



Immigration Issues

NEW REGULATIONS FOLD INS INTO DHS, ADDRESS DIVISION OF IMMIGRATION JURISDICTION BETWEEN DHS AND DOJ - The U.S. Depts. of Homeland Security (DHS) and Justice (DOJ) have begun issuing regulations that implement the transfer of the functions of the Immigration and Naturalization Service from the DOJ to the DHS and delineate the manner in which jurisdiction over immigration matters—including the immigration justice system—is to be divided between the two departments. Under the Homeland Security Act of 2002, the INS ceased to exist on Mar. 1, 2003. The Executive Office for Immigration Review (EOIR), which includes the immigration courts and the Board of Immigration Appeals, remains within the DOJ.

Reorganization of Regulations. One new set of regulations, issued by the attorney general as a final rule without public notice or the opportunity for public comment, purports to simply divide existing regulations between those pertaining to the former INS and those pertaining to the EOIR. The commentary to the rule states that once this is done, the DHS secretary can then make substantive changes to INS rules and the attorney general can

make substantive changes to EOIR rules, and the two can consult each other when changes in those rules would affect both the EOIR and functions of the former INS. The justification claimed for issuing this rule as a final one is that it makes only "technical amendments to the organization, procedures and practices of the Department of Justice and reflects the transfer of functions contemplated by the Homeland Security Act of 2002."

The rule reorganizes title 8 of the Code of Federal Regulations by creating a new chapter V in 8 CFR and transferring or duplicating certain parts and sections to the new chapter V and to 28 CFR chapter I. The rule is not a paragraph-by-paragraph jurisdictional split; instead, it provides for substantial duplication of regulations, purportedly until each agency is able to issue its own. A result of this duplication in the regulations, their temporary nature, and the likelihood that the duplication will result in incorrect citation and conflicting policies is likely to be disorganization within the government and confusion for everyone who has to deal with the new system.

The new rule does reflect the attorney general's apparent intent to retain authority over certain immigration matters that, under the Homeland Security Act, may no longer be under his juris-

IN THIS ISSUE

IMMIGRATION ISSUES

New regulations fold INS into DHS, address division of immigration jurisdiction between DHS and DOJ ..... 1
Policy to detain asylum-seekers and apprehend Iraqis announced ..... 2
Ashcroft reverses Reno in Matter of R-A-; gender-based asylum rules in jeopardy ..... 3
INS fees raised back to prior levels ..... 3
2003 Federal Poverty Guidelines issued ..... 4

LITIGATION

9th Circuit remands motion to reopen in absentia hearing under IIRIRA ..... 4
9th Circuit finds filing of petition for review does not suspend deadline for voluntary departure granted by BIA ..... 5
6th Circuit finds indefinite detention of inadmissible noncitizens unlawful ..... 5

9th Circuit rules BIA violated due process by refusing to consider new evidence on appeal ..... 6
EOIR issues notice about settlement of class action for suspension of deportation applicants ..... 6

EMPLOYMENT ISSUES

Immigrant delivery workers found to be employees covered by federal minimum wage and overtime law ..... 7
Social Security Administration begins sending no-match letters for 2003 ..... 7
Office of Special Counsel announces request for proposals ..... 8

IMMIGRANTS & WELFARE UPDATE

Workforce Investment Act bill introduced in the House; Pres. Bush releases WIA reauthorization proposal ..... 8
District court enjoins Colorado's termination of immigrants' Medicaid eligibility ..... 9

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.

diction. According to the rule's summary, the Attorney General will retain "other functions related to immigration that are indigent to the functions of the Attorney General." Chapter I, part 1, sec. 103.37(g) specifically provides that precedent decisions of the BIA and the attorney general will have a binding effect on the DHS. Moreover, as the commentary to the new rule states, the rule also specifically provides that the DHS secretary "may refer cases or questions of law to the Attorney General for decision at any time. . . . At the same time, the Attorney General has specified the reservation of the parallel authority to refer cases to himself for decision at any time." It remains to be seen how the two departments will resolve any conflicting interpretations of law resulting from this new arrangement.

**Authority of and Delegation of Authority by the Secretary of Homeland Security.** A final rule issued by the DHS provides that the department secretary now has the authority formerly vested in the INS commissioner, and that the secretary may delegate that authority to any DHS official, officer or employee, or to any other employee of the U.S., to the extent allowed by law. This delegation can be by any means he chooses and need not be published in the Federal Register. Under the new rule, any U.S. employee to whom such authority is delegated may issue notices to appear. The rule also grants the DHS secretary new power to designate as an immigration officer any employee or officer of the DHS or of the U.S., or any senior or supervisory officer of such employee.

These provisions represent a significant expansion of who can exercise delegated authority compared to what the previous regulations provided for. Under the new rule, federal employees who have no training, experience, or expertise in immigration law may now be given authority to enforce it, and the DHS secretary may grant such authority without having to issue new regulations or even providing notification via the Federal Register. Furthermore, the DHS has chosen to issue this rule as a final one, justifying this maneuver by claiming that, since this set of regulations is related to agency organization and management, they do not constitute a "rule." Comments on the final rule may nonetheless be submitted.

Prior to the INS reorganization, the attorney general had already quietly assumed the authority to delegate immigration enforcement authority outside the INS. In an only recently disclosed Dec. 18, 2002, directive, he authorized the FBI to exercise the functions of immigration officers for the purpose of investigating, locating, and apprehending aliens who are in the U.S. in violation of the Immigration and Nationality Act or of any law or regulation regarding visas, alien admissions, and immigrant or nonimmigrant maintenance of status, as well for enforcing these statutes or regulations, including special registration. The attorney general's order did not appear in the Federal Register and came to light only after an anti-immigrant Web site disclosed that it had been issued.

