeas jurisdiction was barred, relying on a provision of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), which implemented the CAT. Section 2242(d) of the FARRA limits review of claims raised under the CAT "except as part of the review of a final order of removal pursuant to section 242" of the INA. The district court concluded that this provision precluded it from exercising jurisdiction, and Ogbudimkpa appealed.

On appeal, the court concluded that the district court does have jurisdiction over the case and that the FARRA did not repeal habeas jurisdiction. The court noted that the provision of the FARRA limiting review and consolidating it with review of a final order of removal is strikingly similar to the permanent judicial review rules of the IIRIRA, which the Supreme Court has found, in *INS v. St. Cyr*, 533 U.S. 289 (2001), do not bar habeas corpus jurisdiction. The court found that the reasoning of *St. Cyr* supports the availability of habeas jurisdiction in this case. The court also noted that, even before the issuance of the decision in *St. Cyr*, the Ninth Circuit had concluded that habeas review was available for CAT claims. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000). After *St. Cyr*, the First and Second Circuits have also reached this conclusion. *Saint Fort v. Ashcroft*, 329 U.S. 191 (1st Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003).

The government also argued that Art. 3 of the CAT is not "self-executing," such that it takes effect only to the extent it is implemented by Congress, and that individuals may not bring habeas claims based on violations of non-self-executing treaties. However, the court found that the FARRA contains language "virtually identical" to Art. 3 of the CAT, such that even if

Art. 3 is not self-executing, individuals can bring claims based on this language of the FARRA.

Concluding that the district court erred in dismissing the petition for lack of jurisdiction, the court reversed and remanded to the district court to consider the merits of Ogbudimkpa's habeas petition.

*Ogbudimkpa v. Ashcroft*, No. 02-1181  
(3rd Cir. Aug. 22, 2003).

## Employment Issues

**FIRED UNDOCUMENTED WORKER WHO SUBSEQUENTLY OBTAINED WORK AUTHORIZATION MAY PURSUE REINSTATEMENT AND FRONT PAY UNDER TITLE VII** – A federal district court judge in Texas has refused to dismiss an action brought by a worker who was undocumented at the time that he was subjected to sexual harassment and fired by his employer in violation of Title VII of the Civil Rights Act (Title VII), but who subsequently obtained work authorization. The court determined that, though the worker was barred from receiving back pay as a remedy for having been fired unlawfully, he was not foreclosed from pursuing other remedies, including reinstatement and front pay.

Enrique Escobar was employed as a security guard for Spartan Security Service from January to July 2001. Escobar alleged that Spartan Security's president sexually harassed him and that he was fired after he rebuffed his superior's advances. Escobar became authorized to work in the United States before he filed an action against Spartan Security in federal court. Relying on *Hoffman Plastic Compounds v. NLRB*, 122 S.Ct. 1275 (2002), and *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 1034 (1999), the employer sought to dismiss the entire action on the grounds that Escobar's undocumented status at the time of the alleged violations barred him from all relief.

In *Egbuna*, the Fourth Circuit Court of Appeals held that an undocumented plaintiff who alleged that he was unlawfully denied employment did not have standing to file an action under Title VII, because an unauthorized worker is not a "qualified" applicant. In *Hoffman Plastic Compounds*, the Supreme Court held that an undocumented worker is not entitled to back pay, a remedy that is available under the National Labor Relations Act (NLRA). (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10)

In refusing to dismiss Escobar's lawsuit, the federal court in Texas reasoned that *Hoffman* "did not specifically foreclose all remedies for undocumented workers under either the NLRA or other comparable federal labor statutes, and did not . . . foreclose remedies for workers who have subsequently attained legal work status." Similarly, because Escobar is now a documented worker, the logic of *Egbuna* does not apply to his case.

*Escobar v. Spartan Security Service*, \_\_\_ F. Supp.2d \_\_\_, 2003 WL 22129459 (S.D.Tex. July 30, 2003).

**NLRB: EMPLOYER THAT REFUSES TO ABIDE BY SETTLEMENT AGREEMENT CANNOT RELY ON *HOFFMAN* AS A DEFENSE** – The National Labor Relations Board (NLRB) has rejected an employer's attempt to raise, as a defense to charges that the employer engaged in unfair labor practices, the immigration status of the workers it treated unfairly. The case concerns the employer's failure to comply with a settlement agreement between it and the NLRB to which the employer agreed after it was charged with unlawful conduct committed during a union organizing campaign in 2001.

