



Immigration Issues

DHS SUPPORTS ASYLUM FOR BATTERED WOMEN DENIED HELP FROM THEIR HOME GOVERNMENTS – The Dept. of Homeland Security has taken the position that asylum should be granted to a woman who was brutally battered by her husband in Guatemala and then denied assistance by the government when she sought help to flee him. The DHS took this position in a brief submitted to Atty. Gen. John Ashcroft in the case of Rodi Alvarado.

The department maintains that not all battered women should be granted asylum but that asylum is appropriate where local authorities refuse to help and the victim's attempts to flee within the country are unsuccessful. The brief also indicates that this principle would best be established by final regulations—which the DHS and U.S. Dept. of Justice are in the process of finalizing—rather than by issuance of a precedent decision in this case.

The Alvarado case has had a long and fluctuating history. She suffered brutal beatings by her abusive husband and fled Guatemala in fear for her life after local police and courts there refused to intervene on her behalf because they viewed her situation as a "domestic matter." In the United States, she was granted asylum by an immigration judge. That decision was reversed by the Board of Immigration Appeals in an en banc precedent deci-

sion, which was then vacated by Atty. Gen. Janet Reno in one of her last actions before leaving office. *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999; A.G. 2001).

Reno's decision remanded the case for reconsideration after regulations on gender-based asylum that were proposed by the Clinton administration are finalized (see "INS Issues Proposed and Final Asylum Regulations," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 1). However, after he was appointed attorney general, Ashcroft took jurisdiction over the case by recertifying the decision. At that time he announced plans both to issue a new decision and to revise the regulations (see "Ashcroft Reverses Reno in *Matter of R-A-*; Gender-Based Asylum Rules in Jeopardy," IMMIGRANTS' RIGHTS UPDATE, Apr. 8, 2003, p. 3).

U.S. ICE TO EXPAND TO DENVER AND ATLANTA DISTRICTS ITS PILOT PROJECT TO DETAIN IMMIGRANTS AT IMMIGRATION COURT

– U.S. Immigration and Customs Enforcement (ICE) has announced that it will expand a detention pilot project that the agency first experimented with in Hartford, Connecticut. The expanded pilot project will be conducted in the agency's Denver and Atlanta districts. Under the pilot project, the agency will detain immigrants who are denied relief in proceedings and receive removal orders at their hearings, even if they reserve appeal.

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FOUNDED IN 1979, THE NATIONAL IMMIGRATION LAW CENTER PROVIDES technical help to legal services programs, community-based non-profits, and pro bono attorneys throughout the United States. NILC also counsels impact litigation, conducts policy analysis and trainings,

and publishes legal reference materials. NILC's staff specializes in immigration law and in immigrants' employment and public benefits rights. In addition to this newsletter, NILC produces legal manuals, a referral directory, and other community education materials.

E-MAIL "INQUIRY BOX" AT NATIONAL VISA CENTER AVAILABLE TO ATTORNEYS AND ACCREDITED REPS – The State Dept.'s National Visa Center has created an e-mail "inquiry box" to which attorneys and accredited representatives can direct inquiries regarding their clients' cases. The address is nvcattorney@state.gov.

Inquiries to this address should include the following:

1. Case or receipt number as the *subject line* of the e-mail
2. The visa beneficiary's name and date of birth
3. The petitioner's name and date of birth
4. Contact information for the attorney/accredited representative's agency or law firm
5. For employment-based (I-140) inquiries, the name of the company or organization filing the visa petition

The new inquiry box has been available since Mar. 8, 2004.

Attorneys and accredited representatives may continue to send written correspondence by regular mail to the following address: National Visa Center, ATTN: WC (written correspondence), 32 Rochester Ave., Portsmouth, NH 03801-2909. Or they may contact the NVC via phone at 603-334-0700, Mon.–Fri., 8 AM–8:45 PM EST.

