



Immigration Issues

DEPARTMENT OF HOMELAND SECURITY ESTABLISHED – Legislation that President George W. Bush signed into law on Nov. 25, 2002, creates a new cabinet-level department, the Dept. of Homeland Security (DHS), and puts into motion the most massive reorganization of government in 50 years. The new law merges 22 separate agencies that have a total of 170,000 employees.

Organization. The DHS will be headed by a secretary, with a deputy secretary as his or her first assistant. The organization is structured around four directorates, each headed by an undersecretary: Information Analysis and Infrastructure Protection; Science and Technology in Support of Homeland Security; Border and Transportation Security; and Emergency Preparedness and Response.

Under previous law, immigration enforcement and immigration services were the responsibility of the same agency—the Immigration and Naturalization Service—within the Dept. of Justice (DOJ). Under DHS reorganization, that will no longer be the case.

Section 471 of the statute abolishes the INS. Immigration enforcement (Border Patrol, detention and removal program, intelligence program, investigations program, and inspections program) and immigration services (adjudications of visa petitions, naturalization petitions, asylum and refugee applications, service center adjudications, and all other INS adjudications) will now be housed in the DHS. But these functions will be undertaken by different parts of the agency, and these branches may be assigned varying levels of importance within the broader agency structure.

Under sections 441 and 442, immigration enforcement activities are located in the Bureau of Border Security within the Border and Transportation Security Directorate. This bureau will be headed by an assistant secretary who reports directly to the undersecretary for Border and Transportation Security. In contrast, immigration services are not located in any of the directorates. They are instead housed in a free floating component called the Bureau of Citizenship and Immigration Services, which will be headed by a director who reports directly to the DHS deputy secretary. That the Services Bureau is not contained in any directorate reflects the difficulty of fitting immigration services within

IN THIS ISSUE

IMMIGRATION ISSUES

Department of Homeland Security established	1
DOJ expands "call-in" special registration to additional nationalities	3
BIA issues two decisions on notice requirements for juveniles	4
Reinstatement of removal held to not apply to special immigrant juvenile adjustment	4
INS and State Dept. interpret Child Status Protection Act	4
INS postpones granting benefits to thousands due to change in procedures for conducting FBI background checks	6

LITIGATION

District court enjoins removals to Somalia	6
9th Circuit rules INS can require bond to ensure compliance with an order of supervision	6

9th Circuit finds failure to serve notice of hearing on attorney violates due process	7
9th Circuit finds that IJ violated due process by denying a respondent opportunity to present evidence	7
<i>Barahona-Gomez</i> : Court approves settlement in class action for suspension applicants	8

EMPLOYMENT ISSUES

Judge refuses to allow discovery into plaintiff's immigration status in involuntary servitude case	10
OCAHO rules persons with TPS cannot bring citizenship-based discrimination claims under IRCA; agency has jurisdiction over national origin-based document abuse claims	10

IMMIGRANTS & WELFARE UPDATE

Court invalidates SSA rule on "nonwork" SSNs for driver's license applicants	11
--	----

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 basic structure of an agency whose principal mission is to combat terrorism. But it also indicates the relatively low priority given to immigration services, which, as a tiny part of the DHS, will have to compete with all of the big directorates in gaining the attention of the DHS deputy secretary.

The law on its face does not address explicitly how the problems endemic to the historically dysfunctional INS will be resolved. But several provisions indicate at least a recognition that problems exist. Section 451 (a)(5) provides for pilot programs to eliminate and prevent backlogs in immigration benefit applications. Section 458 requires elimination of the immigration backlog within one year of enactment of the DHS law. Section 459 requires the DHS secretary to report to Congress within one year of the law's enactment on how the Services Bureau will "efficiently, fairly, and within a reasonable time" complete its adjudications functions.

Section 475 provides for a director of Shared Services to coordinate resources of the enforcement and services bureaus, including information resources management, records and file management, and forms management. Each bureau will have a chief of Policy and Strategy to coordinate immigration policy issues with the other. Each bureau will also have its own legal advisor. It is not clear how policy differences will be resolved, and policies for critical areas such as asylum may well differ based on the differing functions of the bureaus.

Investigations of Violations. Immigrants' rights, human rights, and civil rights organizations had advocated for a strong civil rights office, to be headed by a high ranking official with the power to investigate civil rights violations. This office was not established, and advocates will have to look to the law's weaker provisions to ensure that immigrants' rights are protected. Despite these provisions' weakness, the limited oversight mechanisms they provide should be vigorously pursued to maximize their effectiveness. In addition, these provisions do incorporate certain congressional reporting requirements, which provide some opportunity to highlight the inadequacy of protections afforded by the statute.

First, section 705 provides only for an officer for Civil Rights and Civil Liberties, who can "review and assess information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees and officials" of the DHS. The officer may, through the Internet and media, make the public aware of the responsibilities of the office and provide information on how to contact him or her. Significantly, the officer does not have the power to investigate such violations. The officer must report annually to Congress on allegations of abuses and actions taken by the DHS in response to them.

Second, the statute provides in section 452 for a Citizenship and Immigration Services ombudsman, who reports directly to the DHS deputy secretary. The ombudsman is to assist individuals and employers in resolving problems with the Services Bureau, identifying problem areas in dealing with the bureau, and proposing changes to the bureau's administrative practices to mitigate these problems. The ombudsman must report annually to Congress and provide an inventory of problems and solutions, as well as reasons for inaction and recommendations. The reports must be submitted directly to lawmakers, without prior comments or changes from the DHS secretary, deputy secretary,

or head of the Services Bureau. The statute also provides for local ombudsmen who operate independently of the Services Bureau. Significantly, the Bureau of Border Security, which carries out enforcement activities, contains no such ombudsman provisions.

Third, the DHS has an inspector general (IG) appointed to it under the Inspector General Act of 1978. But the IG's authority is curtailed in section 801 of the DHS law. The DHS IG is under the secretary's "authority, direction, and control" regarding audits, investigations, or issuance of subpoenas requiring access to certain "sensitive" information, and the secretary may prohibit these activities altogether.

Under section 443, the undersecretary for Border and Transportation Security has authority to conduct investigations of noncriminal allegations of misconduct, corruption, and fraud involving employees of the Bureau of Border Security. Under section 453, the director of the Services Bureau has similar responsibilities for that Bureau. But the functions authorized by both provisions amount to the department investigating itself.