**Freedom of Information Act and Privacy Act Procedures.** The DHS also has issued an interim final rule that provides for disclosure of agency records and information under the Freedom of Information Act and the Privacy Act. While this rule provides for disclosure comparable to what other federal administrative agencies are required to provide, it does not resolve a fundamental underlying problem in the Homeland Security Act itself. That legislation provides that unclassified information pertaining to

critical infrastructure need not be disclosed by the DHS if such information is voluntarily submitted to the agency. Critics fear that companies will take advantage of this provision—by volunteering information to the DHS—to shield themselves from scrutiny about practices they engage in that may negatively impact the environment and the public's health.

The DHS invoked a limited exception to the normally required notice and comment period which is to precede issuance of a final rule on the grounds that "for good cause" it has concluded that notice and comment would be "impracticable, unnecessary, or contrary to the public interest." Despite this, the DHS asked for comments about the interim final rule.

**Technical Amendments.** Another recently issued rule makes technical amendments to internal citations in 8 CFR chapter V.

68 Fed. Reg. 9,824–46 (Feb. 28, 2003) (reorganization of regulations); 68 Fed. Reg. 10,922–24 (Mar. 6, 2003) (authority of DHS secretary); 68 Fed. Reg. 4,056–69 (Jan. 27, 2003) (FOIA and Privacy Act procedures); 68 Fed. Reg. 10,349–61 (Mar. 5, 2003) (technical amendments).

#### **POLICY TO DETAIN ASYLUM-SEEKERS AND APPREHEND IRAQIS ANNOUNCED**

– The U.S. Dept. of Homeland Security (DHS) announced on Mar. 18, 2003, that it would begin detaining asylum-seekers from 33 countries with links to the Al Qaeda network and that detained persons would remain in government custody for the duration of their asylum processing. According to the Lawyers Committee for Human Rights, the new detention policy is being implemented against all asylum-seekers who attempt to enter the United States at borders and ports of entry and is not being applied to individuals who file for asylum affirmatively. Two days after the announcement of its new asylum-seeker detention policy, the DHS also announced that teams of agents from the Bureau of Immigration and Customs Enforcement (BICE) and the Federal Bureau of Investigation (FBI) would begin seeking out and detaining Iraqi nationals who are unlawfully present in the U.S. Both policies are part of the DHS's new "Operation Liberty Shield," whose stated aim is to increase security and prevent terrorism as the U.S. prosecutes its war against Iraq.

**Asylum Detention Policy.** The new detention policy is an extension of expedited removal (Immigration and Nationality Act sec. 235(b)), which is enforceable against any non-U.S. citizen who attempts to enter the U.S. without the appropriate documents or by using false documents. Such individuals are summarily returned to their countries of origin unless they express a fear of being persecuted upon being returned there. Individuals who articulate such a fear are screened by asylum officers to determine whether their fear meets a standard known as the "credible fear" standard. Those who are determined to meet this standard are then eligible to apply for asylum before an immigration judge.

The expedited removal provision requires that asylum-seekers be detained until they complete the initial credible fear screening. Once screened, they may be released from custody if their identity is confirmed, if they have ties to the community, and if they pose no risk to the public. The new policy requires that all newly arriving asylum-seekers from the 33 countries on the DHS's list be detained until they complete the asylum application process, which in many cases takes years. Moreover, the new policy does not distinguish between individuals who may pose a secu-

rity risk and those who do not.

According to the Lawyers' Committee for Human Rights, the DHS has confirmed that among the countries on the list of 33 are the following: Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Iran, Iraq, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Palestine (i.e., Gaza and the West Bank), Qatar, Somalia, Sudan, Syria, Thailand, Tunisia, Uzbekistan, and Yemen.

The stated rationale for the new policy is increased security. According to DHS Secretary Tom Ridge, "We just want to make sure that those who are seeking asylum, number one, are who they say they are and, two, are legitimately seeking refuge in our country because of political repression at home, not because they choose to cause us harm or bring destruction to our shores."

For anyone who might think that detaining asylum-seekers indefinitely based on their national origin is not good policy, the Lawyers Committee for Human Rights has provided a convenient way to register an objection to the policy via e-mail by going to the following URL: <http://capwiz.com/lchr/issues/alert/?alertid=1710526&type=An>.

**Iraqi Apprehensions.** The new apprehension policy is similar to the government roundup of Arab and Muslim noncitizens following the attacks of Sept. 11, 2001. Then, the government detained hundreds of persons from countries with links to Al Qaeda, many of whom were not in lawful immigration status. Many were detained for extended periods and then sent back to their countries of origin. Now the government is seeking out and detaining Iraqis whom it believes may sympathize with Iraqi president Saddam Hussein. The DHS said it is detaining Iraqi nationals who have been identified using a range of intelligence criteria as possibly posing a threat to the safety and security of the American people. According to the *Washington Post*, the DHS is unwilling to release further details about the criteria it is using to determine which Iraqis to detain because the operation is ongoing.

Participating in the operation are FBI agents, who are assisting officers of the BICE. Under a little publicized order signed by Attorney General John Ashcroft on Dec. 18, 2002, FBI agents may investigate, determine the location of, and apprehend non-U.S. citizens who are in the U.S. unlawfully or who have violated any other law or regulation relating to visas, admissions of noncitizens, or the maintenance of immigrant or nonimmigrant status. The order also allows FBI agents to enforce the special registration rules of 8 CFR sec. 246.1(f). (For more on the special registration program, see "DOJ Proposes Rules to Monitor Certain Nonimmigrants," IMMIGRANTS' RIGHTS UPDATE, July 29, 2002, p. 2). The attorney general's order was not published in the Federal Register and was not publicly disclosed at the time it was issued.

The BICE is the new department that serves as the primary investigative arm of the DHS. Its mission includes investigating a broad array of activities related to terrorism and other perceived threats to U.S. security, such as terrorists' financing, money laundering, illegal arms dealing, immigration fraud, and migrant smuggling.

