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Immigration Issues

INS IS RELEASING DETAINEES FROM MITCH-DEVASTATED COUNTRIES – Detained Hondurans, Guatemalans, Nicaraguans, and Salvadorans, whose home countries were devastated in October by Hurricane Mitch, are being released from detention on a case-by-case basis, the Immigration and Naturalization Service has announced. According to a Nov. 30, 1998, press statement, the INS may release as many as 3,000 "nonviolent" Central American detainees before Jan. 7, 1999, the date the agency currently plans to resume deportations to hurricane-affected countries.

As justification for this temporary policy, INS commissioner Doris Meissner said that the governments of the hurricane-devastated countries are simply unable to receive deportees at this time and that the INS must make effective use of scarce detention space.

Three categories of persons in INS custody may be eligible for release under the policy:

• Persons awaiting immigration court hearings who are not subject to mandatory detention can be paroled from detention.

• Noncriminals who have a final order of removal can be released under an order of supervision.

• Non–aggravated felon criminals with a final order of removal who have been detained more than 90 days also can be considered for release under an order of supervision.

Among the factors a district director is to consider before releasing a detainee under this policy are whether or not the person has a criminal background, whether the person has a history of appearing for immigration proceedings, and whether the person can rely on family, friends, or private organizations for support.

PROPOSED REGULATIONS ISSUED FOR NACARA SUSPENSION AND SPECIAL RULE CANCELLATION CASES – The Immigration and Naturalization Service has issued a proposed rule to implement the suspension of deportation and special rule cancellation provisions of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA). Under these provisions, eligible nationals of El Salvador, Guatemala, and countries formerly within the Soviet Bloc, as well as their spouses and children, may apply for suspension of deportation or cancellation of removal under special, more favorable rules.

The proposed regulations address both eligibility for this relief and the procedures the INS proposes to use in adjudicating applications for relief under the NACARA. Although tradi-

IN THIS ISSUE

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tionally applications for suspension of deportation have been adjudicated by immigration judges, under the proposed rule INS asylum officers would be authorized to adjudicate most NACARA applications.

ELIGIBILITY

To be eligible to apply for NACARA suspension or special rule cancellation, an individual must not have been convicted of an aggravated felony and must fall into one of the following categories:

1. Salvadorans or Guatemalans who registered for benefits under the settlement agreement in *American Baptist Churches v. Thornburgh (ABC)*, 760 F. Supp. 796 (N.D.Cal. 1991), and who were not apprehended at the time they entered the U.S., which must have been after Dec. 19, 1990.

2. Salvadorans or Guatemalans who filed an application for asylum with the INS on or before Apr. 1, 1990.

3. Nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia, who entered the U.S. on or before Dec. 31, 1990, and filed an application for asylum on or before Dec. 31, 1991.

4. The spouse, child (unmarried and under 21 years of age), unmarried son, or unmarried daughter of an individual described in any of the above three categories who is granted suspension or cancellation. Unmarried sons or daughters over 21 years of age must also have entered the U.S. on or before Oct. 1, 1990, in order to be eligible.

Eligible individuals who were placed in deportation proceedings prior to Apr. 1, 1997, may apply for suspension of deportation. Individuals who were not placed in deportation proceedings may apply for "special rule" cancellation of removal—i.e., cancellation under special NACARA rules that are generally equivalent to the eligibility requirements of suspension of deportation under immigration law as it was constituted before it was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Generally, applicants for either suspension of deportation or special rule cancellation must show that they have maintained continuous physical presence in the U.S. for at least seven years, that they have good moral character, and that their removal from the country would result in extreme hardship to themselves or to a parent, spouse, or child who is a U.S. citizen or lawful permanent resident. Individuals who are deportable (or, for those in removal proceedings, deportable or inadmissible) because of criminal convictions, terrorist activity, or for having a final document fraud order must establish ten years of continuous physical presence in the U.S. and good moral character subsequent to commission of the offense that made them deportable. They also most meet a heightened standard of hardship, since to be eligible for relief they must establish that their deportation would result in exceptional and extremely unusual hardship to themselves or to a parent, spouse or child.

There is also a special provision for battered spouses and children, who only need to establish continuous physical presence for a three-year period.

Under the proposed rule, the following individuals would be able to have their cases decided by INS asylum officers:

1. Guatemalan or Salvadoran nationals who applied for asylum with the INS on or before Apr. 1, 1990, and whose asylum applications are pending with the agency.

2. *ABC* class–members who are eligible for the benefits of the *ABC* agreement and who have not yet had a de novo asylum adjudication under the terms of that agreement.

3. Nationals of former Soviet bloc countries who meet the NACARA eligibility criteria and who have asylum applications pending with the INS.

4. The spouse, child, unmarried son, and unmarried daughter of an individual in one of the above three categories, as long as the principal applicant has a suspension or special rule cancellation application pending with the INS or has been granted suspension or cancellation (however, as discussed below, in some cases if the relative is already in proceedings, he or she may not be able to apply with the INS).

An individual who has been placed in deportation or removal proceedings still may apply to the INS, but only if an immigration judge or the Board of Immigration Appeals has administratively closed the case because either (1) the applicant is entitled to a de novo asylum adjudication under *ABC;* (2) the applicant is an *ABC* class member with a final order of deportation who is entitled to a de novo asylum adjudication under *ABC,* whose deportation case was reopened pursuant to a NACARA motion to reopen, and who then requested administrative closure to apply for suspension from the INS; or (3) the applicant is the spouse, child, or unmarried son or daughter of a NACARA beneficiary who is eligible to apply, and *has* applied, for suspension of deportation or special rule cancellation from the INS.

Thus, generally, INS asylum officers will adjudicate NACARA suspension or special rule cancellation cases only when the applicant also has an asylum case pending before them, whether or not it was filed pursuant to *ABC.* However, asylum officers will decide suspension or cancellation cases for the spouses, children, or unmarried sons and daughters of NACARA beneficiaries even when these relatives do not have pending asylum cases. Moreover, in cases where these relatives had deportation or removal proceedings administratively closed in order to seek NACARA relief from the INS, the INS will not allow them to also apply for asylum from the agency. Instead, the Executive Office for Immigration Review (EOIR) will retain jurisdiction over such cases for all purposes other than NACARA suspension or special rule cancellation.

There is also one circumstance in which INS will not adjudicate NACARA suspension applications even for applicants with asylum cases pending before the agency. Salvadorans or Guatemalans who registered for *ABC* benefits but subsequently failed to maintain their eligibility for a de novo asylum adjudication under the agreement by failing to meet a deadline for filing an asylum application still are eligible to apply for suspension or special rule cancellation under the NACARA. However, under the proposed rule, these individuals may not apply for suspension from the INS, even if they belatedly filed an asylum application; instead, they will have to apply for NACARA relief in deportation or removal proceedings if they are denied asylum.

APPLICATION PROCESS

Applications to the INS for NACARA suspension or special rule cancellation must be made on Form I-881, which the INS is in the process of finalizing. Individuals will be able to apply when the INS issues interim or final regulations, some time after the Jan. 25, 1999, deadline for comments on the proposed rule. The INS will not accept applications made on Forms EOIR-40 or EOIR-42, the forms used by the immigration court for suspension and cancellation. Individuals who are in deportation or removal proceedings may apply now for suspension or special rule cancellation from the immigration judge, using the EOIR forms. However, once the INS issues interim or final regulations, applicants who are in proceedings will also have to use Form I-881.