The employer, Tuv Taam, Inc., had been charged with numerous violations of the National Labor Relations Act (NLRA), including charges that it interrogated employees, conducted unlawful surveillance, unlawfully reduced union supporters' work hours, discharged employees, and refused to reinstate workers who struck in protest of the unfair labor practices. The settlement agreement required the employer to remedy the unfair labor practices by, among other things, providing back pay to the employees named in the settlement. The agreement also provided that, in the event that Tuv Taam failed to abide by the agreement, the NLRB general counsel would move for summary judgment on all matters raised in the complaint and Tuv Taam waived all defenses to the allegations against it.

The day after the NLRB regional director approved the settlement, the Supreme Court issued its decision in *Hoffman Plastic Compounds v. NLRB*, 122 S.Ct. 1275 (2002), holding that undocumented workers are not entitled to back pay as a remedy under the NLRA. (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). Tuv Taam subsequently refused to abide by the terms of the settlement agreement and requested that the NLRB hold a "*Hoffman* hearing" to determine the immigration status of the workers covered by the agreement before deciding the merits of the unfair labor practice charges. The NLRB refused and left all matters regarding the workers' immigration status for the compliance stage.

The NLRB unequivocally determined that it "is not foreclosed by *Hoffman* from awarding a back pay remedy on the basis of [the employer's] bare assertion that the discriminatees are undocumented workers." In this case, Tuv Taam based its allegations that the workers were undocumented on a "no-match letter" it received from the Social Security Administration (SSA) months after it had entered into the settlement agreement. The SSA sends no-match letters to some employers whose employee earnings reports contain incorrect names or Social Security numbers that do not match those in the agency's database. The NLRB held that such evidence is not "legally cognizable evidence" of the discriminatees' immigration status.

Importantly, the NLRB held that in this case, the employees' immigration status "does not bear on whether the [employer] engaged in the unlawful conduct, . . . nor does it bear on the remedy to be ordered at this state of the proceedings for the unlawful conduct found." Given that this case involved all of the most common unfair labor practices, advocates should be able to rely on it to prevent inquiries into complainants' immigration sta-

tus in most cases before the NLRB. Although it refused to hold that inquiries into immigration status are never relevant, the NLRB implicitly limited those inquiries to cases involving refusal-to-hire allegations.

*Tuv Taam*, 340 NLRB No. 86 (Sept. 30, 2003).

**FLORIDA COURT OF APPEAL: HOFFMAN DOES NOT PREEMPT STATE WORKERS' COMPENSATION LAW** – The Florida Court of Appeal has held that undocumented workers are entitled to receive the same benefits available to documented workers under that state's workers' compensation law.

An employer challenged an award of benefits to an undocumented worker, arguing that the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 122 S.Ct. 1275 (2002), preempted state law, and thus that undocumented workers are precluded from receiving workers' compensation benefits. The Florida court rejected that argument. It reasoned that the Supreme Court has held that workers' compensation is an area where states have the authority to regulate under their police power, and that Florida has long allowed benefits to undocumented workers. Unless there is a conflict with federal law, the Florida appellate court held, the Florida legislature's award of benefits to undocumented workers is lawful. The court held that, given that there is no such conflict, the award of benefits is proper.

*Safeharbor Employer Services I, Inc. v. Velazquez*, 2003 Fla.App. LEXIS 15281 (Oct. 13, 2003).

**HOUSE BILL WOULD EXTEND EMPLOYMENT ELIGIBILITY VERIFICATION PILOT AND EXPAND IT BEYOND EMPLOYMENT CONTEXT** – The House Judiciary Committee has approved a bill that would extend a pilot employment eligibility verification program for another five years, dramatically expand it from six states to all fifty, and obliterate statutory limits on the use of the program's database outside the employment context.

The committee approved the bill, HR 2359, despite the conclusion of a statutorily mandated independent study that the program should not be expanded, primarily because it relies on inaccurate and outdated information contained in Immigration and Naturalization Service databases, it raises unresolved problems related to privacy, and some of the employers who have participated in it have abused the program, engaging in prohibited practices. The bill, which passed the committee on Sept. 24, 2003, without a hearing, would make the pilot program's system available to any federal, state, or local agency seeking to verify a person's citizenship or immigration status. The bill would make both U.S. citizens and noncitizens subject to the information sharing, without providing any privacy protections whatsoever.