**ASHCROFT REVERSES RENO IN MATTER OF R-A-; GENDER-BASED ASYLUM RULES IN JEOPARDY** – Attorney General John Ashcroft has

certified the decision of the Board of Immigration Appeals in *Matter of R-A-*, Int. Dec. 3403 (BIA), which denied asylum to a woman who fled Guatemala after her husband had brutalized her for 10 years and she was unable to obtain help or protection from Guatemalan police or courts. Ashcroft, who told the Senate Judiciary Committee of his decision on Mar. 4, 2003, said he plans to issue a new decision in the case. He also told the committee that the Depts. of Justice and Homeland Security are working together to revise asylum regulations that originally were issued to address the kinds of issues raised by *Matter of R-A-*.

Rodi Alvarado's asylum application took a bumper car-like ride through the legal system before reaching its final disposition. She had fled Guatemala in fear of her life, leaving behind her two children, after local police and courts there refused to intervene on her behalf against her abusive husband because they viewed her situation as a "domestic matter." Here in the U.S., she applied for asylum and the immigration judge granted it to her. The Immigration and Naturalization Service then appealed. Although it found her to be credible, the Board of Immigration Appeals reversed the IJ's decision. Then in Jan. 2001, during the closing days of the Clinton administration, Attorney General Janet Reno overturned the BIA's reversal of the IJ's decision. Now, finally, the present attorney general has reinstated the decision that the former attorney general overturned. He has done so under the authority of 8 CFR sec. 3.1(h), which provides that the BIA must refer to the attorney general any case he directs the BIA to refer to him.

The proposed regulations that are now being revised by the Depts. of Justice and Homeland Security were issued in late Dec. 2000 to address the issue of when and how gender-based abuses can be bases for granting asylum. These regulations have afforded protection to women who flee a broad range of serious human rights violations, including trafficking for prostitution, gang rape, honor killing, and domestic violence (see "INS Issues Proposed and Final Asylum Regulations," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p.1).

With regard to the revision of the proposed regulations, Justice Dept. spokesperson Jorge Martinez told the *Miami Herald*: "The final rule will not be limited to addressing gender persecution claims. What the regulation would do is provide a uniform set of standards for adjudication of a broad range of fairly common but difficult to interpret issues in asylum." He added that the review is still in its early stages.

These developments have not gone unnoticed by lawmakers on Capitol Hill. On Feb. 27, 2003, 49 members of the House of Representatives sent a letter to the attorney general expressing their support for women asylum-seekers, and now a second letter is being circulated through the House to gather even more signatures. A similar letter is circulating in the Senate. The contact for the latest House letter is Jennifer Stewart of Rep. Gregory Meek's office (D-NY). The contact for the Senate letter is Janice Kaguyutan of Sen. Ted Kennedy's office (D-MA).

**INS FEES RAISED BACK TO PRIOR LEVELS** – The Immigration and Naturalization Service has issued an interim rule returning its fees for applications and benefits to pre-Jan. 24, 2003, levels. The fees were lowered on that date as a result of a provision of the Homeland Security Act that eliminated section 286(m) of the Im-

migration and Nationality Act, which authorized the agency to include surcharges in its fees to recover the cost of services that the INS provides without fee, such as asylum and refugee processing (see "INS Reduces Fees for Immigration Services," IMMIGRANTS' RIGHTS UPDATE, Feb. 21, 2003, p. 9). Subsequently, Congress repealed this provision of the Homeland Security Act, in the Homeland Security Act Amendments of 2003. Accordingly, the INS has now returned all fees to their prior levels. The change was made immediately effective, as of the Feb. 27, 2003, date of publication of the interim rule in the Federal Register.

68 Fed. Reg. 8,989-92 (Feb. 27, 2003).

**2003 FEDERAL POVERTY GUIDELINES ISSUED** – The U.S. Dept. of Health and Human Services has issued updated federal poverty income guidelines that took effect Feb. 7, 2003. The guidelines, which serve as a basis for determining eligibility for many means-tested benefits, are updated yearly to reflect changes in the Consumer Price Index. Under the affidavit of support requirements created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sponsors seeking to immigrate family members must establish that they have an income of at least 125 percent of the federal poverty guidelines. The table below contains the new guidelines.

### 2003 Federal Poverty Guidelines

FAMILY UNIT SIZE	48 CONTIGUOUS STATES & D.C.	ALASKA	HAWAII
1	\$ 8,980	\$11,210	\$10,330
2	12,120	15,140	13,940
3	15,260	19,070	17,550
4	18,400	23,000	21,160
5	21,540	26,930	24,770
6	24,680	30,860	28,380
7	27,820	34,790	31,990
8	30,960	38,720	35,600
For each additional family member, add:			
	3,140	3,930	3,610

68 Fed. Reg. 6,456-33 (Feb. 7, 2002).

## Litigation

**9TH CIRCUIT REMANDS MOTION TO REOPEN IN ABSENTIA HEARING UNDER IIRIRA** – The Ninth Circuit Court of Appeals has reversed and remanded a case in which a woman was ordered removed in an in absentia removal hearing. In reversing the Board of Immigration Appeals, the court concluded that under section 240 of the Immigration and Nationality Act, individuals claiming that they did not receive a hearing notice have a lighter evidentiary burden when seeking to reopen an in absentia hearing than was the case in deportation proceedings prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

The case before the Ninth Circuit was that of Regina Salta,

who had voluntarily requested that the Immigration and Naturalization Service place her in removal proceedings so that she could apply for cancellation of removal. Salta appeared at her initial hearing before the immigration judge but was told the hearing would be continued because the court did not yet have her file. According to the INS, the agency sent a subsequent hearing notice, but neither Salta nor her counsel appeared for the continued hearing. At that hearing, the IJ ordered her removed.