Information Sharing. The statute gives the DHS access to a vast array of information from the public and private sectors. Under section 201 (d), the DHS's tasks are to "access, receive, and analyze law enforcement information, intelligence information, and other information from agencies of the Federal Government, State and local government agencies (including law enforcement agencies), and private sector entities." Some agencies that are being folded into the DHS, such as the INS, maintained investigative, intelligence gathering, and data sharing systems of their own. So even though the statute does not give new authority to collect information, the DHS will have extensive access to information for data mining and data analysis. An example of data mining is Total Information Awareness (TIA), a program being developed in the Dept. of Defense by the Defense Advanced Research Projects Agency (DARPA) to gather and analyze information from public and commercial databases. Reports recently appeared in the press indicating that this program was authorized by the DHS legislation, but its development actually preceded the law's passage. The DHS would, however, appear to have access to its work, and similar activities carried out by other agencies.

Privacy. Section 221 requires the DHS secretary to establish procedures for information sharing under the statute. These procedures are to limit dissemination to ensure that information is not used for unauthorized purposes. They are also to ensure the secrecy and confidentiality of such information, protect the statutory and constitutional rights of individuals who are subjects of such information, and provide data integrity through timely removal and destruction of obsolete or erroneous names and information. Section 222 requires the secretary to appoint a privacy officer who has primary responsibility for privacy policy. Among other duties, the officer must report to Congress about DHS activities that affect privacy, including complaints of privacy violations, implementation of the Privacy Act of 1974, internal controls, and "other matters." The statute, however, does not authorize the privacy officer to take complaints or conduct investigations.

The statute contains several positive provisions with respect to privacy. Section 880 expressly forbids the Terrorism Informa-

tion and Prevention System (TIPS), which would have enlisted delivery personnel, utility workers, and other civilian personnel to report on suspicious activities of their customers. Section 1514 provides that "[n]othing in this Act shall be construed to authorize the development of a national identification system or card."

Unaccompanied Minors. Section 462 of the act transfers matters related to unaccompanied minors from the INS to the Office of Refugee Resettlement of the Dept. of Human Services. But the section also provides that nothing in the act should be construed to transfer responsibility for "adjudicating benefit determinations under the Immigration and Nationality Act" from the DOJ, DHS, or the Dept. of State. Moreover, the act does not provide for protections that were sought by advocates for unaccompanied minors, including the appointment of counsel and guardians ad litem.

THE CHANGES BROUGHT ABOUT by the DHS legislation are substantial. The INS is to be reorganized in ways different from those hoped for by immigrants' rights advocates. But there is a clear recognition of the failures of the INS in its old form, and the statute does establish some processes and mechanisms to bring to light any new malfunctions. Advocates should make full use of the avenues created by the law to ensure fair treatment for noncitizens.

DOJ EXPANDS "CALL-IN" SPECIAL REGISTRATION TO ADDITIONAL NATIONALITIES

– The attorney general has published a notice in the Federal Register requiring certain nationals of two additional countries, Pakistan and Saudi Arabia, to report to the Immigration and Naturalization Service and be registered under the National Security Entry-Exit Registration System (NSEERS). As was the case with two other such notices issued this fall, the new requirement applies to individuals who were not given any notice concerning the special registration requirements at the time they were admitted to the United States as nonimmigrants. The first call-in notice required nationals of Iran, Iraq, Libya, Sudan, and Syria to register by Dec. 16, 2002; the second required nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen to register by Jan. 10, 2003. (For more information on the two prior notices, see "DOJ Requires Certain Nonimmigrants Admitted to the U.S. before Sept. 11, 2002, to Appear for 'Special Registration' by Dec. 16, 2002," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 2002.)

The new "call-in" notice requires certain male citizens or nationals of Pakistan and Saudi Arabia who were admitted to the U.S. as nonimmigrants on or before Sept. 30, 2002, to appear in person at an INS office between Jan. 13 and Feb. 21, 2003, or face the possible loss of their status and be subject to removal. Armenia was also listed on the notice, but the INS issued a press statement stating that the listing was in error. On Dec. 18, 2002, the INS published a revised version of the notice that did not include Armenia as a designated country.

According to reports compiled by the American Immigration Lawyers' Association from attorneys and statements issued by INS offices, experiences of the call-in registration process to date

have varied considerably at different offices across the countries. Despite the serious consequences of failing to register for individuals subject to the requirement, the INS has not made any significant national efforts to publicize the requirements in the affected immigrant communities. At some offices persons seeking to register were turned away because the office was not prepared to receive them. At others registrants have been asked to empty their wallets, and INS officers have recorded their credit card, bank account numbers, and other personal information. Waiting times of as long as four or five hours have been reported at some offices. Perhaps most troubling, at some offices the INS has detained and initiated removal proceedings against registrants for technical violations of status, despite the fact that the registrants are pursuing applications for adjustment of status and have been granted employment authorization.

It appears that generally people in this situation are being released on bond, and will be able to seek adjustment in proceedings. However, there have also been reports that individuals who entered the U.S. under the Visa Waiver Program may be subjected to summary removal (although none of the countries designated for call-in special registration are designated for the VWP, individuals from such countries who obtained citizenship in a third country and entered the U.S. under the VWP may be subject to call-in registration if they retained citizenship or nationality in a designated country). Because of the complex issues that such cases may present, individuals subject to the registration requirement should seek advice of counsel prior to registering.

The requirements announced in the most recent notice apply to males born on or before Jan. 13, 1987 (i.e., those who are 16 years old or older); who are nationals or citizens of Pakistan or Saudi Arabia; who were inspected and last admitted to the U.S. as nonimmigrants on or before Sept. 30, 2002; and who will remain in the U.S. until at least Feb. 21, 2003. To register, such individuals must appear before an immigration officer at any of the locations listed in the appendix to the notice at some time during the period starting on Jan. 13 and ending on Feb. 21, 2003.

According to the notice, registrants must present travel documents, including a passport, a Form I-94 issued upon admission, and any other forms of government-issued identification; proof of residence, including any land title, lease, or rental agreement; proof of matriculation at an educational institution (if applicable); and proof of employment (if they are employed). The notice also states that such registrants must present any other information requested by the immigration officer. Once registered as part of the NSEERS program, registrants must appear before the INS annually, within ten days of the anniversary of their registry date. They must also report any change of address on Form AR-11 within ten days of any move to a new residence or address.

The notice states that the call-in special registration requirements apply to individuals who are nationals or citizens of the designated countries even if they hold dual nationality or citizenship with another country not specified in the notice. The notice exempts lawful permanent residents, asylum applicants who applied for asylum on or before Dec. 16, 2002, asylees, and foreign diplomats from the special registration requirements.

67 Fed. Reg. 77,136–38 (Dec. 16, 2002) (original notice); 67 Fed. Reg. 77,642–44 (Dec. 18, 2002) (revised notice).

BIA ISSUES TWO DECISIONS ON NOTICE REQUIREMENTS FOR JUVENILES

– The Board of Immigration Appeals has issued two *en banc* precedent decisions addressing the requirements for a notice of proceedings in cases concerning juveniles. The decisions explain the special consideration that must be given to minors in removal proceedings.