**Current Status of Basic Pilot Program.** The Basic Pilot is one of three employment eligibility verification pilot programs mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the other two being the Citizenship Attestation and the Machine-Readable programs. The latter two programs were terminated by the Bush administration after their expiration in April and May of 2003, leaving the Basic Pilot as the only one that continues to operate. Currently, it operates in six

states: California, Texas, Florida, New York, Illinois, and Nebraska.

**The Basic Pilot Evaluation.** Section 405 of the IIRIRA required the attorney general to provide "the Judiciary Committees of the House of Representatives and of the Senate with reports on the pilot programs within 3 months after the end of the third and fourth years in which the programs" were in effect. These statutorily mandated reports were issued late, in Jan. 2002, shortly after the pilot programs had been extended by Congress and the president for an additional two years.

The evaluation of the Basic Pilot was conducted for the Justice Dept. by two independent private contractors, the Institute for Survey Research at Temple University, and Westat. The evaluation report identified several critical problems with the program and concluded that it "is not ready for larger-scale implementation at this time."

Among the problems cited by the report:

- The program was hindered by inaccuracies and outdated information in the INS databases.

- The program did not consistently provide timely immigration status data, which delayed the confirmation of workers' employment authorization in one-third of the cases. (The primary victims of the inaccuracy and unreliability of INS databases were those workers who were penalized by employers unsure of the workers' employment eligibility, according to the report.)

- A sizeable number of workers who were not confirmed as employment-eligible by the Basic Pilot were indeed work-authorized but, for a variety of reasons, had not straightened out their records with the INS or the Social Security Administration (SSA). (Forty-two percent of a possibly unrepresentative sample of such workers were found to be work-authorized, compared to less than 25 percent who were "most likely" unauthorized.)

- Some employers surveyed did not follow the federally mandated memorandum of understanding that they were required to sign as a condition of participating in the Basic Pilot.

- Participating employers engaged in prohibited employment practices, including:

- Preemployment screening, which not only denies the worker a job but also the opportunity to contest database inaccuracies;

- Taking adverse employment action based on tentative determinations, which penalizes workers while they and the INS work to resolve database errors; and

- Failing to inform workers of their rights under the program.

- Some employers compromised the privacy of workers in various ways, such as by failing to safeguard access to the computer used to maintain the pilot system, e.g., by leaving passwords and instructions in plain view.

- Some employers missed deadlines required by the pilot program and failed to inform workers of their rights when the system was unable to confirm their work authorization.

- Some employers continued to employ workers even when the pilot's system did not confirm their employment eligibility.

- The INS and the SSA were not accessible: 39 percent of employers reported that the SSA never or only sometimes returned their calls promptly, and 43 percent reported a similar experience with the INS.

- The cost to expand the pilot program to all employers and to

convert it from a voluntary to a mandatory system would exceed \$11 billion.

The evaluation, which cost the INS millions of dollars to commission, flatly rejected any notion that the program should be significantly expanded. According to its authors:

*The evaluation uncovered sufficient problems in the design and implementation of the current program to preclude recommending that it be significantly expanded. Some of these problems could become insurmountable if the program were to be expanded dramatically in scope. The question remains whether the program can be modified in a way that will permit it to maintain or enhance its current benefits while overcoming its weaknesses [emphasis added].*

No evidence was presented to the Judiciary Committee that the Dept. of Homeland Security (DHS), which took over the functions of the INS in March 2003, had solved any of the problems identified in the report. Nor would HR 2359 require that the DHS provide Congress with periodic reports detailing the steps it had taken to address these problems, the number of employers that were participating in each pilot program, all of the states they were operating in, and plans to expand or change the technology used by each program, nor its plans to increase safeguards against unfair immigration-related employment practices.

***Basic Pilot's Uses Expanded Beyond the Employment Context.***

Section 3 of HR 2359 would permit states and local governments to use the Basic Pilot employment eligibility confirmation system to check the immigration or citizenship status of any U.S. citizen or noncitizen who came within their purview. This would expand the Basic Pilot far beyond the employment context.