Under the proposed rule, the fee for applying to the INS for suspension or cancellation is $215 per applicant, up to a family cap of $430 for a family of two or more qualified relatives. Each applicant 14 years of age or older will also have to be fingerprinted, even if he or she previously submitted fingerprints with an asylum application; the current fee for fingerprinting is $25. The fee for suspension or cancellation applications made to the immigration court is $100, which covers all family members in the same proceedings.

After the application is filed, the asylum office will send the applicant notice of the date, time, and place of a scheduled interview. If the applicant has applied for both asylum and suspension or cancellation, the asylum officer will elicit information relating to eligibility for both forms of relief. The INS recommends that the applicant bring a copy of the application and the originals of any supporting documents to the interview. At the interview, the applicant may be represented by an attorney or other representative, in which case the representative must submit a form G-28, Notice of Entry of Appearance.

An applicant who is not fluent in English must bring an interpreter to the interview. The applicant's attorney or representative may not serve as interpreter, nor may any witness in the case. Applicants who have asylum applications pending with the INS cannot use employees of their country of nationality as interpreters. The INS considers that failure to bring a competent interpreter to the interview, if it is without good cause, constitutes an unexcused failure to appear for the interview, which may result in dismissal of the application or referral to the immigration court.

Failure to appear at the interview or the fingerprinting appointment may be excused if the INS did not mail notice to the applicant's current address and the applicant had provided that address to the office of International Affairs prior to the date the notice was mailed. Failure to appear at either the interview or the fingerprinting appointment also can be excused if the applicant demonstrates "exceptional circumstances."

THE DECISION

The applicant is required to return in person to the asylum office to receive the decision. If the applicant is not fluent in English, he or she must bring an interpreter to this appointment.

The INS has determined that before an applicant may be granted suspension of deportation or cancellation of removal the applicant must be found to be deportable (or, in removal cases, deportable or inadmissible). The commentary to the proposed rule states that "since asylum officers are not authorized to make determinations regarding inadmissibility or deportability in most contexts," applicants will be required to concede inadmissibility or deportability before the INS can grant them relief. Accordingly, the proposed rule provides that if the INS has made a preliminary determination to grant suspension or cancellation, the applicant will be notified of that decision and asked to sign an admission of deportability or inadmissibility. If the applicant refuses to concede deportability or inadmissibility, the case will be referred to the immigration court.

The asylum officer is to refer the case to the immigration court if he or she determines that the applicant is not "clearly eligible" for suspension or cancellation. If the officer decides to grant the suspension or cancellation application but makes a preliminary determination that the applicant is not eligible for asylum, the officer is to notify the applicant of this determination and give the applicant the opportunity to either pursue the application or withdraw it. If the applicant requests in writing to withdraw the asylum application, it will be dismissed without prejudice. If the INS grants suspension or cancellation and adjusts the applicant to permanent residence, the INS may notify the applicant that it intends to dismiss the application without prejudice unless the applicant notifies the agency in writing within thirty days of the notice that he or she would like to pursue the asylum application.

If the asylum officer determines that an applicant is eligible for both suspension or cancellation and asylum, the INS will grant the suspension or cancellation application and adjust the applicant to permanent residence. The INS will also grant the applicant asylum, an action that allows the applicant to immediately apply to bring immediate family members to the U.S. If the asylum officer determines that the applicant is eligible for asylum but not suspension or cancellation, the INS will grant asylum and dismiss the suspension or cancellation application without prejudice. If the officer determines that the applicant is not eligible for either suspension, cancellation, or asylum, the INS will place the applicant in removal or deportation proceedings or move to recalendar or resume any proceedings that previously were administratively closed.

The proposed rule also addresses the eligibility criteria for suspension and cancellation under the NACARA. With respect to the continuous physical presence requirement for NACARA suspension of deportation, the burden of proof is on the applicant to establish that any breaks in the period of continuous physical presence were brief, casual, and innocent and did not meaningfully interrupt the applicant's continuous physical presence in the U.S. For cancellation of removal, the IIRIRA replaced this test with a "bright-line" test—a single absence of more than 90 days, or cumulative absences totaling over 180 days, disqualifies one from establishing continuous physical presence. Although the statute does not suggest that absences shorter than 90 days affect continuous physical presence, the proposed rule states that such absences may interrupt continuous physical presence if they are not brief, casual, and innocent. The commentary to the proposed rule also notes that the "stop-time" rule of IIRIRA section 309(c)(5) (the provision stating

that the calculation of continuous physical presence stops upon service of a notice to appear) does not apply in NACARA suspension and special rule cancellation cases.

The commentary to the proposed rule states that asylum officers must interpret the "extreme hardship" requirement for suspension and special rule cancellation under the same legal standards that have been developed by the immigration court in suspension of deportation cases. Although advocates had urged the INS to simplify the extreme hardship determination by taking into account the history of political turmoil in Central America that led to enactment of the NACARA, as well as the economic devastation recently wrought by Hurricane Mitch, the proposed rule retains the requirement of a case-by-case determination of extreme hardship.

The proposed rule identifies a large number of factors that may be relevant in evaluating whether deportation would result in extreme hardship to an applicant or to his or her qualified relative, including:

1. The age of the alien, both at the time of entry to the U.S. and at the time of applying for suspension
2. The age, number, and immigration status of the applicant's children and their ability to speak the native language and adjust to life in another country
3. The health condition of the alien or the alien's child, spouse, or parent, and the availability of any required medical treatment in the country to which the alien would be returned
4. The alien's ability to obtain employment in the country to which the alien would be returned
5. The length of residence in the U.S.
6. The existence of other family members who will be legally residing in the U.S.
7. The financial impact of the alien's departure
8. The impact of a disruption of educational opportunities
9. The psychological impact of the alien's deportation or removal
10. The current political and economic conditions in the country to which the alien would be returned
11. Family and other ties to the country to which the alien would be returned
12. Contributions to and ties to a community in the U.S., including the degree of integration into society
13. Immigration history, including authorized residence in the U.S.
14. The availability of other means of adjusting to permanent resident status

WORK AUTHORIZATION AND TRAVEL

The commentary to the proposed rule notes that applicants for NACARA suspension or special rule cancellation are eligible to apply for and be granted employment authorization. They may apply for work authorization at the time they file a suspension or cancellation application with the INS or the EOIR.

The commentary also notes that nothing in the NACARA authorizes travel outside the U.S. NACARA beneficiaries who leave the country without first obtaining advance parole and who are inadmissible for lack of valid entry documents, or for having false documents, may be subject to expedited removal. The commentary states that NACARA beneficiaries who leave the country and return with advance parole will no longer be eligible for suspension of deportation, since they would be inadmissible rather than deportable. Although the commentary does not address the effect of advance parole on individuals in removal proceedings, it should not affect their eligibility for special rule cancellation, since this relief is available to individuals whether they are inadmissible or deportable.