INA sec. 240 provides that a respondent who receives proper written notice of a removal hearing but fails to attend the hearing must be ordered removed in absentia. The respondent may move to reopen the case and have such an order rescinded if his or her absence from the hearing was due to "exceptional circumstances" (defined as serious illness or the death of a family member), if the respondent can show that he or she did not receive notice of the hearing, or if the respondent can show that he or she was in custody and, through no fault of his or her own, could not attend the hearing. Salta claimed that she had not received notice of the hearing.

In moving to reopen her case, Salta did not file any documentation supporting her claim that she had not received notice of the continued hearing. Because Salta did not present evidence demonstrating that the INS notice had been improperly delivered, the IJ denied her motion, and the BIA affirmed the denial.

In affirming the denial of Salta's motion, the BIA relied on *In re: Grijalva*, 21 I. & N. Dec. 27 (BIA 1995), a case that applied former INA sec. 242(B), a statute governing deportation proceedings under pre-IIRIRA law. In *Grijalva*, the BIA stated that a presumption exists that public officers, including postal employees, properly discharge their duties. And in cases in which a hearing notice is sent by certified mail via the U.S. Postal Service and proof exists that delivery was attempted and the addressee was left notification of the attempted delivery of the certified mail, there is a strong presumption of effective service. Such a presumption can be overcome with proof of non- or improper delivery. However, to support such a defense, the individual must present substantial, probative evidence from the Postal Service, third party affidavits, or other similar evidence showing that delivery was improper.

Noting that no court had yet considered the evidentiary requirements for establishing, in the context of removal proceedings, that a respondent did not receive the required hearing notice, the Ninth Circuit pointed out that under the pre-IIRIRA statute notices had to be delivered by certified mail. The current statute requires only that the individual receive written notice. According to the court, while it is still proper to presume that postal officers discharge their duties properly, sending notice by regular mail does not raise the same strong presumption of proper delivery as sending it by certified mail would. Moreover, the court indicated that the requirements under *Grijalva* make sense only if certified mail is employed, because only then does documentary evidence exist to show whether or not notice was actually delivered.

The court was also persuaded by the fact that, since Salta

herself initiated the proceeding, she had every reason to appear for her hearing. The court therefore held that the IJ and the BIA had abused their discretion by applying the *Grijalva* evidentiary requirements to Salta's motion to reopen. Accordingly, the court remanded the case to the BIA with instructions to remand to the IJ to allow both Salta and the INS to supplement the case record and to conduct an evidentiary hearing to determine whether Salta should be permitted to reopen her application for cancellation of removal. *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002).

#### **9TH CIRCUIT FINDS FILING OF PETITION FOR REVIEW DOES NOT SUSPEND DEADLINE FOR VOLUNTARY DEPARTURE GRANTED BY BIA –**

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit has ruled that when the Board of Immigration Appeals issues a final order including a grant of voluntary departure, the time for departure is not suspended by the filing of a petition for review. The panel concluded that the court's prior decision in *Castillo-Aragon v. INS*, 852 F.2d 1088 (9th Cir. 1988) (en banc), has been undermined by changes in the law enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In *Castillo-Aragon*, the court found that when a petition for review is timely filed before the BIA's grant of voluntary departure has expired, the BIA's order, including the grant of voluntary departure, is stayed and does not take effect unless and until the order is upheld on appeal.

The serious consequences of failing to depart before the expiration of voluntary departure include the entry of an order of removal and bars to future discretionary relief, including adjustment of status.

The panel found that several changes in the law subsequent to the ruling in *Castillo-Aragon* serve to undermine that decision. Among other things, the decision in *Castillo-Aragon* was based on the fact that the court would lose jurisdiction over the petition for review if the petitioner departed the United States; after the IIRIRA, that is no longer the case. *Castillo-Aragon* was also based on the fact that under pre-IIRIRA law the filing of a petition for review automatically stayed the BIA's order pending resolution of the appeal. That also was changed by the IIRIRA, and the BIA's order now is stayed only if the court decides to grant a stay.

Because in this case the court had denied a stay, the panel majority did not address whether the period of voluntary departure would be suspended under its ruling if a stay is granted. Judge Martha Berzon wrote a separate concurrence to emphasize her conviction that if the court grants a stay of the removal order, it has equitable jurisdiction to stay the availability of voluntary departure. *Zazueta-Carrillo v. Ashcroft*, No. 02-70259 (9th Cir. Mar. 13, 2003).

#### **6TH CIRCUIT FINDS INDEFINITE DETENTION OF INADMISSIBLE NONCITIZENS UNLAWFUL –**

The U.S. Court of Appeals for the Sixth Circuit has ruled that the Immigration and Nationality Act does not authorize the indefinite detention of non-U.S. citizens who have been found inadmissible and ordered removed from the U.S. The en banc decision applies the Supreme Court's ruling in *Zadvydas v. Davis*, 533 U.S. 678 (2001) (finding that sec. 241 of the INA, enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) does not authorize the in-

definite detention of noncitizens who have been found deportable and ordered removed), to excludable noncitizens. The court concluded that INA sec. 241 does not authorize detention of noncitizens under a final order of exclusion once removal is no longer reasonably foreseeable, and that after a six-month period of detention there is a presumption that removal is not reasonably foreseeable.

The Sixth Circuit's decision was made in two appeals, heard together, of district court decisions denying the petitioners' habeas corpus petitions. Both petitioners, a Mr. Rosales and a Mr. Carballo, are Cubans who were paroled into the U.S. as part of the Mariel boatlift in 1980. During the 1980s, both petitioners were convicted of multiple criminal offenses and as a result had their parole status terminated, and each ultimately received a final order of exclusion. The Immigration and Naturalization Service was not able to deport them to Cuba, and both petitioners spent numerous years in INS detention.