Such a dramatic expansion of the flawed program is unwarranted given the significant problems identified by the program evaluation. It would magnify the existing privacy and inaccuracy problems by permitting the expanded program to provide more detailed information than it currently discloses. (Section 3 would permit citizenship or immigration status information to be provided in addition to the identity and employment eligibility information currently made available under the Basic Pilot.) Moreover, the provision contains no privacy protections or protections against abusive use by individuals within state or local governments of the information provided through the system.

State and local governments already have access to a system that makes use of DHS databases to determine whether documents presented by non-U.S. citizens match those issued by immigration authorities. The SAVE system, created by sec. 121 of the Immigration Reform and Control Act of 1986 (IRCA) (Pub. L. 99-603), includes numerous safeguards to protect against misuse of information, discrimination, and inappropriate disclosure. But none of these protections are included in HR 2359. While the SAVE system cannot verify the immigration status of persons who credibly self-identify as U.S. citizens, no credible study has documented this as a major problem.

Sec. 3 of the new bill would take the U.S. a huge step closer to the establishment of a national register or database of all U.S. citizens and residents, the necessary precursor to implementing a national ID. It amalgamates data regarding citizens and noncitizens

into a single database that would be used for multiple purposes, including some that have nothing to do with employment eligibility verification. This would represent a misuse of the SSA data that would be tapped by the expanded system, a use far beyond the purposes originally identified for establishing Social Security numbers.

To date, no studies or explanation of the impact of this change or of its cost—which could be significant—have been conducted or provided. The cost of the current Basic Pilot is \$6 million for only 700 employers, according to the program evaluation report. Such a major change from existing law deserves to be studied and considered on its own merits. It should not be tacked onto a simple employment eligibility verification pilot expansion bill, with no information provided about its potential impact.

**The Vote.** Eighteen Republicans voted in favor of the bill, and seven Democrats and one Republican voted against it. It is expected that similar legislation will be introduced in the Senate.

## Public Benefits Issues

**SENATE HELP COMMITTEE PASSES WIA REAUTHORIZATION BILL; MANY PROVISIONS FOR LEP PERSONS INCLUDED**

– The Workforce Investment Act Amendments of 2003 (S. 1627), a bill that would reauthorize the 1998 Workforce Investment Act, has passed the Senate Health, Education, Labor and Pensions (HELP) Committee. S. 1627 is the result of bipartisan negotiations over the summer among HELP Committee staff and includes a number of provisions that would improve job training and adult basic education services for limited English proficient (LEP) persons. When Sen. Mike Enzi (R-WY), a HELP Committee member, introduced S. 1627, he said that the bill “improves upon the existing one-stop career center delivery system to ensure that it can respond quickly and effectively to the changing needs of employers and workers in the new economy and address the needs of hard-to-serve populations.” It is unclear when S. 1627, which the committee passed on Oct. 2, will reach the Senate floor.

The following summary of the bill’s provisions focuses solely on those that are LEP-related. For an analysis of the complete bill, visit The Workforce Alliance’s Web site at [www.workforcealliance.org](http://www.workforcealliance.org).

### TITLE I AMENDMENTS

The amendments to Title I of the act would do the following:

1. *Expand the purpose of the WIA* to include, among other goals, providing LEP individuals with skills—including English language skills—that make them employable and eliminating disincentives to train hard-to-serve populations and minority workers.

2. *Create a new definition of “integrated training program,”* which is a program that combines job training and language acquisition.

3. *Define “youth participant eligibility”* for youth activities to include in-school and out-of-school youth who are deficient in basic skills, including English proficiency.

4. *Require states to describe how they will serve hard-to-*

serve populations in their state plans. Current law requires states to describe how they will serve the employment and training needs of dislocated workers, low-income individuals, homeless individuals, ex-offenders, individuals training for nontraditional employment, and other individuals with multiple barriers to employment, but not persons who are LEP.

5. *Include the development of strategies to serve hard-to-serve populations* as an allowable statewide employment and training activity. Hard-to-serve populations include people who are LEP.

6. *Require the memorandum of understanding (MOU) between the local board and the one-stop center to include information about what methods will be used to meet the needs of hard-to-serve populations at one-stop centers.* The current MOU requirement does not address hard-to-serve populations.

7. *Expand "intensive" services to include English acquisition and integrated training programs.* The discussion draft defines "integrated training programs" as programs that combine occupational skills training with language acquisition. Current law does not specify that integrated training programs are allowable "intensive" training activities.