In *Matter of Gomez-Gomez*, the Immigration and Naturalization Service served a Notice to Appear (NTA) on an adult who identified himself as the parent of an eight-year-old respondent. The minor respondent was released to the parent, and a notice of hearing was subsequently mailed to the parent's address. After the minor failed to appear for her hearing, the immigration judge declined to enter an *in absentia* order of removal, finding that there was no evidence apart from that provided by the adult to establish either the minor's removability or the fact that the adult was the minor's parent. On appeal, the BIA reversed, finding that absent any evidence that puts in question the information provided by the adult to the INS, the IJ should accept it. The BIA found that in such circumstances, service on the adult constituted adequate notice.

In *Matter of Mejia-Andino*, the INS served a notice of proceedings on an uncle who was detained accompanying a seven-year-old respondent, to whom the minor was released from custody. However, the minor had stated that she was en route to her parents, who were residing in the United States. When she failed to appear for the hearing, the immigration judge entered an *in absentia* removal order. On appeal, the BIA noted that service on the accompanying uncle was proper but not sufficient, because the INS was aware that after her release from detention, the respondent would reside with her parents in the United States. The BIA interpreted 8 C.F.R. section 103.5a(c)(ii) to require in these circumstances that the INS at least attempt service of a notice on a parent.

Matter of Gomez-Gomez, 23 I. & N. Dec. 522,

Int. Dec. 3483 (BIA Dec. 4, 2002), *Matter of Mejia-Andino*,

23 I. & N. Dec. 533, Int. Dec. 3484 (BIA, Dec. 4, 2002).

REINSTATEMENT OF REMOVAL HELD TO NOT APPLY TO SPECIAL IMMIGRANT JUVENILE ADJUSTMENT

– In an important decision affecting abused and neglected children, the Office of Administrative Appeals (AAO) of the Immigration and Naturalization Service has ruled that reinstatement of removal does not apply to a special immigrant juvenile (SIJ) applying for adjustment of status. The AAO concluded that, because under the Immigration and Nationality Act special immigrant juveniles seeking adjustment are deemed to have been paroled into the U.S., they cannot be considered to have entered the U.S. unlawfully and thus are not subject to reinstatement of removal.

The decision came in the case of a 17-year-old Mexican boy who sought to adjust his status based on an SIJ petition. The district director denied the adjustment application because the boy had returned to the United States without inspection, after having been removed three times under expedited removal orders. The district director found that reinstatement of removal applied to the applicant and barred him from the relief of adjustment of status. The boy appealed the denial to the AAO. Upon review, the AAO ordered the district director to withdraw the decision and remand the case.

An SIJ petition is available to children under the age of 21 who have been abused, neglected, or abandoned, and who are deemed eligible for long-term foster care by a juvenile court. A child may file an SIJ petition along with an adjustment of status application at the local INS district office with jurisdiction over the child's residence. If successful, the child gains lawful permanent residence.

Congress amended the reinstatement of removal provision at issue when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The amended provision (Immigration and Nationality Act § 241(a)(5)) states that an individual who reenters the U.S. illegally after removal or departs voluntarily under such an order is subject to the previous removal order, may not reopen his or her case, and is barred from all relief.

The AAO began its analysis by noting that nothing in the reinstatement of removal provision exempts minors from its application. However, the appellate unit recognized that INA section 245(h)(1) accords SIJ petitioners a special status. This statute provides that an individual seeking adjustment as an SIJ "shall be deemed, for purposes of subsection (a) [the section on adjustment of status] to have been paroled into the U.S." The AAO then relied on *Leng May Ma v. Barber*, 357 U.S. 185 (1958), for the proposition that a paroled alien is deemed not to have entered the U.S. The AAO concluded that for this reason the SIJ applicant cannot be considered to have entered the U.S. unlawfully and thus is not subject to the reinstatement of removal provision.

The AAO went on to note that while an SIJ applicant may sidestep the reinstatement provision, the petitioner was still subject to the inadmissibility grounds under INA section 212. In this case, the boy's previous removals and misrepresentations of citizenship give rise to several grounds of inadmissibility. However, the INS may waive these grounds for humanitarian purposes, family unity, or when it is otherwise in the public interest.

The appellate unit's decision, although not designated as a precedent decision, is significant because it is the AAO's first decision analyzing treatment of SIJ applicants with illegal reentries. The appellate unit has jurisdiction over a number of matters, including appeals of denials of applications for adjustment of status.

Decision of Antonio Francis-Lugo,

INS Office of Administrative Appeals (Nov. 14, 2002).

INS AND STATE DEPARTMENT INTERPRET CHILD STATUS PROTECTION

ACT – Both the Immigration and Naturalization Service and the Dept. of State have issued preliminary guidance on the Child Status Protection Act (CSPA), which was signed by President George W. Bush in Aug. 2002 (for a description of the law, see "President Signs Bill Protecting Visa Applicants from Aging Out," IMMIGRANTS' RIGHTS UPDATE, Sept. 10, 2002, p. 6). This guidance comprises memoranda from Johnny Williams, INS executive associate commissioner, Office of Field Operations, and Joseph E. Langlois, INS director, Asylum Division, and a cable from the Dept. of State. The major provisions of these documents are summarized below.

Immediate Relatives. The INS and the State Dept. will use the age of the beneficiary on the date the Form I-130, Petition for Alien Relative, is filed to determine if he or she qualifies as an

immediate relative child. For example, if a U.S. citizen files an I-130 for a 20-year-old daughter, she will remain permanently eligible to immigrate as a child even if the adjustment or consular processing occurs after she turns 21, as long as she does not marry.

Children who are second preference beneficiaries and whose parents naturalize will be able to use their age on the date of their parent's naturalization to determine if they will be classified as immediate relatives. For example, if a lawful permanent resident files an I-130 for a 17-year-old son and then naturalizes when the son is 20, the son will remain eligible to immigrate as an immediate relative, even if he had turned 22 by the date of his adjustment or consular interview.

Third preference married children of U.S. citizens can now use their age on the date of the termination of a marriage when applying for adjustment or an immigrant visa. For example, if a U.S. citizen files a Form I-130 for his 18-year-old married son and that son later divorces before turning 21, the son can still immigrate as an immediate relative child, even if the adjustment or consular processing occurs after he turns 21.