Rosales filed a habeas petition in 1998, after he had been denied release pursuant to the Cuban Review Plan. The district court denied the petition, concluding that INA sec. 241 authorized the INS to detain Rosales indefinitely and that the statute did not violate his constitutional rights. Rosales appealed this decision to the Sixth Circuit, and a panel of the appellate court reversed the district court in a Jan. 2001 ruling. After the Supreme Court issued its decision in *Zadvydas*, the government petitioned the Court for certiorari in Rosales's case. In May 2001, Rosales was released on parole, subject to conditions of supervision. In Dec. 2001, the Supreme Court vacated the Sixth Circuit decision and remanded Rosales's case for consideration in light of *Zadvydas*.

Carballo filed a habeas petition in federal district court in Texas in 1990. The district court denied the petition, finding Carballo's detention was authorized by former INA sec. 237(a) and that the statute was constitutional. In 1998, Carballo filed a successive habeas petition in federal district court in Tennessee. The district court denied the petition, finding that the petition raised the same claims as Carballo's first petition and that under the doctrine of "the law of the case," the court was barred from considering the successive petition. Carballo appealed this decision to the Sixth Circuit, and in Oct. 2001 a panel of the appellate court upheld the district court decision. In Nov. 2001 the Sixth Circuit sua sponte vacated the panel decision and granted en banc review of the case. Subsequently, the court scheduled Rosales's case to be heard at the same time.

In the en banc ruling, the court first affirmed its jurisdiction over the habeas petitions, noting that the Supreme Court in *INS v. St. Cyr*, 533 U.S. 289 (2001), held that habeas jurisdiction under 28 U.S.C. sec. 2241 was not repealed by the IIRIRA. The en banc court also rejected the government's argument that Rosales's appeal is moot because he was released from detention while the case was pending. The court found that the case is not moot, because Rosales remains subject to restrictive conditions and because the government could revoke his parole and redetain him at any time and "for almost any reason."

The court also rejected the contention that the denial of Carballo's first habeas petition bars the court from considering his successive petition. The court found that, although the second petition did raise the same claims as the first one, an inter-

vening change in the law warranted consideration of the merits of the petition.

On the merits, the court first determined that the statute applicable to the petitioners' detention is the provision enacted as part of the IIRIRA (INA sec. 241) rather than the statute that authorized their detention under pre-IIRIRA law (former INA sec. 237(a)). In rejecting the government's contention that pre-IIRIRA law should apply, the court noted that the petitioners are not challenging the legality of their original detention but rather the government's authority to continue to detain them now. The court concluded that INA sec. 241(a)(6) governs the petitioners' continued detention.

Examining the plain language of this provision, the court found no basis to distinguish the Supreme Court's interpretation of the statute in *Zadvydas* from the cases of the petitioners. The statute "does not draw any distinction between the categories of removable aliens; nor would there be any statutory reason to interpret 'detained beyond the removal period' differently for aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability," the court held (quoting INA sec. 241(a)(6)). The court also concluded that to interpret the statute to authorize the indefinite detention of excludable noncitizens would raise serious constitutional concerns.

For these reasons, the court adopted the same interpretation of sec. 241(a)(6) as the Supreme Court used in *Zadvydas*. Under this interpretation, six months is considered a presumptively reasonable period for the detention of a noncitizen with a final order of exclusion. After this period, once the noncitizen presents "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing" (quoting *Zadvydas*, 533 U.S. at 701). The court concluded that, although the government presented evidence of continuing negotiations between the U.S. and Cuba over the return of Cuban nationals, it failed to show a significant likelihood that the petitioners would be removed in the reasonably foreseeable future.

*Rosales-Garcia v. Holland*, No. 99-5698 (6th Cir. Mar. 5, 2003).

#### **9TH CIRCUIT RULES BIA VIOLATED DUE PROCESS BY REFUSING TO CONSIDER NEW EVIDENCE ON APPEAL**

—The U.S. Court of Appeals for the Ninth Circuit has issued an en banc decision finding that the Board of Immigration Appeals violated the due process rights of a respondent by refusing to consider new evidence before denying his application for suspension of deportation. The decision turns in part on the fact that at the time the BIA issued its decision it had, and exercised, fact-finding authority independent from that of immigration judges. The decision also reflects the particular circumstances of the case.

The respondent in this case, a Mr. Ramirez-Alejandre, is a Mexican national who entered the United States approximately 23 years ago. He had substantial equities, including a U.S. citizen daughter and five lawful permanent resident brothers. In 1990, he was placed in deportation proceedings, and at his deportation hearing in 1992 he applied for suspension of deportation. The IJ granted the application, finding that Ramirez-Alejandre had established that he was of good moral character and had seven years of continuous physical presence in the U.S., and that deportation would result in extreme hardship to both him and his

U.S. citizen daughter. The IJ also found that granting suspension was an appropriate exercise of discretion, describing Ramirez-Alejandre as "a role model" who "would be relegated to the grinding poverty of . . . Mexico without . . . any hope for anything in the future" were he to be deported. The INS appealed this decision to the BIA. Over the course of the eight years that the case was on appeal to the BIA, Ramirez-Alejandre on several occasions filed supplemental submissions of evidence to show additional hardship that would result from his deportation.

In 2000, the BIA issued a decision on the appeal. It upheld the IJ's rulings that Ramirez-Alejandre satisfied the good moral character and seven years' continuous physical presence requirements for suspension. However, the BIA found that he failed to establish that deportation would result in extreme hardship. In so ruling, the BIA stated that it did not consider the additional evidence submitted by the respondent while the case was on appeal because "this Board as an appellate body does not consider evidence submitted for the first time on appeal." Ramirez-Alejandre then filed a petition for review of this decision.

In ruling on the appeal, the court of appeals noted that, at the time of the BIA's ruling in this case, the BIA had authority to make factual determinations independent of those made by IJs. Moreover, under its precedent, the BIA was to determine whether a suspension applicant's deportation would result in extreme hardship based on the circumstances existing at the time of the BIA's ruling rather than being limited to the time of the initial application.