8. *Create additional criteria that training providers must meet in order to receive funding under the WIA, among which is having the ability to provide services to hard-to-serve populations.*

9. *Expand the definition of "training" services to include the development of strategies to serve hard-to-serve populations and customer support to hard-to-serve populations.* S. 1627 would allow eligible training providers to assist LEP persons in navigating the services and activities that are available to them.

10. *Include programs that integrate job training and language acquisition as an allowable training activity.* Current law does not specify that bilingual training and integrated training are allowable activities. Existing programs that integrate skills training and language acquisition have demonstrated remarkable employment outcomes.

11. *Include low levels of English proficiency in factors that determine adjusted levels of performance.* The current performance system creates a disincentive to serve persons who are LEP, because they generally need more intensive training than English-speakers. In order to meet performance measures, many job-training centers serve those most likely to get a job. States currently have to meet performance measures that are negotiated between each governor and the U.S. Dept. of Labor (DOL), taking into account economic conditions and the characteristics of the population. S. 1627 defines those characteristics to include, among other indicators, low levels of English proficiency.

12. *Create incentive grants for states that demonstrate "exemplary performance" in serving hard-to-serve populations.* Under current law, bonus grants are awarded only to states that exceed their performance measures. S. 1627 awards grants based on the state's performance in serving hard-to-serve populations.

13. *Create a national demonstration project for "integrated workforce training programs" designed to analyze and provide data on programs that integrate language acquisition and job*

*training.* The project would award at least ten grants over a two-to four-year period; \$10 million would be allocated for the project. The bill would require the secretary of Labor to report to the Senate and House on the program's effectiveness.

#### TITLE II AMENDMENTS

The amendments to Title II of the act would do the following:

1. *Revise the purpose of the Adult Basic Skills Education Act.* Current law does not include providing services to immigrants or providing for basic English language instruction in the purpose of Title II (Adult Basic Education/ESL) of the act. S. 1627 includes "assisting immigrants who are not proficient in English" within the purpose of this part of the statute.

2. *Include in the list of allowable state leadership activities those activities that would help LEP persons.* Activities include:

- Technical assistance for English language acquisition programs;
- Integration of literacy and language activities with occupational training and promoting links with employers;
- Development of curriculum frameworks and rigorous content standards that specify what adult learners should know in the area of language acquisition;
- Piloting and developing of assessment tools and strategies that identify the needs and capture the gains of students at all levels, with particular focus on students who are LEP; and
- Development and implementation of programs and services that meet the needs of adults who are LEP.

3. *Require states to report on the number of 16- to 18-year-olds who have enrolled in adult education not later than one year after participating in secondary school education.* Educators and advocates are concerned that 16-, 17-, and 18-year-olds have been pushed into adult English as a second language (ESL) programs due to increased demands on high schools to meet the student performance requirements of the No Child Left Behind Act and various state laws. The data collected will be used to assess whether these concerns are justified.

4. *Create additional criteria for providers who wish to receive Adult Basic Education (ABE) funding.* Criteria include:

- The commitment of the provider to serve LEP individuals;
- Whether local communities have a demonstrated need for language acquisition and civics education programs; and
- Whether English language acquisition (and other) programs are based on the best practices and research available.

5. *Allow administrative funds to be spent on the development of measurable goals in speaking the English language.*

6. *Authorize the National Institute for Literacy to identify research on practices related to English acquisition.*

7. *Expand national leadership activities to include developing and replicating best practices, including working with LEP adults.*

8. *Amend the ABE funding formula to take into consideration the number and the growth of the population of immigrants in each state.* Under current law, LEP persons are not considered in the distribution of ABE funds, even though they are enrolled in ABE programs, such as ESL.

**LSC UPDATES APPENDIX TO IMMIGRANT ELIGIBILITY RULES** – The Legal Services Corporation (LSC) has issued a revised appendix to its rule 1626, the regulation governing immigrant eligibility for legal services. Prepared by the National Immigration Law Center for the LSC, the appendix lists typical documents that non-U.S. citizens may use to show that they have an LSC-eligible immigration status. The appendix had not been updated since 1997, and the new revision lists a number of new documents. The new appendix took effect on Sept. 26, 2003.