Preference and Diversity Visa Categories. Both the INS and the State Dept. narrowly interpret the CSPA provision that protects some children from "aging out" of the family preference, employment-based, and diversity categories. As expected, both agencies define the date on which an immigrant visa becomes available as the date on which the beneficiary's priority date becomes current. The Williams memorandum specifies that this is the first day of the month in which the priority date becomes current. A beneficiary's age then becomes "locked in" on the date that his or her priority date becomes current, less the number of days that the petition had been pending, as long as the beneficiary seeks to acquire permanent resident status within one year of such availability. For example, if a parent filed an I-130 in 1998 when the child was 20 years old, and the priority date became available today, and the I-130 was not adjudicated until today, the beneficiary's "age" would be his or her age on the date the priority date became current (24 years) minus the period of time the I-130 was pending (4 years), which means the beneficiary's age would be deemed to be 20.

Unfortunately, in interpreting the CSPA language referring to the number of days that a petition is pending, both agencies instruct that this calculation is made by counting only the days that elapse between the date the I-130 is filed and the date it is adjudicated. Any additional time that is accrued while an adjustment or visa application is being processed and decided is not counted. (For a broader interpretation, see Tapia-Ruano and Berg, "Special Rules for Children of LPRs and Other Child Derivatives Under the Child Status Protection Act of 2002," *AILA Immigration Law Today*, Oct. 2002, p. 625.)

Both agencies state that the law requires that the beneficiary who wants to take advantage of this provision of the law must apply for adjustment of status or an immigrant visa within one year of the date that the priority date became available. However, neither agency clarifies that beneficiaries who would otherwise benefit from the provisions of the CSPA but whose cases were more than one year old on the date of the CSPA's passage should be "grandfathered" by counting one year from the date of the passage of the CSPA.

To calculate the age of derivative children of diversity visa

(DV) applicants under the law, the State Dept. starts with the derivative beneficiary's age on the first day on which the principal applicant's selection number becomes eligible for visa processing. It will then subtract the amount of time that elapses between the first day of the DV mail-in application period for the relevant year and the date on the letter notifying the principal applicant that his or her application has been selected.

Although subject to revision, the State Dept.'s current position is that V visa applicants are not eligible for the benefits of this provision of the CSPA.

Unmarried Sons and Daughters of Naturalized Citizens. The unmarried sons and daughters of naturalization applicants can request that automatic conversion from second preference to first preference not occur at the time of their parent's naturalization. This option benefits the sons and daughters of Filipinos who are disadvantaged by automatic conversion.

For example, if a permanent resident files an I-130 for his 14-year-old unmarried Filipino son and then naturalizes, the son's immigrant category would automatically convert from the second preference to the first preference. For Aug. 2002, the second preference cutoff for Filipino unmarried sons and daughters of permanent residents is Dec. 3, 1993, but the first preference cutoff for Filipino unmarried sons and daughters of American citizens is Nov. 1, 1989. In this case, the son would likely request that his status not be automatically converted from second to first preference.

Asylees and Refugees. Children who turn 21 after an asylum application is filed but prior to its adjudication are still considered to be eligible for derivative asylum status. To qualify the child must be under the age of 21 on the date that his or her parent, the principal asylum applicant, files the asylum application. The child need not have been included as a dependent on the parent's application at the time of filing; however, he or she must have been included prior to the adjudication. The filing date is defined as the date on which the INS receives the asylum application. If the filing date in the INS's computerized Refugee Asylum Processing System (RAPS) and the receipt date stamped on the Form I-589 conflict, whichever date is earlier should be used for CSPA purposes.

Additional guidance will be forthcoming regarding the impact of the CSPA on procedures for granting asylum *nunc pro tunc* to children who turn 21 after the adjudication of a parent's asylum application but before the parent's application for adjustment of status.

Effective Date. The law applies to cases pending with the INS or the State Dept. on or after the date of enactment. This includes any petition already approved by the INS, but where no final action on the beneficiary's application for adjustment or for an immigrant visa has been taken.

The State Dept. specifies that, at present, a beneficiary whose immigrant visa application was denied prior to the date of enactment because he or she "aged out" or was otherwise found ineligible, cannot benefit from the provision of the law pertaining to the preference and diversity visa categories. Similarly, a beneficiary of an approved petition who never applied for a visa prior to the law's enactment because he or she "aged out" will receive no benefit under this provision. However, a beneficiary whose immigrant visa application was filed before the date of enactment but

was refused under Immigration and Nationality Act section 221(g) will receive the benefit of this provision as long as the application was otherwise pending on the date of enactment.

"The Child Status Protection Act" (Williams memo), Sept. 20, 2002; "H.R. 1209: Child Status Protection Act" (Langlois memo) Aug. 7, 2002; "Child Status Protection Act of 2002: ALDAC #1" (State Dept. cable), undated (posted on AILA InfoNet at Doc. No. 02090940 (Sept. 9, 2002)).

INS POSTPONES GRANTING BENEFITS TO THOUSANDS DUE TO CHANGE IN PROCEDURES FOR CONDUCTING FBI BACKGROUND CHECKS

The Immigration and Naturalization Service has cancelled naturalization swearing-in ceremonies that were scheduled for thousands of applicants during Dec. 2002, because of a change in the procedures used by the agency to conduct criminal background checks with the Federal Bureau of Investigation. The INS has also postponed issuance of lawful permanent residence and asylum because of this change.

Previously, when the INS sent name and date-of-birth information to the FBI for a criminal background check and the FBI did not affirmatively respond, the INS assumed that the check did not indicate a criminal record. Under the new policy, the INS is not to grant naturalization, permanent residency, or asylum until there has been an affirmative response from the FBI.

According to press reports, the new policy resulted in the cancellation of naturalization ceremonies for thousands of applicants across the country. The American Immigration Lawyers Association has reported that it was advised by the INS that a mechanism for obtaining automated responses from the FBI on an ongoing basis is mostly completed, but that there is a backlog of cases that still need FBI clearances.

Litigation

DISTRICT COURT ENJOINS REMOVALS TO SOMALIA – The federal district court in Seattle, Washington, has issued a temporary restraining order prohibiting the Immigration and Naturalization Service from removing Somali nationals in the United States to Somalia. The court also certified a nationwide class for purposes of the TRO, therefore prohibiting any removals from the U.S. to Somalia. The TRO is in effect until the court considers the petitioners' motion for a preliminary injunction, which is scheduled to be heard on Jan. 14, 2003.

The ruling comes in a habeas case filed on behalf of five Somali nationals subject to final orders of removal. The petitioners contend that the Immigration and Nationality Act does not authorize their removal to Somalia, because the government of Somalia has not indicated any intent to accept them. In a Minnesota case that presented the same issue earlier this year, a federal district court held that section 241(b)(2) of the INA requires the acceptance of the receiving country in all cases of removal, and that decision is now on appeal before the U.S. Court of Appeals for the Eighth Circuit. *Jama v. INS*, No. 01-1172, 2002 WL 507046 (D. Minn. Mar. 31, 2002).