The court also found that the BIA's procedural practice left respondents with no clear guidance as to whether or how they could supplement the record on appeal. In some cases the BIA required the filing of a motion to reopen and in others it considered evidence submitted without such a motion. During the eight years that the appeal was pending, the Executive Office for Immigration Review imposed time and numerical restrictions on motions to reopen. Notably, in this case the BIA's refusal to consider the new evidence offered by Ramirez-Alejandre was not based on the form of his submission but rather on the "untrue" assertion that the BIA does not consider evidence submitted for the first time on appeal.

The court also found that the offered evidence was relevant and significant to the determination of extreme hardship and that it "unquestionably had the potential for likely altering the outcome under the BIA's own precedent" and Ninth Circuit case law concerning suspension of deportation. The court concluded that the BIA's failure to consider the evidence violated due process. The court remanded the case to the BIA to determine whether to consider the evidence that was offered, without applying the "categorical exclusion" that "this Board as an appellate body does not consider evidence submitted for the first time on appeal."

*Ramirez-Alejandre v. Ashcroft*, \_\_ F.3d \_\_,  
No. 00-70724 (9th Cir. Feb. 13, 2003).

#### **EOIR ISSUES NOTICE ABOUT SETTLEMENT OF CLASS ACTION FOR SUSPENSION OF DEPORTATION APPLICANTS**

—The Executive Office for Immigration Review has published a notice in the Federal Register, pursuant to the settlement in *Barahona-Gomez v. Ashcroft*, that starts an 18-month period during which class members may file motions to reopen their deportation cases, if they

need to do so. Therefore, the deadline for filing such motions is now Sept. 20, 2004. The EOIR is the federal agency that includes the immigration courts and the Board of Immigration Appeals.

*Barahona-Gomez* is a class action lawsuit that challenged the actions of EOIR officials who in Feb. 1997 issued directives that halted immigration judges and the Board of Immigration Appeals from granting suspension of deportation in new cases, based on their interpretation of the 4,000-person cap on suspension/adjustment grants imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). (For a detailed explanation of the *Barahona* settlement, see "*Barahona-Gomez*: Court Approves Settlement in Class Action for Suspension Applicants," IMMIGRANTS' RIGHTS UPDATE, Dec. 23, 2002, p. 8.) Under the settlement, class members in the Ninth Circuit who ultimately were or could be denied suspension under the "stop-time rule," but who could have had their suspension applications granted before the rule's Apr. 1, 1997, effective date, will be able to have their cases decided without regard to the stop-time rule.

The notice includes a general description of class members eligible for relief under the settlement. It states that individuals may be eligible for relief if they:

1. applied for suspension of deportation;
2. had their hearings take place within the jurisdiction of the Ninth Circuit;
3. had their cases scheduled for an individual hearing on the merits before an immigration judge between Feb. 13, 1997, and Apr. 1, 1997; or had their cases pending at the BIA between Feb. 13, 1997, and Apr. 1, 1997, and the Notice of Appeal had been filed with the BIA on or before Oct. 1, 1996;
4. had the "stop-time rule" (of IIRIRA § 309(c)(5)) as the basis for the IJ or the BIA denying or not adjudicating the application for suspension of deportation; and
5. for cases before an IJ, the IJ must have (a) reserved a decision or continued the hearing until after Apr. 1, 1997; (b) issued a decision denying or not adjudicating the application for suspension of deportation; (c) not yet issued a decision; or (d) granted suspension of deportation and the Immigration and Naturalization Service appealed the decision based upon IIRIRA sec. 309(c)(5).

The notice cautions that not all individuals who meet the above general description will qualify for relief. With the notice, the EOIR published an advisory statement that explains the factual situations which determine if an individual will qualify for relief under the settlement. More information regarding the settlement as well as the full settlement agreement is also available on the NILC Web site, [www.nilc.org](http://www.nilc.org). The full agreement is also available on the EOIR Web site: [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir).

68 Fed. Reg. 13,727-29 (Mar. 20, 2003).

## Employment Issues

**IMMIGRANT DELIVERY WORKERS FOUND TO BE EMPLOYEES, COVERED BY FEDERAL MINIMUM WAGE AND OVERTIME LAW** – A federal court in New York has ruled that more than 200 African immigrant delivery workers who were paid less than \$3 per hour were "employees," not independent contractors, and are therefore entitled to the federal minimum wage and overtime pay. The men worked for the

Manhattan stores of Duane Reade, a company that operates a large supermarket and drug store chain in the New York metropolitan area. The judge also determined that because Duane Reade and the corporations and individuals that supplied the workers are "joint employers," they are jointly liable for violations of the Fair Labor Standards Act and New York labor law.

Instead of hiring workers directly, Duane Reade paid two corporations and their principals (who are also defendants in the action) to hire the delivery workers at the rate of \$250 to \$300 per week per worker. Those entities then paid the workers whom they assigned to the Duane Reade stores a flat rate of \$20 to \$30 per day, despite requiring them to work 8 to 11 hours per day, 6 days a week. The store and the outsourcing company characterized the workers as "independent contractors" in order to evade the minimum wage and overtime protections mandated by federal and New York law.

The court applied an "economic reality test" in determining that the workers were employees of the store and the outsourcing company, not independent contractors. The court focused on the fact that the outsourcing entities hired, fired, transferred, and paid the delivery workers; that the workers were not required to make an up-front investment in their equipment and uniforms in order to be hired or assigned to a store; that the workers needed no special skills to find their way from the stores to the customers' homes, where they completed the deliveries; and that the plaintiffs' services constituted an integral part of the defendants' business. The judge concluded that "it is clear . . . that the delivery workers depend upon the [outsourcing entities] for the opportunity to sell their labor and are not in any real sense in business for themselves."