Comments to the proposed rule are due on or before Jan. 25, 1999, after which the INS will issue an interim or final rule to implement the procedure. Organizations wanting to contribute to model comments currently being prepared by advocates may contact Dan Kesselbrenner of the National Immigration Project of the National Lawyers Guild at (fax) 617-227-5495 or nipdan@nlg.org.

[63 Fed. Reg. 64,895–913 (Nov. 24, 1998).]

INS ISSUES NEW DETENTION GUIDELINES AS TPCR EXPIRE – The Immigration and Naturalization Service has issued new guidelines regarding the mandatory detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The IIRIRA amended section 236 of the Immigration and Nationality Act to require the detention without possibility of release of aliens who are deportable under most of the criminal grounds of deportability. It also requires mandatory detention for aliens who are inadmissible because of criminal convictions or terrorist activities.

The IIRIRA provided for a two-year transition period during which the attorney general could invoke "transition period custody rules" (TPCR) if she found that there was insufficient detention space and personnel to meet the mandatory detention requirements. She invoked the TPCR in 1996 and 1997. Under the TPCR, the INS has been allowed to release aliens with criminal convictions who, if not for the transitional rules, otherwise would have been subject to mandatory detention.

When the IIRIRA's mandatory detention provisions went into effect on Oct. 9, 1998, the TPCR expired. In a memorandum to regional directors accompanying the new guidelines, which were issued Oct. 7, 1998, INS executive associate commissioner Michael A. Pearson acknowledges that "100 percent compliance with these guidelines will be virtually impossible to achieve immediately." At the same time, he directs the INS regional directors to adhere to the guidelines "to the extent possible" and work toward using 80 percent of detention space for mandatory detention cases.

Under the new guidelines, four categories of alien detention are set forth: (1) required (with limited exceptions); (2) high priority; (3) medium priority; and (4) lower priority. Aliens in category 1, required detention, *must* be detained, with a few exceptions. Aliens in categories 2, 3, and 4 may be detained depending on the availability of detention space and the facts of each case. Aliens in category 2 should be detained before aliens in categories 3 or 4, and aliens in category 3 should be detained before aliens in category 4. The INS district directors or sector chiefs retain the discretion, however, to do otherwise if the facts of a given case require.

The guidelines provide a detailed breakdown of the categories of aliens subject to the mandatory detention provisions and the categories of detention that apply to them, dividing the aliens

into three groups: (1) arriving aliens subject to expedited removal under INA section 235; (2) aliens in proceedings under INA sections 240 (removal) and 238 (expedited removal of criminal aliens), and former sections 236 (exclusion) and 242 (deportation); and (3) aliens with final orders of removal, deportation, or exclusion.

The following describes the subcategories of aliens subject to mandatory detention and not eligible for release—i.e., those in category 1—along with the limited exceptions.

ARRIVING ALIENS: EXPEDITED REMOVAL UNDER INA SECTION 235

Aliens arriving at ports of entry who are inadmissible under INA section 212(a)(6)(C) or 212(a)(7) are subject to expedited removal proceedings and are subject to mandatory detention unless (1) it is necessary that they be paroled because of a medical emergency or to meet a legitimate law enforcement objective, or (2) the alien is referred for a full removal proceeding (e.g., upon a finding that the alien has a "credible fear of persecution").

The guidelines state that although any parole is discretionary, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided they do not pose a risk of flight or a danger to the community. Significantly, the guidelines assign to low-priority category 4 those aliens who originally were placed in expedited removal and referred to a full removal proceeding under section 240 because an INS officer found that they had a credible fear of persecution.

Aliens must be detained who are ordered removed under expedited removal, who then make an unverified claim to U.S. citizenship, or to lawful permanent resident, refugee, or asylee status, and are referred to an immigration judge for a status review. However, aliens in this category may be paroled if this is required because of a medical emergency or to meet a legitimate law enforcement objective.

If there is insufficient detention space to detain an alien in expedited removal who arrived at a land border port of entry and claims a fear of persecution unrelated to Canada or Mexico, that alien may be required to wait in Canada or Mexico pending a final determination of his or her asylum claim. Aliens who express a fear of persecution related to either Canada or Mexico must be detained for proceedings and may not be required to wait in that country for a determination of their claim.

Aliens subject to expedited removal who arrive at a land border port of entry but do not claim lawful status in the U.S. or a fear of persecution are supposed to be processed immediately and detained until removed. These aliens should not be required to wait in Mexico or Canada pending the issuance of an expedited removal order.

ALIENS IN PROCEEDINGS

Pursuant to INA section 236(c), the INS must take into custody all aliens who are chargeable as terrorists, and virtually all aliens who are chargeable as criminals, upon their release from criminal incarceration or custody. Section 236(c) does not apply to the following groups of aliens who are removable as criminals: (1) aliens who are removable under section 237 for a single crime involving moral turpitude, if they were sentenced to less than a year of incarceration; (2) aliens who are removable under section 237 for a conviction of high-speed flight from an immigration checkpoint; and (3) aliens who are removable under section 237 for crimes relating to domestic violence, stalking, and the abuse or neglect of children.

Section 236(c) applies to aliens either in removal proceedings under section 240 or in deportation proceedings under former section 242. Therefore, under section 236(c) the INS must continue to detain aliens who are described in that section (by their section 237 equivalents) if (1) they were previously taken into custody while in deportation proceedings (i.e., charged under section 241 in proceedings commenced prior to Apr. 1, 1997) and (2) they are still in custody upon the expiration of the TPCR. Note that current section 236(c) does not apply to aliens in exclusion proceedings under former section 236.

Under the new guidelines, once an alien is in INS custody, the alien may be released during proceedings only if the attorney general determines that it is necessary to protect a witness, a person cooperating with an investigation, or a family member of such a person. (*Note:* Section 236(c)(2), which authorizes such release, actually refers to "a witness, a potential witness, a person cooperating with an investigation *into major criminal activity,* or an *immediate* family member or *close associate* of such a person" [emphasis added].) To be considered for release in the exercise of discretion, the alien must also demonstrate that release would not pose a danger to persons or property and that he or she does not pose a flight risk.

The INS also considers that it must detain any alien in exclusion proceedings under former section 236 (i.e., charged under section 212 in proceedings commenced prior to Apr. 1, 1997) who has been convicted of an aggravated felony, as currently defined under INA section 101(a)(43). The INS may not parole such an alien during exclusion proceedings. Note that the expiration of the TPCR has no effect on these aliens, since the TPCR did not apply to them.

ALIENS WITH FINAL ORDERS OF REMOVAL, DEPORTATION, OR EXCLUSION

All aliens who have final orders of removal or deportation are subject to required detention. This category includes all aliens ordered removed under revised section 240, whether or not they are terrorists or criminals, and all criminal aliens ordered removed under revised section 238. It also includes all terrorist and criminal aliens ordered deported under former section 242 if they are subject to required detention under section 236(c).

Revised INA section 241(a) requires the INS to remove within 90 days any of the aliens in this category. The alien may not be released during this 90-day period. According to the guidelines, aliens whom the INS is unable to remove within 90 days should be released under an order of supervision. However, the INS may continue to detain certain aliens, including, those who are inadmissible on any ground, deportable or removable on criminal or security grounds, or dangerous, or flight risks.