2004 FEDERAL POVERTY GUIDELINES ISSUED – The U.S. Dept. of Health and Human Services has issued updated federal poverty income guidelines that took effect Feb. 13, 2004. 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 income. The table below contains the new guidelines.

2004 Federal Poverty Guidelines

FAMILY UNIT SIZE	48 CONTIGUOUS STATES & D.C.	ALASKA	HAWAII
1	\$ 9,310	\$11,630	\$10,700
2	12,490	15,610	14,360
3	15,670	19,590	18,020
4	18,850	23,570	21,680
5	22,030	27,550	25,340
6	25,210	31,530	29,000
7	28,390	35,510	32,660
8	31,570	39,490	36,320
For each additional family member, add:			
	3,180	3,980	3,660

69 Fed. Reg. 7335–38 (Feb. 13, 2004).

NEW CIS FEE WAIVER GUIDANCE AVAILABLE – U.S. Citizenship and Immigration Services recently issued new guidance to its offices around the country regarding CIS's policy for waiving fees when applicants for an immigration benefit establish that they are unable to pay the established fees. Though this "field guidance" does not cover every circumstance that might arise, it is a useful resource for advocates who work with low-income immigrants

who may need to submit some type of application to CIS. The field guidance document can be downloaded in PDF format from the following URL: http://uscis.gov/graphics/publicaffairs/newsrels/FeeWaiver03_29_04.pdf.

EIGHTEEN STATES INTRODUCE DRIVER'S LICENSE BILLS IN 2004; TWO STATES REJECT RESTRICTIVE BILLS – So far during the 2004 state legislative sessions, at least 38 bills have been introduced in 18 different states that address immigrants' ability to obtain a driver's license. As in previous years, the proposals regarding driver's licenses are broadly diverse: some bills would expand immigrants' eligibility for licenses, and others would restrict immigrants' ability to obtain them. Also as in previous years, restrictive bills outnumber those that would expand immigrants' access to licenses. However, four of the restrictive bills have already been rejected.

The more generous proposals include allowing students to obtain a driver's license, regardless of their immigration status; eliminating requirements that applicants be lawfully present in the U.S. in order to qualify for receiving a license; allowing applicants who do not have a Social Security number (SSN) to submit an affidavit to that effect; and expanding the list of documents that can be used to prove identity. Ten states currently allow immigrants to obtain a driver's license regardless of their immigration status, and 44 states either do not have an SSN requirement or have an exception to the requirement.

Generally, most of the restrictive bills have been introduced in states that already have a lawful presence requirement, and the bills seek to place further limits on immigrants' ability to obtain licenses. Examples of restrictive bills include preventing a state from accepting, as proof of identity, a driver's license from a jurisdiction that doesn't have a lawful presence requirement; requiring that an immigrant's driver's license expire with his or her immigration status; including some type of notation on the driver's license indicating that the bearer is a non-U.S. citizen; and prohibiting the acceptance of foreign documents (including passports) as proof of identity. Although proposals such as these have been introduced in previous years, very few have become law. In fact, of the 66 restrictive bills introduced in 2003, only 7 became law.

Two states, Utah and Maryland, have already rejected restrictive bills this year. Legislators in Utah had to deal with two bills that would have overturned a 1999 law that allows state residents, regardless of their immigration status, to obtain a license. In Maryland, legislators rejected two bills, both of which would have imposed a lawful presence prerequisite for obtaining a license.

More detail on driver's license bills introduced in 2004, as well as a link to a toolkit created for advocates interested in organizing driver's license campaigns in their states, is available on NILC's website: www.nilc.org.

Litigation

UNUSED ASYLEE ADJUSTMENT NUMBERS FROM PRIOR YEARS STILL AVAILABLE; ALL ASYLEES MUST RECEIVE CONTINUOUSLY VALID WORK AUTHORIZATION DOCUMENT – In a nationwide class action, a fed-

eral district court has found “that all refugee admission numbers that have been made available for asylee adjustments [to permanent residence] in prior years but [that] remain unused are presently available to be used for asylee adjustment” and that *all* asylees must be provided a work authorization document immediately upon being granted asylee status. The work authorization document issued to asylees, the court said, must contain their fingerprint and photograph—and, more importantly, it must be “continuously valid for the duration of the [person’s] status as an asylee.”