In concluding that Duane Reade was a "joint employer," the court focused on the workers' performance of "an integral service for the store in which they worked, [which enabled] Duane Reade to compete more effectively with mail order fulfillment companies and other drug stores by offering drug deliveries to its customers." The court also found that the delivery workers worked from the premises of the stores and assisted other workers in those stores with their regular tasks, such as bagging items at checkout counters, stocking shelves, providing security, and making inter-store deliveries. The court determined that the relationship between the store and the outsourcing entities was "so extensive and regular as to approach exclusive agency."

On Mar. 11, 2003, the court denied the defendants' motion for reconsideration.

*Ansoumana et al. v. Gristede's Operating Corp. et al.*, 2003 U.S. Dist. LEXIS 985 (Jan. 28, 2003), *reconsideration denied*, 2003 U.S. Dist. LEXIS 3470 (Mar. 11, 2003).

**SOCIAL SECURITY ADMINISTRATION BEGINS SENDING NO-MATCH LETTERS FOR 2003** – Starting the last week of Feb. 2003, the Social Security Administration began sending "no-match" letters to workers' home addresses, as it has in previous years; and it began sending no-match letters to employers in mid-March. The SSA sends no-match letters to a worker and his or her employer to notify them when the worker has not received credit for earnings in the previous tax year as reported by the employer on the W-2 form. When a W-2 contains a name or Social Security

number that does not match the SSA's records, the earnings withheld from the worker's pay for social security go into the SSA's Earnings Suspense File and the worker does not get credit for them. This withholding of credit can affect the worker's future retirement or disability benefits.

The SSA sent no-match letters to over 950,000 employers throughout 2002, and this created many problems for immigrant workers, their families, communities, and employers. In Dec. 2002, the SSA decided to change its policy regarding the no-match letter program for 2003. After realizing that a lot of the new information provided by employers in response to the 2002 no-match letters still contained discrepancies, or that many workers' accounts had already been corrected through some other method (e.g., workers dealt directly with the SSA to correct their account information), the agency has decided to roll back the number of no-match letters it sends out in 2003. This year, it will send no-match letters only to employers that have at least 10 employees whose information does not match the SSA's or who file W-2s in which mismatched records account for at least one-half of one percent of the total amount of earnings reported for tax year 2002. The SSA estimates that it will send out no-match letters to about 130,000 employers in 2003.

#### OFFICE OF SPECIAL COUNSEL ANNOUNCES REQUEST FOR PROPOSALS –

The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) has published a notice in the Federal Register requesting that interested parties submit funding proposals for fiscal year 2003–04. The OSC, an agency within the Civil Rights Division of the U.S. Dept. of Justice, provides grants to organizations that educate workers and employers about their rights and responsibilities under the antidiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. sec. 1324b.

The *due date* for grant proposal submissions is *Apr. 21, 2003*. The request for proposals was published Mar. 5, 2003.

Application forms may be obtained by writing or calling the U.S. Dept. of Justice, Civil Rights Division, Office of Special Counsel for Immigration Related Unfair Employment Practices, 950 Pennsylvania Avenue, N.W., Washington, DC 20530; tel. 202-616-5594 (TDD for the hearing impaired: 202-616-5525). Required forms are also available at OSC's Web site: <http://www.usdoj.gov/crt/osc>. For further information, contact the OSC's Lilia Irizarry at the telephone numbers listed above.

## Immigrants & Welfare Update

#### WORKFORCE INVESTMENT ACT BILL INTRODUCED IN THE HOUSE; PRESIDENT BUSH RELEASES WIA REAUTHORIZATION PROPOSAL –

Legislation to reauthorize the Workforce Investment Act (WIA) has been introduced in the House of Representatives. Authored by Rep. Howard "Buck" McKeon (R-CA), chairman of the House Subcommittee on 21st Century Competitiveness, the Workforce Reinvestment and Adult Education Act of 2003 (HR 1261) was introduced on Mar. 13, 2003, one week after President George W. Bush released an outline of his WIA reauthorization proposal.

While both proposals include some measures that would improve immigrants' access to WIA services, overall, they do not

go far enough in improving the program to better serve immigrants. Specifically, the proposals to create Personal Reemployment Accounts (PRAs) and grant waiver authority to states would drastically limit the few services that immigrants and limited English-proficient (LEP) persons currently receive.

**President Bush's Proposal.** The Dept. of Labor issued the outline of the Bush administration's recommendations on Mar. 7, 2003. It included the following proposals to increase immigrants' access to services:

- *Providing better access to training services.* One-stop centers, which are the local agencies that provide WIA services, have taken a "work first" approach that emphasizes job placement over skills training. This approach has benefited individuals considered most employable, at the expense of those who require intensive skills training. As a result, most immigrants have not been able to enroll in intensive and training services, including programs that provide English classes and occupational skill training. The Bush proposal would allow individuals to receive services that are "most appropriate for their unique needs." The proposal specifically identifies programs that integrate ESL and occupational training as allowable training activities. The proposal also provides a separate funding stream for the one-stop infrastructure so money can be focused on "meeting the needs of businesses and workers."

- *Reducing current barriers that have kept community-based organizations from participating in the WIA system.* Providers who wish to receive WIA funds for training must meet a set of federal performance measures to remain on the "eligible provider list." The current performance measures have effectively excluded community-based organizations from participating in the program because of the onerous requirements. The Bush proposal would bring flexibility to the "eligible provider list" by allowing governors to set their own performance measures based on the unique situation of each state.

- *Removing barriers to serving "most in need."* The current performance system creates a disincentive to serve persons who are LEP because they generally need more intensive and longer periods of training than individuals who speak English. Although it offers no concrete recommendation, the Bush proposal recognizes the need to make changes to the current performance system.

The Bush proposal, however, also contains three key provisions that could make it much more difficult for immigrants and LEP persons to be served by the program. These proposals include the following:

- *Block granting adult, dislocated worker, and employment services funding streams into one grant.* Current separate funding streams recognize the different needs of job-seekers. The consolidation of the funding streams would potentially create competition for scarce resources among the different groups and ignore the unique needs of different job-seekers.