The INS must detain aliens who have been issued final orders under expedited removal on grounds of being inadmissible under INA section 212(a)(6)(C) or section 212(a)(7). Pending immediate removal, the INS must detain such an alien. However, the INS may stay the removal of such an alien if removal is not practicable or proper, or if the alien is needed to testify in a

criminal prosecution.

The INS must continue to detain until removal any alien with a final order of exclusion (i.e., charged under section 212 in proceedings commenced prior to Apr. 1, 1997) who has been convicted of an aggravated felony as currently defined under INA section 101(a)(43). The INS may not parole such an alien unless the alien is determined to be unremovable pursuant to old INA section 236(e)(2) and the alien meets the criteria for release under that provision.

[INS Memorandum HQOPS (DDP) 50/10-C (Oct. 7, 1998), reprinted at 75 *Interpreter Releases* 1523–33 (Nov. 2, 1998).]

BIA CONSIDERS PRESUMPTION OF FUTURE PERSECUTION IN ASYLUM CASE WHERE COUNTRY CONDITIONS HAVE CHANGED – When an applicant for asylum has shown that he has been persecuted in his home country on account of race, religion, nationality, membership in a particular social group, or political opinion, and the record reflects that conditions have changed in that country to such an extent that his fear of future persecution by the original persecutors is not well-founded, the applicant bears the burden of demonstrating that he has a well-founded fear of being persecuted by parties other than those who persecuted him in the past. The Board of Immigration Appeals reached this conclusion recently in the case of an asylum applicant from Afghanistan.

In his home country, the applicant had been a supporter of the Jamiat party, a moderate pro-Islamic party that is anti-Communist. In 1988, when the government in Afghanistan was Communist, the applicant's father, who was also a supporter of the Jamiat party, was kidnapped by the KHAD, the government's secret police. In 1989, the applicant himself was arrested by the KHAD for possessing a flyer supporting the Jamiat party. He was detained for about one month, during which time he was deprived of food and also beaten and kicked to the point of losing consciousness. When he was taken to a hospital, he escaped his captors and shortly thereafter fled to the United States.

In 1992, Afghanistan's Communist government fell. Since then, the country has been ravaged by continuous civil war between factions of the forces that drove the Communists from power.

At his asylum hearing, the applicant claimed that he qualified for asylum as a victim of past persecution by the Communists. The immigration judge denied the application for asylum, finding that if the applicant were deported to Afghanistan, the Communists would no longer pose a threat to him. The applicant also claimed that he is afraid to return to Afghanistan because he fears being persecuted by the Jamiat party for having failed to properly support it. He also fears the ongoing fighting there, and he claimed that if he were deported he would be persecuted in Afghanistan because his sojourn in the U.S. has made him culturally different from his fellow Afghans. However, these claims did not convince the IJ that the applicant was eligible for asylum.

On appeal to the BIA, the applicant argued that because he had suffered persecution in Afghanistan, the Immigration and Naturalization Service had the burden of showing that he no longer has a well-founded fear of future persecution either by his previous persecutors, the Communists, or by rival Islamic factions. The applicant also submitted new evidence to show that the Taliban, an ultraconservative Islamic faction, recently came to control at least three-fourths of Afghanistan and that as a moderate Muslim he fears persecution by them as well. He sought a remand in the event he was not granted asylum on appeal.

In its decision, the BIA found that country conditions had changed in Afghanistan with the fall of the Communist government and that the applicant no longer has a well-founded fear of persecution from the Communists. The BIA concluded that the presumption set forth in 8 C.F.R. section 208.13(b)(1)(i)—i.e., a person who has established past persecution is presumed also to have a well-founded fear of future persecution—is extinguished by changed conditions in the applicant's country which indicate that the particular threat that led to the past harm no longer exists. Accordingly, a person in the asylum applicant's situation bears the burden of demonstrating that he or she has a well-founded fear of persecution by parties other than those that perpetrated the past persecution.

The BIA also found that the persecution the applicant had suffered was not severe enough to qualify him for asylum based on the provision set forth in 8 C.F.R. section 208.13(b)(1)(ii). Under this section, a victim of past persecution who cannot show a well-founded fear of future persecution must "[demonstrate] compelling reasons for being unwilling to return to his or her country of nationality or last habitual residence arising out of the severity of the past persecution."

The BIA *was* convinced, however, that the applicant should be permitted to develop his claim that his religious beliefs and practices are in conflict with the ideology and policies of the Taliban. Therefore, it remanded the matter for further proceedings before the IJ.

Finally, the BIA cautioned that, if adopted, a proposed rule that was published in the Federal Register on June 11, 1998, would make meaningful changes in the regulatory language addressed in its decision. Thus, the BIA's decision may be limited if the proposed rule becomes final.

In re N–M–A–, Int. Dec. 3368 (BIA, Oct. 21, 1998).

MOTION TO REOPEN BY A WOMAN ORDERED DEPORTED IN ABSENTIA NOT SUBJECT TO EXCEPTIONAL CIRCUMSTANCES REQUIREMENT – The Board of Immigration Appeals has concluded that an applicant seeking to reopen an in absentia deportation order does not need to satisfy the requirements of former Immigration and Nationality Act section 242B(c)(3), where the person did not receive oral warnings of the consequences of failing to appear at a deportation hearing, was ordered deported in absentia, and subsequently moved to reopen deportation proceedings in order to apply for a form of relief that was unavailable to her at the time of the in absentia hearing.

The respondent, a citizen of Ghana, entered the U.S. on Oct. 22, 1993, without a valid immigrant visa and subsequently applied affirmatively for asylum. On Aug. 16, 1995, the asylum officer referred the asylum application to the immigration court. The asylum officer served the respondent with an Order to Show Cause (OSC) and Notice of Hearing, scheduling a Jan. 17, 1996, deportation hearing. According to the OSC, the warnings and consequences of failing to appear at the deportation hearing were

not read to the respondent, whose native language is Twi. When the respondent did not appear at the January 17 hearing, she was ordered deported in absentia.

Meanwhile, on Dec. 15, 1995, the respondent married a U.S. citizen, who filed an immediate relative petition on her behalf on Feb. 27, 1996. On Mar. 4, 1996, the respondent filed a motion to reopen her deportation proceeding, accompanied by an application for adjustment of status. In her motion, the respondent said that she had been told by the asylum officer that she would receive in the mail formal notice of her deportation hearing. The respondent claimed that she had not received a formal notice and had failed to appear because she was unaware of the hearing date. However, the IJ denied the motion to reopen on the basis that the respondent did not establish that her failure to appear was due to exceptional circumstances.

After her visa petition was approved on May 24, 1996, the respondent filed a new motion to reopen. When the IJ denied this second motion on the same basis as before, the respondent appealed. On appeal, the main issue presented was whether the respondent's motion to reopen was precluded by the stricture, under INA section 242B(c)(3), that an in absentia deportation order may not be rescinded unless the person against whom it was issued demonstrates that his or her failure to appear for the deportation hearing was due to exceptional circumstances.