The lawsuit in which the U.S. District Court for the District of Minnesota issued partial summary judgment on these two issues was brought on behalf of all asylees in the United States who have applied for lawful permanent resident status and whose applications remain pending. The plaintiffs alleged that the Immigration and Naturalization Service (which was dissolved last year and its functions transferred to a handful of agencies within the new Dept. of Homeland Security, including U.S. Citizenship and Immigration Services) had failed to issue approximately 22,000 asylee immigrant visas that should have been allocated to waiting plaintiffs and class members. The plaintiffs also contended that, in part because of INS mismanagement, at the time they brought the lawsuit there was a backlog of more than 96,000 applications for adjustment by asylees.

The lawsuit also challenged the INS’s requirement that asylee adjustment applicants pay a fee (currently \$120) to renew their employment authorization documents every year. In addition, the plaintiffs argued that the immigration services’ practice of automatically issuing an employment authorization document (EAD) only to asylees granted asylum by asylum officers, while requiring those granted asylum by immigration judges or the federal courts to apply separately for an EAD, is illegal.

The court was particularly forceful in agreeing with the plaintiffs’ arguments regarding the government’s duty under the law to provide work authorization documents to all asylees, saying that the government’s “violations are so widespread, so egregious, and so plainly harmful to asylees as a class as to constitute nothing short of a national embarrassment.” The judge described government-established procedures for providing asylees evidence of work authorization as “Kafkaesque.”

On the issue of whether asylee adjustment numbers made available by successive presidential administrations each fiscal year since 1992 are *still* available—since each year’s allotment of numbers was not used in its entirety (presumably because of mismanagement) by the immigration services to adjust the status of asylees to permanent residence—the court found that they *are* still available. The government, the court ordered, must “make an accounting of the precise number of asylee adjustment numbers made available . . . but not used by Defendants in each fiscal year since 1992.” In addition, the government must find out how many asylee adjustment numbers have been “misused” to adjust the status of certain asylees who were not subject to the per-year limits on how many asylees can adjust to permanent residence. (Such “exempt” asylees include certain Iraqi Kurds, Syrian Jews, and asylees who applied for asylum before 1990.) “Defendants,” the court ordered, “shall use all unused and misused asylee adjustment numbers made available in prior years to adjust the status of aylees, beginning at the start of the waiting list.”

The plaintiffs in the case are represented by the American Immigration Law Foundation, the Massachusetts Law Reform Institute, and the law firm of Dorsey & Whitney, LLP. The court’s partial summary judgement is available in PDF format at www.aila.org/fileViewer.aspx?docID=12262&index=0.

Ngwanyia v. Ashcroft, No. 02-CV-502 RHK/AJB, 2004 U.S. Dist. LEXIS 1975 (D.Minn., Feb. 12, 2004).

SUPREME COURT TO DECIDE WHETHER REMOVALS WITHOUT CONSENT OF RECEIVING GOVERNMENT ARE LAWFUL

—The U.S. Supreme Court has granted a writ of certiorari to decide whether the Dept. of Homeland Security can remove Somalis with final removal orders to Somalia despite the lack of a government there to accept their return.

In the case to be reviewed, the U.S. Court of Appeals for the Eighth Circuit rejected the petitioner’s contention that the Immigration and Nationality Act requires the consent of a receiving government before a removal can be carried out. However, the Ninth Circuit has ruled that such consent is required and on that basis upheld a nationwide injunction of removals to Somalia, in *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003) (for more on *Ali*, see “9th Circuit Upholds Nationwide Injunction of Removals to Somalia,” IMMIGRANTS’ RIGHTS UPDATE, Oct. 21, 2003).