In issuing a TRO, the court found that the petitioners made a strong showing of likely harm were they to be removed to Somalia.

The court noted that the INS "by its own submission, demonstrates that Somalia is a war-torn country under strife with no government in control." While the government cited deteriorating conditions in Somalia since Sept. 11, 2001, and indications that terrorists are present there as reasons for removing Somalis from the U.S. at the present time, the court found that these factors "weigh in favor of Petitioners' interest in not being returned to Somalia." The court also concluded that the petitioners demonstrated a strong likelihood of success on the merits.

The court rejected the government's jurisdictional arguments against the TRO. The court found that section 242(f)(1) of the INA, which restricts the authority of courts "to enjoin or restrain the operation of the provisions" of specified sections of the INA, to be inapplicable to this case. The court reasoned that the petitioners in this case do not seek to enjoin the operation of section 241(b), but rather allege that the INS is violating the statute. The court also found the jurisdictional restriction outlined in INA section 242(g) to be inapplicable, noting the narrow construction that the Supreme Court gave to this section in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

In certifying a nationwide class, the court first noted that in habeas cases a class should generally be more narrowly drawn, to include only individuals under the custody of the director of the detention facility where the petitioner is held. However, the court found that a nationwide class is appropriate where the attorney general may properly be considered the custodian. In this case, the INS did not reveal the location of putative class members, despite a Freedom of Information Act request from the petitioners and questions from the court. The court therefore concluded that it is appropriate to consider the attorney general the custodian and to certify a national class.

Ali Ali v. Ashcroft, No. C02-2304P (W.D. Wash. Dec. 10, 2002).

9TH CIRCUIT RULES INS CAN REQUIRE BOND TO ENSURE COMPLIANCE WITH AN ORDER OF SUPERVISION

The U.S. Court of Appeals for the Ninth Circuit has ruled that the Immigration and Naturalization Service may require a noncitizen to post a bond to ensure his or her compliance with an order of supervision.

Persons are released under an order of supervision when they are subject to a final order of removal that the INS is unable or unwilling to execute. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court ruled that the INS is not authorized to detain noncitizens subject to final removal orders once removal is no longer reasonably foreseeable. In this case, the petitioner was released from custody, but the INS required that he post a \$10,000 bond as a condition of that release. The petitioner argued that the INS had no authority to require a bond because the statute did not authorize it and because the INS could not continue to detain him in light of *Zadvydas*. However, the court concluded that, where (as in this case) the amount of the bond is reasonable and does not prevent the noncitizen's release, the INS may require it.

The petitioner in this case, a Mr. Doan, is a Vietnamese national who was ordered removed to Vietnam because of two felony convictions. Vietnam refused to accept his return, and when the INS continued to detain him he filed a habeas petition in district court. The district court denied relief, and Doan appealed. While

his appeal was pending, the Ninth Circuit decided *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *amended sub nom. Ma v. Ashcroft*, 257 F.3d 1095 (2001), finding that section 241 of the Immigration and Nationality Act does not authorize detention under a final removal order where removal is not reasonably foreseeable. The appeals court vacated the district court ruling in Doan's case and remanded it to the district court in light of *Ma*. The case was then held in abeyance with the agreement of the parties pending the Supreme Court's review of *Ma*, which ultimately resulted in the *Zadvydas* decision. While the parties awaited the High Court's decision, the INS agreed to release Doan from custody, subject to payment of a \$10,000 bond. Doan's family immediately paid the bond.

After the Supreme Court issued the *Zadvydas* decision, Doan sought an injunction from the federal district court to require the INS to return the \$10,000. As noted above, he argued that the agency could not impose a bond when it no longer had authority to detain him. The district court concluded that the imposition of bond as a condition of release was within the attorney general's authority under the statute, and Doan appealed.

On appeal, the court noted that the Supreme Court in *Zadvydas* found that under INA section 241, the INS could impose reasonable conditions on release and supervision, and that the violation of such conditions could result in further detention. The opinion also cited with approval the regulations that the attorney general promulgated to implement the statute, which expressly authorize imposition of a bond as a condition of release. 8 C.F.R. § 241.5(b). The Ninth Circuit distinguished *Shrode v. Rowoldt*, 213 F.2d 810 (8th Cir. 1954), which had found imposition of a bond not authorized by the INA, because the ruling predated the attorney general's regulation and the Supreme Court's interpretation of the statute in *Zadvydas*.

In upholding the attorney general's authority to impose bond, the court noted that "serious questions may arise concerning the reasonableness of the amount of bond if it has the effect of preventing an alien's release." In this case, however, the court held that there was no question concerning the reasonableness of the bond. *Doan v. INS*, No. 01-56784 (9th Cir. Nov. 27, 2002).

9TH CIRCUIT FINDS FAILURE TO SERVE NOTICE OF HEARING ON ATTORNEY VIOLATES DUE PROCESS – The U.S. Court of Appeals for the Ninth Circuit has ruled that the Board of Immigration Appeals violated due process by refusing to grant a motion to reopen an *in absentia* deportation order, in a case where neither the respondent nor his attorney received notice of the hearing. The decision is based in part on the fact that the Order to Show Cause initiating deportation proceedings was served on the respondent's attorney, and in part on ambiguities in the advisals contained in the OSC from which the respondent could reasonably conclude that notice of the hearing would be sent to his attorney.

The respondent in this case, a Mr. Dobrota, is a Romanian citizen who was admitted to the United States as a visitor in 1993 and subsequently applied for asylum. While the application was pending, Dobrota moved his residence from Garden Grove to Concord, California, without informing the Immigration and Naturalization Service. However, the attorney representing him in the asylum case continued to receive notices regarding the case. In

1994 the INS denied the asylum application, and in July 1995 the agency issued an OSC against Dobrota. The INS sent the OSC by certified mail both to the attorney and to the Garden Grove address that Dobrota had listed on the asylum application. Because he had moved, Dobrota did not receive the OSC, but his attorney did receive the copy mailed to him.

In Oct. 1995, the immigration court mailed a notice of a deportation hearing to the Garden Grove address, which was returned to the court with "attempted, unknown" stamped on the envelope by the Postal Service. The court did not mail the notice to Dobrota's attorney, apparently because he had not filed an EOIR-28 Notice of Appearance form with the court. When Dobrota failed to appear for the hearing, he was ordered deported *in absentia*. The INS then served notice of the deportation order on Dobrota's attorney.