The BIA reviewed the language of section 242B and concluded that the statute does not preclude the respondent's motion to reopen. In particular, the BIA reasoned that the applicable section of the INA is section 242B(e)(1), which identifies categories of aliens precluded from obtaining certain forms of relief from deportation. This section specifies that if an alien fails to appear at a deportation hearing after receiving, in a language the alien understands, oral notice of the consequences of failing to appear, the alien is ineligible for five years for certain forms of relief from deportation, including adjustment of status. Conversely, the BIA reasoned, if the oral warnings are not provided, relief is not precluded.

In this case, oral warnings had not been given. Therefore, the BIA found that that the respondent is entitled to a hearing on her application for adjustment of status. Since the respondent is not seeking, pursuant to INA section 242B(c)(3), to rescind the order of deportation that was entered in her absence, the IJ erred in requiring the respondent to demonstrate that her failure to appear for the deportation hearing was due to exceptional circumstances. Instead, the respondent is asking that her case be reopened so that she can apply for a form of relief, adjustment of status, that was unavailable to her at the time of her hearing. The respondent's motion to reopen on this basis is thus subject instead to the requirements at 8 C.F.R. sections 3.2(c) and 3.23(b)(3) (1998), the BIA found.

In re M–S–, Int. Dec. 3369 (BIA, Oct. 30, 1998).

REGARDLESS OF CONVICTION DATE, AGGRAVATED FELONS ARE SUBJECT TO DEPORTATION IF PLACED IN PROCEEDINGS ON OR AFTER MAR. 1, 1991 – In a recent decision, the Board of Immigration Appeals found that section 602 of the Immigration Act of 1990 modified section 7344(b) of the Anti–Drug Abuse Act of 1988 (ADAA), thereby making an alien convicted of an aggravated felony deportable as an aggravated felon, regardless of the alien's conviction date, if the alien is placed in proceedings on or after Mar. 1, 1991.

The respondent in the case before the BIA, a lawful permanent resident, had been convicted of third degree murder on Jan. 23, 1987. Subsequently, an immigration judge found him to be deportable as an aggravated felon, apparently relying on language in section 321 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) that broadened the Immigration and Nationality Act's definition of *aggravated felony* and provides that "the term [*aggravated felony*] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." The BIA initially upheld the IJ's decision on this same basis, but then granted the respondent's motion for reconsideration and issued a new decision.

In its most recent decision, the BIA reaffirmed the principles of *Matter of A–A–*, 20 I. & N. Dec. 492 (BIA 1992), which sets forth a two-step analysis to be followed in determining how an aggravated felony conviction affects an individual under the INA. The first step is to determine whether the individual's conviction comes within the INA's definition of *aggravated felony.* If it does, then the IJ must determine whether the aggravated felony can be used to determine deportability and bar relief from deportation. In this case, the IJ failed to conduct the second step of this analysis. His assumption that the above-quoted provision of the IIRIRA resolved the case was in error, because this provision is relevant only to the first step of the analysis: determining whether the crime of which the respondent was convicted fits the definition of *aggravated felony.* There was no question in this case that the respondent's conviction for murder comes within that definition, but the issue rather was whether he could be found deportable based on that conviction.

The aggravated felony ground of deportation was originally added to the immigration statute by section 7344(a) of the ADAA. Section 7344(b) made the new deportation ground enforceable against aliens convicted of an aggravated felony on or after Nov. 18, 1988. Subsequently, the 1990 act amended and redesignated the grounds of deportation. Section 602 of the 1990 act applies to aliens placed in proceedings on or after Mar. 1, 1991. It contains ambiguous language that can be read two ways: as having no effect on the "date restriction" language in ADAA section 7344(b), thereby leaving the provision to apply only to those convicted of aggravated felonies on or after Nov. 18, 1988; or as modifying section 7344(b) by making all aggravated felons deportable, regardless of the date of their conviction.

The respondent in the case before the BIA asserted that he should not be found deportable as an aggravated felon because his conviction occurred before Nov. 18, 1988. He argued that ADAA section 7344(b) limits deportability under the aggravated felony ground to aliens convicted on or after Nov. 18, 1988, and that section 602 of the 1990 act did not eliminate the date restriction on the aggravated felony ground of deportability set forth in the ADAA.

The BIA reviewed section 602 of the 1990 act and noted that it is ambiguous. Nonetheless, it found that section 602 eliminated the date restriction on the aggravated felony ground set forth in the ADAA. It concluded that an alien convicted of a crime defined as an aggravated felony is subject to deportation

regardless of the date of the conviction, if the alien was placed in deportation proceedings on or after Mar. 1, 1991. In reaching this conclusion, the BIA expressly noted that its decision is limited to the case of an individual whose crime fits within the original 1988 definition of *aggravated felony.* Therefore, the BIA did not address whether the analysis would be different for an individual whose conviction was brought within the aggravated felony definition only by a subsequent amendment to that definition, and particularly for amendments that initially were made only prospectively.

In re Lettman, Int. Dec. 3370 (BIA, Nov. 5, 1998).

212(h) WAIVER NOT AVAILABLE TO LPR FOUND TO HAVE BEEN INADMISSIBLE AT TIME OF ENTRY – In the case of a non–U.S. citizen who was lawfully admitted to the U.S. for permanent residence but subsequently found to have been excludable at entry or inadmissible on the date he was admitted, the Board of Immigration Appeals has found that he is ineligible for a discretionary waiver under section 212(h) of the Immigration and Nationality Act.

The respondent in the case first entered the U.S. in January 1989, then reentered on July 3, 1991, as a lawful permanent resident. On Apr. 26, 1996, he was convicted of conspiracy to defraud the United States by making false statements to a department of the U.S. The respondent testified that he had engaged in fraudulent activity before leaving the U.S. and had continued this activity upon his return.

Deportation proceedings were initiated against the respondent on May 20, 1996. At his deportation hearing, he sought a 212(h) waiver. The immigration judge found the respondent to be deportable on the basis of his criminal conviction and as an alien who, due to this conviction, was excludable at entry under INA section 212(a)(2)(A)(i)(1). The IJ also found the respondent ineligible for a waiver under INA section 212(h), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, because he had not "lawfully resided continuously" in the U.S. for at least seven years immediately preceding the date deportation proceedings were commenced against him.

On appeal to the BIA, the respondent argued that the seven-years'-lawful-residence requirement for obtaining a waiver under INA section 212(h) should not apply to him because his July 3, 1991, admission into the U.S. was not lawful. Section 212(h) imposes the residence restriction on any "alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence . . . ." The respondent argued, based on the IJ's ruling, that his July 3, 1991, entry was not lawful and that therefore he should not be precluded from applying for the waiver.

In its decision, the BIA reasoned that the respondent had been admitted as an LPR and held that the statute does not distinguish between admitted persons whose admission was lawful and those whose admission is subsequently determined to have been unlawful. To read such a distinction into the statute would be arbitrary and capricious, the BIA held. Furthermore, the BIA held, because the respondent was admitted to the U.S. in LPR status and has failed to accrue seven years of lawful residence since the date he was admitted, he is ineligible for a waiver under section 212(h). *In re Pablo Ayala-Arevalo,* Int. Dec. 3371 (BIA, Nov. 30, 1998).