Jama v. INS, 72 U.S.L.W. 3535, 124 S.Ct. 1407 (Feb. 23, 2004) (No. 03-674).

Employment Issues

PRESSURE TO SHARE ITIN INFORMATION FOR NON-TAX PURPOSES CONTINUES

—Treasury Secretary John W. Snow recently affirmed that neither the Internal Revenue Service (IRS) nor the office of the Treasury Inspector General for Tax Administration (TIGTA) has a program or project to investigate unauthorized workers in an effort to have them deported. In a Mar. 10, 2004, letter to members of the Congressional Hispanic Caucus (CHC), Snow emphasized that the core missions of the IRS and TIGTA focus on the tax system, and that TIGTA is investigating whether individual tax identification numbers (ITINs) were used for purposes other than compliance with federal tax law enforcement.

As previously reported here, TIGTA agents based in Louisville, Kentucky, targeted for investigation tax-filers whose ITINs appeared on W-2 forms and subsequently filed federal criminal charges against them that were unrelated to the enforcement of tax laws. These tax-filers also faced deportation charges as a result (see “Concerns Raised about Potential IRS Sharing of ITIN-related Information,” IMMIGRANTS’ RIGHTS UPDATE, Feb. 17, 2004, p. 6).

While immigrant advocates welcome Snow’s response to the CHC, serious questions remain. The TIGTA investigation amounts to TIGTA investigating itself. Moreover, testimony by Treasury Dept., Social Security Administration (SSA), and General Accounting Office (GAO) officials in a recent congressional hearing indicate that pressure for sharing of ITIN information for non-tax purposes continues.

On Mar. 10, 2004, the Subcommittee on Oversight and the Subcommittee on Social Security of the House Ways and Means Committee held a joint hearing on “Social Security number and

[ITIN] mismatches and misuse.” The particular mismatch at issue occurs when a Social Security number that is invented or belongs to someone other than the wage-earner appears on the wage-earner’s W-2 form, and an ITIN appears on that same wage-earner’s tax return.

In her testimony, National Taxpayer Advocate Nina E. Olson took a measured approach to the problem. She recognized that there is a “strong tendency for [tax] compliance among ITIN holders,” and that almost 75 percent of the 3.1 million ITINs issued from 1998 to 2001 have appeared on a tax return. In other words, ITINs are overwhelmingly used for tax purposes.

She noted that legitimate and principled tax return preparers will advise the filer to use the ITIN on his or her return and attach to it a W-2 with the SSN. However, when the name associated with the SSN does not match the name on the W-2, the earnings are posted to the SSA’s Earnings Suspense File (thereby denying the earner credit for this income under the Social Security system) until the earnings can at some point be reattributed to the appropriate person. (This is the same process followed any time a Social Security number and the name associated with it do not match properly.) At the same time, the IRS may attribute the ITIN-filer’s income to the person whose SSN was used and claim that this person underreported his or her income. As a result, that person may have to prove that he or she did not in fact earn that income.

As a solution, Olson proposed that the IRS should continue to make improvements to the ITIN program and develop a system of electronically filing SSN/ITIN mismatch returns so that these taxpayers could be assisted at IRS Taxpayer Assistance Centers. Moreover, she recommended that the IRS develop a system to “fence off” income reported under a stolen or fabricated number to protect the identity theft victim from IRS audits and claims. These proposals would protect national security and not undermine the critical tax administration objectives of ensuring taxpayer compliance with tax laws, providing customer service to taxpayers, and eliminating undue burdens on taxpayers and employers trying to comply with tax laws. The “delicate balance” between the U.S. tax, Social Security, and immigration systems would be preserved.