Shortly after learning of the deportation order, Dobrota's attorney filed a motion to reopen on his behalf, together with an EOIR notice of appearance form. The immigration judge denied the motion by checking off all the boxes on a pre-printed summary decision form. On appeal, the BIA remanded the case to the IJ for further explanation of the decision. The IJ then issued a written decision, explaining his reasons for denying the motion. The IJ found that service of the notice on Dobrota's most recent address was proper, and that service of the notice on Dobrota's attorney was not required because the attorney had not filed a notice of appearance form with the immigration court. On appeal the BIA upheld this ruling and dismissed the appeal, and Dobrota then filed a petition for review with the court of appeals.

In making its ruling, the Ninth Circuit noted that "to comport with due process requirements, the notice afforded aliens about deportation proceedings must be reasonably calculated to reach them." Thus, due process does not require that a noncitizen have actual notice of the hearing, and generally mailing a notice of hearing to an individual's most recent address is sufficient.

The court held, however, that in this case there were several factors that could reasonably have led Dobrota to believe that by providing his attorney's name and address with the asylum application he had adequately ensured that his attorney would receive future notices. First, the OSC was mailed to Dobrota's attorney, and that was how Dobrota learned of it in the first place. Second, the OSC itself contains ambiguous advisals which state that "[a]ny notices will be mailed only to the last address provided by you. If you are represented, notice will be sent to your representative." Based on these circumstances, the court concluded that it was reasonable for Dobrota to understand that future notices would be sent to his attorney.

Concluding that the BIA's denial of the motion to reopen was arbitrary and contrary to due process standards, the court granted the petition for review and remanded the case.

Dobrota v. INS, No. 01-71266 (9th Cir. Dec. 6, 2002).

9TH CIRCUIT FINDS THAT IJ VIOLATED DUE PROCESS BY DENYING A RESPONDENT OPPORTUNITY TO PRESENT EVIDENCE – The U.S. Court of Appeals for the Ninth Circuit has ruled that an immigration judge failed to provide a respondent in an asylum case a full and fair hearing and a reasonable opportunity to present evidence on his own behalf, in violation of the due process clause of the Fifth

Amendment. The Ninth Circuit's finding turned on an "off the record" discussion between the IJ and the respondent in which the latter was advised that he had no case. The ruling comes on a petition for review of the decision by the Board of Immigration Appeals upholding the IJ's denial of a motion to reconsider an order of deportation.

The respondent in this case, a Mr. Cano, is a Guatemalan national who was placed in deportation proceedings in 1996. At his first hearing he represented himself and asked for the opportunity to apply for asylum. In so doing, he attempted to present Spanish language documents to support his application, but the IJ informed him that the documents must be translated into English and copied for the court and the INS. The IJ continued the case to give Cano the chance to produce the translated documents.

At the second hearing, the IJ presented Cano with the Dept. of State's country report for Guatemala, which showed that peace accords had been entered between the guerrillas and the Guatemalan government. The IJ entered this document into evidence and then asked Cano what would happen to him if he returned to Guatemala. Cano replied that he had "no certainty." The IJ then went off the record. On returning to the record, the IJ asked, "Do you want to proceed with your application even though I informed you, while we were off the record, that I believe you have no basis for a claim to asylum? Do you wish to proceed with your claim?" After a brief discussion that did not address the merits of the claim, Cano stated "that's fine," and his asylum application was withdrawn. Subsequently, with the assistance of an attorney, Cano filed a motion to reopen, arguing that he had not intended to withdraw the asylum application. The IJ denied this motion. Cano then filed a motion for reconsideration of the denial, arguing that he was denied the opportunity to present evidence and that his due process rights were violated. The IJ also denied this motion, and Cano appealed this denial to the BIA. When the BIA affirmed the IJ's decision, Cano filed a petition for review with the court of appeals.

In its ruling on the appeal, the Ninth Circuit found that the IJ did not provide Cano with an opportunity to present testimony or evidence on the record, before holding an off-the-record discussion with him. The only aspect of the off-record discussion reflected in the record is the question quoted above, in which the IJ expressed his belief that Cano did not have an asylum case. After that discussion, when the IJ went back on the record, "Cano was presented with the Hobson's choice of proceeding with a claim the decision-maker had labeled as baseless, or dropping his claim and receiving six months to make departure arrangements." This, the court found, deprived Cano of "a meaningful option to continue the asylum hearing because he knew that the IJ had already decided his claim had 'no basis.'"

Moreover, because Cano "appeared pro se, the IJ had a duty to 'fully develop the record'" (quoting *Jacinto v. INS*, 208 F.3d 725, 733-34 (9th Cir. 2000)). The IJ, the court found, failed to do this and instead pressured Cano to drop his claim. The court found that the IJ also failed to adequately explain hearing procedures to Cano and failed to give Cano a meaningful opportunity to review or object to the State Dept. report.

The court noted that to demonstrate a due process violation, Cano must establish prejudice, which requires a showing that

"the IJ's conduct 'potentially [affected] the outcome of the proceedings'" (quoting *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000)). Here, while Cano was able to submit documents in support of his motion to reopen, he was denied the opportunity to present oral testimony at a hearing. The court found that "[t]his structural error denied Cano the basic opportunity to create a full and complete record susceptible of appeal and review, and it puts him in the impossible position of having to 'produce a record that does not exist'" (quoting *Perez-Lastor v. INS*, 208 F.3d 733, 782 (9th Cir. 2000)). Accordingly, the court found that Cano established a due process violation, it granted his petition, and it remanded the case for a hearing.

Cano-Merida v. INS, No. 01-71423 (9th Cir. Nov. 22, 2002).

BARAHONA-GOMEZ: COURT APPROVES SETTLEMENT IN CLASS ACTION FOR SUSPENSION APPLICANTS

Federal District Court Judge Claudia Wilken has approved the settlement agreement in *Barahona-Gomez v. Ashcroft*, a class action lawsuit that challenged the actions of Executive Office for Immigration Review officials purporting to implement the 4,000-person cap on suspension/adjustment grants imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Under the settlement, class members in the Ninth Circuit who were denied suspension under the "stop-time rule," but who could have been granted suspension prior to the rule's Apr. 1, 1997, effective date, will be able to have their cases decided without regard to the stop-time rule. Judge Wilkin signed the order approving the settlement on Dec. 18, 2002, and the agreement will become effective on Jan. 17, 2003.