INS BROADENS EXCEPTION TO INITIAL TPS REGISTRATION DEADLINES – The regulatory provision that allows for "late initial registration" for temporary protected status (TPS) has been broadened to apply to persons otherwise eligible for TPS who, during the initial registration period, "are or were in a status or a condition that made [TPS] unnecessary or discouraged registration . . . , including parolees and pending asylum applicants," according to the supplementary information for a final rule issued Nov. 16, 1998, by the Immigration and Naturalization Service.

Under the previous, interim rule, an exception to any of the initial TPS registration deadlines has been available since Nov. 5, 1993, to persons who had *a valid immigrant or nonimmigrant status* during the initial registration period corresponding to their country of origin. Under the interim rule, such people have been eligible for late initial registration provided they registered within 30 days of the expiration of their other valid status or by Feb. 3, 1994, whichever is later.

TPS is granted to nationals of, or individuals of no nationality who last habitually resided in, countries that are designated by the attorney general as experiencing ongoing civil strife, environmental disaster, or certain other conditions that prevent those persons from returning. The original regulations governing TPS effectively limited eligibility for the status only to persons who applied during the specific registration period provided for in the Federal Register notice that initially designated a particular country as one whose nationals are eligible for TPS. As a result, persons from "TPS-designated" countries who did not apply for TPS during the initial registration period—because they were in an immigration status that either made it unnecessary for them to obtain TPS or discouraged them from registering—faced the daunting prospect of having to return to their home countries even though the conditions that precipitated the TPS designation persisted. The subsequent rules providing for exceptions to the initial registration deadlines are intended to ameliorate such situations.

[63 Fed. Reg. 63,593–97 (Nov. 16, 1998).]

AG EXTENDS TPS FOR NATIONALS OF BURUNDI, SIERRA LEONE, AND SUDAN – The attorney general has issued three notices granting extensions of temporary protected status (TPS) to nationals of, or individuals of no nationality who last habitually resided in, Burundi, Sierra Leone, and Sudan. Temporary protected status is granted to persons from countries that are designated by the attorney general as experiencing ongoing civil strife, environmental disaster, or certain other conditions that prevent those persons from returning. The attorney general has now extended the TPS designation for persons from all three countries for an additional year, until Nov. 3, 1999.

Persons from Burundi, Sierra Leone, and Sudan who previously registered for TPS must reregister in order to take advantage of these extensions. Applicants for reregistration must file Form I-821 without the fee, and Form I-765, Application for Employment Authorization. If they do not seek work authori-

zation, they must still file the I-765 but need not pay the $100 filing fee.

For persons from all three countries, reregistration must have taken place within the 30-day period beginning Nov. 3, 1998, and ending Dec. 2, 1998. Late reregistration may be excused under the provisions of 8 C.F.R. section 244.17(c).

The attorney general estimates that there are about 400 persons from Burundi who have previously been granted TPS in the U.S. and are eligible for reregistration, and about 4,000 persons each from Sierra Leone and Sudan who are in the same situation.

Persons from any of the three countries who did not previously register for TPS may also be eligible to register under the TPS extension if they meet the requirements of 8 C.F.R. section 244.2(f)(2)—a process known as "late initial registration." To meet these requirements, individuals must have been "continuously physically present" in the U.S. since the original TPS designation (Nov. 4, 1997), must have been in a status or a condition that made TPS unnecessary or discouraged registration during the initial registration period (see "INS Broadens Exception to Initial TPS Registration Deadlines," p. 8), and must register no later than 30 days from the expiration of that status.

[63 Fed. Reg. 59,334–38 (Nov. 3, 1998).]

Litigation

COURT HAS JURISDICTION TO REVIEW DENIAL OF MOTION TO REOPEN PROCEEDINGS BROUGHT UNDER INA § 241(a)(2) – In the case of a petitioner who had been ordered deported under Immigration and Nationality Act section 241(a)(2) for overstaying a tourist visa, the Ninth Circuit has ruled that it has jurisdiction to review the denial by the Board of Immigration Appeals of the petitioner's motion to reopen to apply for suspension of deportation. The court also held that the BIA abused its discretion when it failed to fully consider the hardship that the petitioner's deportation would cause her husband and her United States citizen children.

When the petitioner was placed in deportation proceedings for overstaying her tourist visa, she filed to adjust status based on marriage to a U.S. citizen. The immigration judge ordered her deported, in part, because the IJ found that she had entered into a sham marriage. When the petitioner appealed, the BIA affirmed the IJ's decision.

The petitioner, however, did not turn herself in when it was time for her to be deported. More than five years later, after she was detained by the Immigration and Naturalization Service, she filed a motion to reopen before the BIA to apply for suspension of deportation. The petitioner based her request for relief in part on the hardship that her deportation would cause her U.S. citizen husband and U.S.-born children. When the BIA denied the motion to reopen, the respondent appealed to the Ninth Circuit.

On appeal, the INS argued that the court lacked jurisdiction to hear the petition because section 309(c)(4)(E) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) precludes, among other things, an appeal of "any discretionary decision under section . . . 244." (This provision is part of the "transitional" rules governing judicial review of deportation cases.) However, the court concluded that it *does* have jurisdiction because the deportation order against the petitioner was issued under INA section 241(a)(2), which is not one of the sections listed in the IIRIRA provision that precludes appeals from discretionary decisions made under certain INA sections.

In her appeal, the petitioner argued that the BIA had abused its discretion by failing to consider all the factors in her favor. She had presented evidence about her community involvement, her marriage to a U.S. citizen, the hardship that her deportation would cause to her children's health and well-being, and information concerning the human rights record of the Philippines. The BIA had brushed aside this evidence by stating merely that it "recognize[d] the respondent's significant equities, particularly those related to her United States citizen children who are in no way responsible for their parent's past conduct."

Agreeing with the petitioner that the BIA had abused its discretion, the Ninth Circuit said that this cursory and generalized analysis of the factors favorable to the petitioner's application for relief does not suffice. To the INS's argument that the BIA had not abused its discretion, since the petitioner had flouted the immigration laws when she failed to report for deportation, the court's response was that there is no per se rule precluding the BIA from exercising its discretion in favor of a respondent's motion to reopen when the respondent has failed to comply with an immigration order.

Finally, the court panel's majority addressed an argument made by the dissent that under the IIRIRA the petitioner is statutorily ineligible for suspension of deportation because she was issued an Order to Show Cause before she had been in the U.S. for seven years—a fact that could preclude her, as a matter of law, from accruing the seven years of physical presence in the U.S. that is a prerequisite for being granted suspension. The majority said that the rules referred to by the dissent affect aliens whose deportation proceedings were pending on Apr. 1, 1997. Therefore, the provision does not apply to the petitioner, since she obtained a final administrative decision from the BIA before Apr. 1, 1997. *Remedios Canlas Arrozal v. INS*, __ F.3d __, No. 97-70068 (9th Cir. Oct. 27, 1998).