- *Creating Personal Reemployment Accounts (PRAs).* Under the PRA proposal, unemployed workers who are profiled as "likely to exhaust their benefits" would be eligible for PRAs of up to \$3,000. The program would provide states with a total of \$3.6 billion over two years. Funds could be used for job search expenses like child care, transportation, and job training, and would be available through the One-Stop Career Centers. While this

proposal appears to make available new money for training and other services, \$3.6 billion is inadequate to meet the expected demand for PRAs. According to a recent report from the Economic Policy Institute, if the 3.5 to 4 million workers who are expected to exhaust their unemployment insurance benefits this year apply for the program, each worker would receive a maximum of \$458. (For a copy of the full report, see <http://www.epinet.org/Issuebriefs/ib188.html>.) In addition, workers who receive a PRA are barred from receiving one-stop center services for one year. Currently, workers in some states can receive services valued at as much as \$1400. (For more detail on the Bush administration's PRA proposal, see [http://www.doleta.gov/reemployment/Reemployment\\_index.cfm](http://www.doleta.gov/reemployment/Reemployment_index.cfm).)

- *Granting new waiver authority to governors.* Currently, governors are allowed to waive certain program rules under the WIA. The Bush proposal would broaden this authority, allowing governors to waive provisions in the law that protect against discrimination, as well as wage and labor standards. It would also give states the option to apply for a block grant of all WIA dollars, giving them complete discretion over how to administer the program.

**Chairman McKeon's Proposal (HR 1261).** Chairman McKeon's bill, which is largely based on President Bush's proposal, includes the PRA proposal and the broadening of state waiver authority. Provisions in the McKeon bill that assist low-income immigrants include the following:

- *Providing better access to training services.* This provision is the same as the administration's proposal.

- *Ensuring that adjusted performance measures take into consideration low levels of English proficiency.* States are assessed on their effectiveness in delivering WIA services through a performance accountability system that allows for adjusted levels of performance. Adjusted levels of performance are currently negotiated between each governor and the U.S. Dept. of Labor, taking into account economic conditions and the characteristics of the population unique to each state. The McKeon bill defines those characteristics to include, among other indicators, levels of English proficiency.

- *Creating incentives to serve "special populations."* Under current law, bonus grants are awarded only to states that exceed their performance measures. The McKeon bill would also award grants based on the state's effectiveness in serving "special populations," including the level of services provided.

- *Including "assisting immigrants who are not proficient in English" in the purpose of the Adult Basic Skills Education Act.* Current law does not include this provision.

- *Including technical assistance to English language acquisition programs in state leadership activities.* Leadership activities are funded through state grants to support education and literacy activities. Current law does not include English language acquisition programs as a leadership activity.

- *Including "serving the LEP population" in the considerations that state agencies must make when distributing Adult Basic Education (ABE)/ESL funds.* Current law requires states to ensure "direct and equitable access" in the distribution of

ABE funding. However, in many states, community-based organizations are unable to compete against community colleges and larger institutions for these funds. The McKeon bill takes a step in the right direction by requiring states to consider the commitment of an agency to serve individuals who are LEP when awarding grants and contracts.

**Outlook.** The Subcommittee on 21st Century Competitiveness held a meeting to mark up HR 1261 on Mar. 20, 2003. At that session, the bill passed on a party-line vote. The bill heads to the full committee on Mar. 26, 2003, and is expected to reach the House floor by early April. Democrats are expected to offer a substitute bill in full committee. In the Senate, members of the Health, Education, Labor and Pensions (HELP) Committee will develop their own proposals for WIA reauthorization. These are likely to differ significantly from the House bill.

NILC has prepared an outline of immigrant priorities for WIA reauthorization, which can be viewed on NILC's Web site at: [www.nilc.org/immsemplymnt/wrkfrc\\_dev/index.htm](http://www.nilc.org/immsemplymnt/wrkfrc_dev/index.htm).

#### **DISTRICT COURT ENJOINS COLORADO'S TERMINATION OF IMMIGRANTS' MEDICAID ELIGIBILITY**

— A federal judge has issued a temporary restraining order blocking implementation of a Colorado law that would have terminated Medicaid eligibility for many of the state's lawfully present immigrants. The new law, SB03-176, relies on distinctions among classes of lawfully present "qualified" immigrants incorporated in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The PRWORA required states to provide Medicaid to certain categories of lawfully present immigrants and purportedly authorized states to determine whether to provide Medicaid to other groups of immigrants who were eligible under federal law. In SB03-176, the Colorado legislature relied on this provision to terminate the Medicaid eligibility of all immigrants for whom the PRWORA does not mandate coverage. The state Medicaid agency rushed to implement the law within a month after its passage.

NILC, the Welfare Law Center, the National Health Law Program, the Immigrants' Rights Project of the American Civil Liberties Union, and the Colorado ACLU brought a class action in federal district court on behalf of the immigrants affected by the law or its implementation. The action challenged the state's implementation of the law as violating the Medicaid Act by failing to adequately determine whether persons whose benefits were being terminated were still eligible and by failing to provide adequate notice and a right to a hearing. It also challenged the law itself on the ground that the state's action in distinguishing between classes of lawfully present immigrants violates the Equal Protection clause of the U.S. Constitution. This claim is significant as a test of whether state decisions to impose restrictions that are optional under PRWORA are subject to strict scrutiny.

On Apr. 1, 2003, the date the law was scheduled to go into effect, Judge Robert E. Blackburn granted a temporary restraining order blocking the state's implementation of the law. A further hearing on the matter is scheduled for Apr. 11.

*Soskin v. Reinertson*, No. 03-RB-0529 (D.Colo. Apr. 1, 2003).

## **The National Immigration Law Center . . .**

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