This litigation challenged directives that were issued by then-Chairman Paul W. Schmidt of the Board of Immigration Appeals and Chief Immigration Judge Michael J. Creppy on Feb. 13, 1997. These directives instructed the BIA and the immigration courts not to grant further suspension applications pending additional guidance. These officials issued the directives because of their concern that, under their interpretation of IIRIRA section 309(c)(7) (which established the aforementioned yearly cap of 4,000 on the number of persons who can adjust to lawful permanent residence by means of suspension of deportation), the EOIR had nearly reached the cap for the fiscal year that began on Oct. 1, 1997. The directives had the most severe impact on applicants served with an Order to Show Cause (OSC) before accumulating seven years' continuous physical presence in the United States, which is a requirement for suspension applications. For these individuals, the directives imposed more than a mere delay in the resolution of their cases. They faced the loss of their eligibility for suspension, since under the BIA's interpretation of IIRIRA section 309(c)(5) they would no longer be eligible once the stop-time rule took effect on Apr. 1, 1997.

Soon after, the plaintiffs in *Barahona* filed suit in federal district court, seeking injunctive relief against the postponement of their cases. On Mar. 28, 1997, the district court issued a preliminary injunction and provisional class certification for individuals who may have been ordered deported after being denied suspension based on IIRIRA section 309(c)(5). Six months later, the court modified the injunction to require the government to notify class members when their suspension applications are denied

based on the new rule for calculating accumulated continuous physical presence. The government appealed both rulings, and the Ninth Circuit ultimately upheld the injunction (see "9th Circuit Affirms Preliminary Injunction in Class Action Case for Suspension Applicants," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 10). The parties then began settlement discussions, resulting in the settlement.

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

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

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

(a) no IJ decision has been issued;

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

(c) the IJ granted suspension after Apr. 1, 1997, and the Immigration and Naturalization Service filed a notice of appeal, motion to reconsider, or motion to reopen challenging the individual's eligibility for suspension based on the stop-time rule.

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

2. Individuals whose cases were pending at the BIA (either on direct appeal from the IJ decision, or on a motion to reopen) between Feb. 13, 1997, and Apr. 1, 1997, where the notice of appeal (or the motion to reopen) was filed on or before Oct. 1, 1996, and which were, or would be (but for the settlement agreement), denied on the basis of the stop-time rule, whether or not the decision of the BIA denying suspension solely on the basis of the stop-time rule has already been issued (note that individuals who are otherwise class members because their case was pending at the BIA between Feb. 13, 1997, and Apr. 1, 1997, but whose notice of appeal (or motion to reopen) to the BIA was filed after Oct. 1, 1996, are not eligible for relief, unless they fall under another category of those eligible). The agreement clarifies that this provision is not intended to bar relief to individuals who are eligible for "repapering" to apply for cancellation of removal, and that cases that have been administratively closed for repapering or for any other reason are considered "pending" for purposes of the settlement.

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

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

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

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

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

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

The EOIR is to identify eligible class members and reopen

their cases as described above within six months of the settlement's effective date, Jan. 17, 2003. In addition, by Feb. 16, 2003, the EOIR is to provide plaintiffs' counsel with a list of all identified class members, as well as an indication whether the agency considers that individual class members are eligible for relief under the settlement.

Class members who are subject to final deportation orders but are eligible to apply for renewed suspension under the settlement may file a motion to reopen their case to apply for renewed suspension. This will be necessary in cases where the BIA or the IJ will not, on their own, be reopening the case. Principally, this will be an issue in cases where a motion to reopen has already been denied. This motion is not subject to the normal time and number limitations on motions to reopen, nor does it require a filing fee. However, the motion to reopen must be filed within 18 months of the date that an advisory statement announcing and describing the settlement is published in the Federal Register, which is to occur by Feb. 16, 2003 (the 18-month period will be extended for an additional 6 months if at least one class member files such a motion within the last 6 months of the 18-month period).

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

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

Barahona-Gomez v. Ashcroft, No. C97-0895 CW (N.D.Cal., settlement approved Dec. 18, 2002).

Employment Issues

JUDGE REFUSES TO ALLOW DISCOVERY INTO PLAINTIFF'S IMMIGRATION STATUS IN INVOLUNTARY SERVITUDE CASE – A federal magistrate judge in New York refused to allow the defendant to conduct discovery into a worker's immigration status in a case involving alleged violations of the Alien Tort Claims Act (ATCA). The case also involves allegations of illegal trafficking in persons and involuntary servitude.

The plaintiff, Topo Pushpa, sued her employers, alleging that they recruited her in India to come to the United States to perform domestic labor. On her arrival, they confiscated her passport and paid her the equivalent of 22 cents per hour during her first 8 months of employment. For her remaining 17 months of service, she was paid a total of \$50.

During discovery, the defendants indicated that they intended to inquire into the plaintiff's immigration status. In response, she moved to have a protective order issued under Rule 26(c) of the Federal Rules of Civil Procedure, which allows a judge to limit the scope of discovery "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense."

The court determined that the plaintiff's immigration status in this case is not material to any aspect of the defenses that might be raised, but relates only to collateral issues. Following the reasoning of other courts that have rejected defendants' attempts to inquire into plaintiffs' immigration status in wage-and-hour cases brought under the Fair Labor Standards Act, the judge granted the protective order. In so doing, he specifically recognized that "[t]he potential danger of deterring a plaintiff from having her day in court by inquiring into a non-relevant matter such as her immigration status is precisely the type of 'oppression' Rule 26 (c) [of the Federal Rules of Evidence] was designed to prevent."

For a discussion of other cases where courts have rejected defendants' attempts at conducting discovery into workers' immigration status, see "*Hoffman*: Lower Courts Limit Impact of High Court's Decision Barring Undocumented Worker from Receiving Back Pay," IMMIGRANTS' RIGHTS UPDATE, May 30, 2002, p. 8, and "Courts Continue Rejecting Defendants' Post-Hoffman Inquiries Into Plaintiffs' Immigration Status," IMMIGRANTS' RIGHTS UPDATE, Oct. 21, 2002, p. 10.)

Topo v. Dhir, 210 F.R.D. 76 (S.D. N.Y. 2002).

OCAHO RULES PERSONS WITH TPS CANNOT BRING CITIZENSHIP-BASED DISCRIMINATION CLAIMS UNDER IRCA; AGENCY HAS JURISDICTION OVER NATIONAL ORIGIN-BASED DOCUMENT ABUSE CLAIMS

– An administrative law judge in the Office of the Chief Administrative Hearing Officer (OCAHO) has ruled that an individual who obtained work authorization through the temporary protected status (TPS) program is not a "qualified individual" under the Immigration Reform and Control Act's (IRCA's) antidiscrimination provisions (8 U.S.C. § 1324b) and is therefore not entitled to bring a claim for citizenship-status discrimination or for document abuse based on citizenship status. The ALJ also determined that a document abuse claim based on national origin "is not a form of national origin discrimination cognizable under Title VII," and OCAHO therefore has jurisdiction over those claims. ("Document abuse" refers to illegal and discriminatory actions or practices engaged in by employers with respect to documents presented by job applicants or employees.)