Employment Issues

INS AND DOL SIGN NEW MEMORANDUM OF UNDERSTANDING ON WORKPLACE INSPECTIONS – Under the terms of a new agreement between the U.S. Department of Labor and the Immigration and Naturalization Service, the DOL will no longer inspect I-9 employment eligibility verification forms when it goes to a workplace to investigate a labor standards violation and the investigation is based on a worker's complaint. This new memorandum of understanding (MOU), which was signed Nov. 23, 1998, replaces an MOU that had been in effect since 1992 and that had been criticized by immigrants' and workers' rights advocates since its inception (see "Law Students File Petition under NAFTA Challenging Collaboration between DOL and INS," p. 11).

Under the old MOU, the DOL was required to inspect I-9 forms whenever it conducted a labor standards investigation. If the DOL's investigation uncovered evidence of unauthorized

employment, the agency was required to refer the case to the INS. Under this policy, an undocumented worker who filed a minimum wage or overtime complaint with the DOL risked triggering a referral to the INS and eventual deportation. This clearly put a chilling effect on the ability of workers and their advocates to file wage complaints with the DOL.

The new MOU does not eliminate DOL involvement in inspections of I-9 forms. The DOL will continue to inspect the forms and make referrals to the INS in "directed" investigations of certain targeted industries. However, under the terms of the new MOU, the DOL will not conduct inspections of I-9 forms in cases where a labor standards investigation is based on a worker complaint. In the language of the new MOU, this limitation "is intended and will be implemented so as to avoid discouraging complaints from unauthorized workers who may be victims of labor standards violations by their employer." While it is problematic that there will continue to be collaboration, albeit more limited, between the DOL and the INS, the new policy represents a significant improvement over the former policy.

The new MOU also makes reference to INS Operations Instruction 287.3a, which gives guidance to INS agents who are contemplating enforcement activity at work sites where there is a labor dispute in progress. Although the operations instruction does not prohibit INS action in such cases, advocates have had some success using this guideline to convince local INS enforcement officials to refrain from conducting a raid at sites where a union organizing drive was in progress. The new MOU directs the DOL and the INS to "develop and implement policies consistent with INS Operations Instruction 287.3a that avoid inappropriate worksite [sic] interventions where it is known or reasonably suspected that a labor dispute is occurring and the intervention may, or may be sought so as to, interfere in the dispute."

COURT FINDS ANTIRETALIATION PROTECTIONS APPLY TO UNDOCUMENTED WORKER REPORTED TO INS – The Federal District Court for the Northern District of California has ruled that an undocumented worker who filed a wage claim against her employer—who in turn reported the worker to the Immigration and Naturalization Service—has a legitimate claim against the employer under the antiretaliation provision of the Fair Labor Standards Act (FLSA). The court rejected the defendant's argument that the suit should be dismissed because any communications it made to the INS were privileged under California law. The court also rejected the defendant's alternative argument that punitive damages as a remedy were unavailable under the FLSA.

The plaintiff, Sylvia Contreras, had filed a claim with the Division of Labor Standards Enforcement of the California Department of Industrial Relations against Corinthian Vigor Insurance Brokerage, Inc., to recover unpaid wages and overtime pay. Corinthian subsequently reported Contreras to the INS, whose agents arrested her four days after she attended a prehearing conference with the Division of Labor Standards Enforcement regarding her wage claim. Contreras filed a lawsuit under the FLSA claiming that, in reporting her to the INS, Corinthian had unlawfully retaliated against her for filing a wage claim.

The FLSA requires payment of the federal minimum wage and requires overtime pay for hours worked in excess of 40 per week. The FLSA also prohibits discharge or other discriminatory conduct in retaliation against an employee for filing a lawsuit or instituting a proceeding to recover FLSA-mandated wages. The defendant moved to dismiss Contreras's complaint under the Federal Rules of Civil Procedure, arguing that she had failed to state a claim under which she could recover damages, since any communications the company made to the INS were absolutely privileged pursuant to California Civil Code section 47(b). This section of the California Civil Code provides, with some exceptions, immunity from liability for communications made in legislative, judicial, or other official proceedings authorized by law.

In response to Corinthian's motion to dismiss, the court expressed doubt that reports to the INS are absolutely privileged under the California Civil Code. Nevertheless, the court did not have to reach that question because it held that under the Supremacy Clause of the U.S. Constitution, California Civil Code section 47(b) is "preempted insofar as it prevents enforcement of the FLSA."

In reaching this holding, the court observed that preemption could be explicit or implied. To determine if there was an implied preemption by the FLSA of the California Civil Code provision, the court would have to examine whether this was a situation "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" The court reviewed various cases that demonstrated congressional intent regarding the application of the FLSA (and other labor laws) to undocumented aliens and found that "it is manifestly clear that, even with the passage of [the Immigration Reform and Control Act of 1986, which mandates sanctions against employers that knowingly employ unauthorized workers], Congress intended that undocumented aliens remain under the protection of the FLSA."

Furthermore, the court found that Congress had manifested its intent that this protection included "the right to be free from unlawful retaliation pursuant to the FLSA." But in the words of the court, "Permitting employers to enjoy absolute immunity under the California Civil Code § 47(b) to file reports with the INS in retaliation for employee complaints not only weakens the anti-retaliation provision of the FLSA, it virtually guts it." Under these circumstances, the court held that the California Civil Code provision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and therefore was "preempted insofar as it prevents enforcement of the FLSA." Accordingly, the court ruled that Contreras had set forth a claim for retaliation in violation of the FLSA and denied the employer's motion to dismiss.

With respect to the employer's alternative motion to strike Contreras's claim for punitive damages, the court noted that only one appeals court, the Seventh Circuit, had ruled on the availability of punitive damages in a FLSA retaliation claim. The Seventh Circuit had ruled that punitive damages were in fact available for such a claim. But the district court predicted that the Ninth Circuit would agree with the reasoning of the Seventh Circuit. Given "the Ninth Circuit's historically expansive view of remedies under federal labor laws," the district court

refused to strike Contreras's claim for punitive damages.

Contreras was represented by Christopher Ho and Marielena Hincapié of the Employment Law Center in San Francisco.

Contreras v. Corinthian Vigor Insurance Brokerage, Inc., No. C98-2701 SC (N.D.Cal. Oct. 26, 1998).

OSC MAY ADVERTISE TO GATHER INFORMATION ABOUT EMPLOYER'S DISCRIMINATORY PRACTICES – An administrative law judge has ruled that the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) can proceed with its plan to make public announcements aimed at gathering more information about an employer's discriminatory practices, which were the subject of a complaint filed by the OSC against the employer. The ALJ, who is part of the Office of the Chief Administrative Hearing Officer (OCAHO) within the U.S. Department of Justice, denied the employer's motions seeking to prevent the OSC from making the announcements.

ALJs within the OCAHO hear cases involving charges brought under the "employer sanctions" and employment anti-discrimination provisions of the Immigration and Nationality Act, as well as document fraud charges brought under INA section 274C. In this case, the OSC charged Agripac, Inc., the respondent, with a pattern and practice of discrimination.

Specifically, the OSC filed a complaint alleging that Agripac maintained an ongoing discriminatory policy of requiring "foreign-appearing" persons to produce certain specific documents before they would be given applications for employment. The complaint also alleged that Agripac rejected other legally acceptable documents that could have confirmed the identity and employment eligibility of the would-be job applicants. However, persons whom Agripac's personnel workers did not judge (based on appearance or other factors) to be foreign were not required to produce documents before they could obtain applications for employment. The OSC also alleged that a specific individual named in the complaint was denied the opportunity to apply for work at Agripac because of this policy.