By statute, programs that receive funding from the LSC may represent only U.S. citizens, U.S. nationals, and certain specified categories of noncitizens. Categories of noncitizens whom LSC programs may represent include the following:

- Lawful permanent residents (LPRs)
- Refugees
- Asylees
- Persons granted withholding of deportation
- Conditional entrants
- Trafficking victims
- Lawful temporary residents under the SAW program of the Immigration Reform and Control Act of 1986
- Temporary agricultural workers (H-2A workers), but only with respect to issues concerning their employment
- Individuals who have applied for adjustment to LPR status and whose application has not been rejected, who have a citizen spouse, parent, or child

The rules also allow LSC programs to represent the following additional groups:

- Indigent foreign nationals who seek assistance under the Hague Convention on the Civil Aspects of International Child Abduction
- Native American members of the Texas Band of Kickapoo

In addition, programs operating in the Northern Mariana Islands, Republic of Palau, Micronesia, and the Marshall Islands may serve clients without regard to their immigration status.

LSC recipients also may use non-LSC funds to represent certain victims of domestic violence, regardless of their immigration status, as long as the representation is related to preventing, or obtaining relief from, the abuse.

**Changes in the Adjustment of Status Category of Eligibility.** The eligibility category for persons who have applied to adjust to lawful permanent resident status and who have the required U.S. citizen relative is not limited to persons who applied for adjustment using the I-485 form. Rather, this category includes anyone who has filed an application that leads to acquiring lawful permanent resident status. The new appendix corrects the prior version by including as “adjustment applications” applications for two additional statuses that lead to LPR status. The first of these is for persons applying for Family Unity. This status was granted to spouses and children of individuals who were granted lawful permanent residence through the legalization provisions of the Immigration Reform and Control Act of 1986. In addition, the Legal Immigration Family Equity (LIFE) Act of 2000 provided a Family Unity status for spouses and children of individuals eligible for legalization. As these individuals are pursuing permanent resident status, they would be eligible for legal services if they have a qualifying relative.

Another category of individuals eligible under the adjustment

of status provisions is comprised of asylum applicants. Asylum is an immigration remedy that leads to permanent resident status and therefore should have been included in the previous appendix.

Since the original appendix was issued, Congress created a number of new statuses that lead to LPR status, and new forms have been issued that constitute evidence of eligibility under this category. The new appendix includes the following forms that were not in the original appendix:

- I-817 (Family Unity)
- I-881 (cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act, or NACARA)
- OF-230 (application for a visa at a consulate)
- I-129F (fiancé(e) petition)
- I-539 for V-status (for spouses and children of LPRs who have petitioned to immigrate)
- I-589 (asylum application)
- I-730 (refugee/asylee relative petition)

In addition, the appendix lists as evidence of eligibility the employment authorization document coded for several new categories of immigrants applying for permanent residence. These codes include:

- (c)(8) (asylum applicants)
- (c)(21) (for S visa applicants—i.e., for informants assisting criminal investigations)
- (a)(9) (for K-visa applicants—formerly for fiancé(e)s of U.S. citizens, but now for spouses and children as well)

A final change in the category of persons eligible for LSC-funded assistance in adjusting their status is the deletion of the requirement (erroneously included in the original appendix) that, to be eligible, noncitizen parents of U.S. citizens must show that their citizen children are under 21 years of age. As the statute contains no such requirement, the revised appendix removes the age provision in order to conform to the statute. However, to be eligible for LSC assistance in adjusting status, noncitizen children of U.S. citizens must be unmarried and under 21 years of age.

**Withholding of Removal Additions.** The appendix also adds two categories in the section on withholding of deportation: withholding of removal and deferral of removal. This is a technical change made necessary by the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the United States's ratification and implementation of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

68 Fed. Reg. 55539 (Sept. 26, 2003).

## Miscellaneous

**WORKERS' RIGHTS AND PUBLIC BENEFITS TRAININGS SLATED** – Upcoming NILC and California Immigrant Welfare Collaborative (CIWC) trainings include a session on **immigrants' access to public benefits** to be held in **Oakland, California on Oct. 30, 2003**, as well as an **immigrant workers' rights** training that will be held on **Nov. 12, 2003**, in **Salt Lake City, Utah**.

Information about the content of these trainings and how to register for them will be available on NILC's Web site: [www.nilc.org/trainings/index.htm](http://www.nilc.org/trainings/index.htm).



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