At the time she was hired, Gloria Ondina-Mendez, a Honduran national, presented an employment authorization document (EAD) that she had obtained through the TPS program. The EAD bore an expiration date of July 5, 2000. In May 2000, Congress extended the TPS program for another year, and the Immigration and Naturalization Service automatically extended the

expiration date on EADs to Dec. 5, 2000. Around July 5, 2000, the employer asked Ondina-Mendez to provide proof that her EAD had been extended, and later asked that she provide the actual EAD. Ondina-Mendez provided the employer with a Kansas identification card and a receipt showing that she had applied for renewal of her EAD. Nevertheless, she was fired. She then filed a charge under the IRCA, claiming that she had been discriminated against based on her citizenship status and national origin, and that the employer had committed document abuse.

The ALJ found that he did not have jurisdiction over either the citizenship-based discrimination claim or the citizenship-based document abuse claim because only a lawful temporary resident (as defined by 8 U.S.C. sections 1160(a) or 1255(a)) qualifies as a "protected individual" under the IRCA. Moreover, the ALJ found he lacked jurisdiction because the TPS program is established under a different section of the Immigration and Nationality Act (8 U.S.C. § 12549(a)). Accordingly, he dismissed those claims.

The only claim that the judge addressed on the merits was the claim of document abuse based on national origin. That claim was based on the employer's request that Ondina-Mendez produce a specific document—an EAD—to satisfy the requirements relating to employment eligibility verification. The judge rejected the employer's contention that he lacked jurisdiction because Ondina-Mendez could have pursued that claim under Title VII, finding that "OCAHO has exclusive, original jurisdiction to adjudicate [an] alleged national origin-based violation of section 1324(a)(6)." He dismissed the claim, however, because Ondina-Mendez failed to show discriminatory purpose or intent on the part of the employer.

This represents the first case to interpret the IRCA's document abuse provision since amendments to it were enacted by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. Prior to the IIRIRA's amendments, claimants alleging document abuse did not have to show an employer's intent to discriminate to establish liability, and an employer's simple refusal to accept a facially valid document or insistence upon more or different documents than required to establish work eligibility violated the law. The IIRIRA changed that by specifically imposing an intent requirement. As the judge determined here, an employer will not be found liable for document abuse if it can show that the request for more or different documents, or the refusal to accept documents that appear genuine on their face, "was made for legitimate reasons not attributable to discrimination."

Ondina-Mendez v. Sugar Creek Packing Co.,
9 OCAHO 1085 (Nov. 5, 2002).

Immigrants & Welfare Update

COURT INVALIDATES SSA RULE ON "NONWORK" SSNS FOR DRIVER'S LICENSE APPLICANTS – A federal district court in the District of Columbia has invalidated a Social Security Administration (SSA) rule that barred individuals from obtaining a "nonwork" Social Security number (SSN) in order to secure a state driver's license. The court held that the SSA rule was implemented without proper notice or opportunity for public comment, as required by the Administrative Procedures Act (APA).

Iyengar v. Barnhart was brought on behalf of eight individuals from Illinois and Alabama who were in the U.S. lawfully as nonimmigrants, but who did not have authorization to work. Alabama and Illinois are among the nine states that currently require an SSN as a condition of obtaining a driver's license, without providing an exception for those who are not eligible or have not been assigned such a number. (For a more complete description of current driver's license policies and exemptions from these rules, see the table, "State Driver's License Requirements," available on NILC's Web site at www.nilc.org.)

Prior SSA policy provided access to "nonwork" SSNs for lawfully present persons who need the numbers in order to obtain a driver's license. In Mar. 2002, however, the SSA revised its operating instructions to eliminate state driver's licenses as a "valid nonwork purpose" for which these individuals can receive nonwork SSNs. (See SSA's Program Operations Manual System (POMS) RM 00203.510. See also "Nonwork SSNs No Longer Available for Driver's License Applicants," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 14.) The court found that the SSA rule represents a "complete reversal" of the SSA's prior understanding of its regulations and contradicts 20 years of administrative common law permitting access to SSNs for this purpose. If the SSA wishes to implement this rule, the court declared, it must provide notice and an opportunity for public comment.

The court declined to address the plaintiffs' substantive challenges to the SSA policy. They had argued that the rule violates the Social Security Act, which requires the SSA to assign numbers "to any individual who is an applicant for or recipient of benefits under any program financed in whole or in part from Federal funds . . ." 42 U.S.C. § 405(c)(2)(B)(ii). The plaintiffs also asserted that the rule violates SSA regulations, which allow the agency to assign SSNs to an individual who is "legally in the United States but not under authority of law permitting him or her to engage in employment, but only for a valid nonwork purpose." 20 C.F.R. §422.104. These challenges, the court reasoned, could be brought after a notice and comment period.

At this time, it is not clear whether the SSA will appeal the decision or attempt to reissue the rule through proper procedures.

Iyengar v. Barnhart, 2002 U.S. Dist. LEXIS 22668
(Nov. 26, 2002).

The National Immigration Law Center . . .

. . . is a national public interest law firm whose mission is to protect and promote the rights of low-income immigrants. NILC staff specialize in the immigration, public benefits, and employment rights of immigrants. We serve an unusually diverse constituency of legal aid programs, pro bono attorneys, immigrants' rights coalitions, community groups, and other nonprofit agencies throughout the United States.

NILC's work is made possible by . . .

. . . income from foundation grants, publication sales, and tax-deductible contributions from individuals and groups. To make a contribution, please check one of the boxes provided, fill in the information requested at the bottom of this notice, and mail your check and this return form to NILC's Los Angeles office.

Enclosed is my contribution of . . . \$25 \$50 \$100 \$_____

To order IMMIGRANTS' RIGHTS UPDATE or other NILC publications . . .

- I wish to subscribe to IMMIGRANTS' RIGHTS UPDATE (subscription \$50/year - 8 issues)
- I wish to order the GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS (nonprofit agencies: \$45; others: \$75)
(California residents must add 8.25% sales tax to purchase total)
- Send me a NILC publications order form (also available at www.nilc.org/pubs/orderfrm.htm)

Total enclosed \$_____

YOUR NAME _____ ORGANIZATION _____

STREET ADDRESS _____ CITY/STATE/ZIP _____

PHONE NUMBER _____ FAX NUMBER _____

MAIL THIS FORM (PLEASE ENCLOSE PAYMENT) TO NILC'S LOS ANGELES OFFICE, C/O NILC PUBLICATIONS

NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010

Address correction requested