In order to learn the names of other workers who had been unfairly denied employment under Agripac's policy and to gather more information about it, the OSC decided to notify the public about the case through public service announcements on radio and written notices posted with community organizations. The OSC notified Agripac of these plans and sent the company copies of the announcements and notices. Agripac responded by filing a motion for protective order, seeking to preclude the OSC from making the announcements by any means. Subsequently, Agripac also tried to block the announcements by filing a motion to bifurcate proceedings — i.e., to have a hearing on liability before dealing with the issue of damages — and to stay the OSC's attempts to advertise its request for information. The ALJ denied all three motions.

In its attempt to prevent the OSC from communicating with persons who had been victims of Agripac's discriminatory hiring policy, the company asserted, among other things, that the OSC's proposed notice constituted wrongful solicitation. In rejecting this argument, the ALJ made a distinction between, on the one hand, communications to potential victims by a government agency such as the OSC that is charged with implementing public policy and, on the other, a private attorney soliciting clients for commercial purposes. Furthermore, the ALJ found, established case law placed the burden on Agripac to show precisely how it would be harmed by the OSC's communications. While Agripac made bare assertions of harm and prejudice, it failed to carry its burden. The ALJ thus denied Agripac's motions and allowed the OSC to proceed with soliciting information for its case against Agripac via public announcements.

United States v. Agripac, Inc., 8 OCAHO 1012 (Sept. 1, 1998).

LAW STUDENTS FILE PETITION UNDER NAFTA CHALLENGING COLLABORATION BETWEEN DOL AND INS – This past September, before the U.S. Department of Labor and the Immigration and Naturalization Service signed their new memorandum of understanding (MOU) concerning workplace inspections (see "INS and DOL Sign New Memorandum of Understanding on Workplace Inspections," p. 9), the Yale Law School Workers' Rights Project, the ACLU Immigrants' Rights Project, and nearly twenty other immigrants' and workers' rights organizations filed a petition challenging the cooperation agreement between the two agencies that was in effect at that time. The groups filed the petition under the labor side agreement of the North American Free Trade Agreement (NAFTA), whose members include the United States, Canada, and Mexico.

Under the previous MOU, which had been in effect since 1992, the DOL was required to inspect I-9 employment eligibility verification forms whenever it conducted a labor standards enforcement investigation at a work site. When the DOL uncovered any evidence that workers unauthorized to be employed in the U.S. were working for the company being inspected, the agency was required to refer the matter to the INS. Therefore, under this arrangement any worker who filed a wage complaint with the DOL risked triggering a referral of his or her case to the INS. This had a chilling effect on workers' willingness to file wage complaints with the DOL, since undocumented workers who filed complaints exposed themselves to the possibility of being deported.

Under federal law, workers in the United States are entitled to mandatory minimum and overtime protections, regardless of their immigration status. The NAFTA labor side agreement requires that the United States, Canada, and Mexico enforce their own labor and employment laws. But the Yale law students and the other petitioners charged that "[b]ecause the MOU results in the systematic underenforcement of U.S. minimum wage and maximum hour laws, it is incompatible both with U.S. labor law and with the NAFTA side agreement on labor." The petitioners asked the governments of Mexico and Canada to investigate this problem and called on the two U.S. agencies to rescind the MOU.

Meanwhile, the DOL and the INS signed the new MOU, according to which DOL inspectors no longer will conduct I-9 inspections in investigations that originate from worker complaints. However, the DOL still will conduct I-9 inspections and make referrals to the INS in those investigations that are not "complaint-driven."

Just hours before the signing of the new MOU, the National Administrative Office of Mexico had formally accepted the petition that had challenged the policy under the former MOU.

At the present time, the petitioners are assessing what step to take next in light of the new interagency agreement.

CARNEGIE ISSUES PAPER ON EMPLOYMENT VERIFICATION PILOT PROGRAMS – The Carnegie Endowment for International Peace has published a paper that provides an explanation and review of the Immigration and Naturalization Service's Employment Verification Pilot Programs, including the three that have been initiated under the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the other pilot programs that have been conducted since 1992. The paper also discusses potential problems with the IIRIRA pilot programs, including the inaccuracy of INS and Social Security Administration (SSA) data bases, the misuse of pilot programs to prescreen job applicants, national origin and citizenship discrimination, and privacy concerns. It makes a number of recommendations to the groups with which the INS has contracted to evaluate the pilot programs.

The IIRIRA created three employment verification pilot programs that allow employers to access INS and SSA data bases to verify whether a new employee is authorized to work in the United States. The IIRIRA also requires the U.S. attorney general to conduct evaluations of the pilot programs and submit reports of her findings to Congress after the end of the third and fourth years in which the pilot programs are in effect.

"INS Pilot Programs for Employment Eligibility Confirmation" was written by Karen Miksch, who is Visiting Assistant Professor in the School of Interdisciplinary Studies at Miami University of Ohio and a former NILC staff attorney. She prepared the paper for the Study Group on Employment Verification Pilot Programs, a group of representatives from immigration, worker, and civil rights organizations convened by the Carnegie Endowment to study and monitor the pilot programs.

For a copy of the paper, contact Yasmin Santiago at the Carnegie Endowment by phone (202-939-2278), fax (202-483-1840), or e-mail (yasmin@ceip.org).

Miscellaneous

POSITION AVAILABLE: ONE STOP IN LOS ANGELES SEEKS STAFF ATTORNEY – One Stop Immigration and Educational Center, Inc., a Los Angeles–based nonprofit immigrants' rights organization, is seeking an experienced immigration attorney. Duties include supervision of counselors, case preparation, research, and court representation. English/Spanish fluency required. To apply, fax cover letter and resume to Meredith Brown at 213-268-2231, or call her at 213-268-8472 x. 16.

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NILC's office in Los Angeles will be moving in early 1999, possibly as early as mid-January. Watch for details about the L.A. office's new address and phone/fax numbers in an upcoming mailing.

NATIONAL IMMIGRATION LAW CENTER
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Address correction requested

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Abbreviations

• *ABC - American Baptist Churches v. Thornburgh* • ADAA - Anti–Drug Abuse Act of 1988 • ALJ - administrative law judge • BIA - Board of Immigration Appeals • DOL - U.S. Department of Labor • EOIR - Executive Office for Immigration Review • FLSA - Fair Labor Standards Act • IIRIRA - Illegal Immigration Reform and Immigrant Responsibility Act of 1996 • IJ - immigration judge • INA - Immigration and Nationality Act • INS - Immigration and Naturalization Service • LPR - lawful permanent resident • MOU - Memorandum of Understanding (between the DOL and the INS) • NACARA - Nicaraguan Adjustment and Central American Relief Act of 1997 • NAFTA - North American Free Trade Agreement • OCAHO - Office of the Chief Administrative Hearing Officer • OSC - Office of Special Counsel for Immigration Related Unfair Employment Practices • OSC - Order to Show Cause • SSA - Social Security Administration • TPCR - transition period custody rules • TPS - temporary protected status •

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