The tax advocate rejected proposals from the IRS, TIGTA, and others to change ITIN administration as well as to routinely share information among the IRS, the SSA, and federal immigration authorities. First, she said, allowing ITINs to be used on W-4 and W-2 forms would not work because it would be an acknowledgement both for the employer and the employee that the worker is undocumented. Second, amending the Internal Revenue Code to require employers to submit W-4s to the IRS upon hiring new employees and amending the confidentiality provisions of sec. 6103 to permit the IRS to inform employers that there is a mismatch might result in more serious identity theft if employees assumed both the SSN and the name of the true holder. Moreover, this extra burden on employers would not necessarily clear up mismatches. Most significantly, this could force undocumented workers even further underground and out of compliance with the tax system. Third, authorizing the IRS to disclose to the SSA and immigration authorities tax information pertaining to undocumented workers would increase the damage done to innocent victims of identity theft, undermine the IRS’s

obligation to provide customer service to taxpayers, and discourage tax filing, Olson said.

Likewise, IRS commissioner Everson recognized in his testimony that sharing of confidential information with immigration authorities would have a chilling effect on efforts to bring ITIN filers into the tax system, and would as a result deprive the federal government of tax revenues.

In contrast with the measured testimony of the Treasury Dept. witnesses, the testimony of Patrick P. O’Carroll, assistant inspector general for investigations with the Social Security Administration’s Office of the Inspector General, conflated the problem of W-2/ITIN mismatch with identity theft in general. Providing little citation to evidence, he predicted “growing confusion between ITINs and SSNs” which “will exacerbate problems with wage reporting,” and that “the ease with which one obtains an ITIN may negate the robust screening processes used to deter fraudulent applications.” He cited one case in which an ITIN was presented as though it were an SSN and fraudulently used to obtain credit, but did not acknowledge that better education regarding the difference between the two is in order.

O’Connell predicted that misuse of ITINs will undermine the SSA’s programs and its ability to provide reliable information to law enforcement authorities, facilitating an “underground network to undermine national security and perpetuate fraud against our economy and its citizens.” But the issue at hand is not misuse of ITINs, and he made no connection between these dire predictions and the situation of an ITIN-filer trying to comply with tax laws who submits a W-2 with someone else’s SSN. He called for improved coordination in the areas of data sharing, data reliability, and use of shared data. However, he did not explain how such coordination would occur, nor how it would affect the “delicate balance” between U.S. tax, Social Security, and immigration systems.

Testimony by Michael Brostek, GAO director of tax issues, likewise drew no conclusions about how the delicate balance described by the IRS tax advocate can be maintained. Brostek described the ease with which an ITIN can be obtained using bogus documents, but his testimony did not establish that this is a problem when ITINs are used only for tax administration purposes. The IRS has tightened application procedures by limiting the number and kind of documents that can be presented to prove identity, but IRS staff explained to the GAO that requiring ITIN applicants to apply in person would delay processing of returns, or prevent them from being filed, and that it would divert IRS resources.

Significantly, the GAO testimony acknowledged that mismatches between an ITIN and SSN on the W-2 “represent a very small portion of the postings to the earnings suspense file.” Likewise, the situation that triggered the TIGTA investigation in Kentucky appears to be a minor problem. According to SSA Deputy Commissioner James B. Lockhart, only two tenths of 1 percent of the W-2s in the suspense file from 1996–2002 had an ITIN on the W-2 instead of an SSN.

The GAO testimony also put into perspective whether employers are at risk of IRS or Dept. of Homeland Security penalties when undocumented workers present them with ITINs or SSNs, concluding that these risks are minimized if employers simply do what is required of them.

The hearing makes clear that pressure exists to allow sharing of ITIN information for non-tax purposes such as immigration enforcement. Advocates should continue to educate workers that they should not provide ITINs to employers and that ITINs should not appear on their W-2s. It is also clear that use of ITINs for non-tax purposes increases the risk that information regarding them may be shared in the future for purposes other than tax administration. Finally, advocates should recognize that use by a wage-earner of someone else's Social Security number may create a burden for the owner of that number with the IRS, and that proposals to minimize that burden may help protect the ITIN's existence.

SSA BEGINS SENDING NO-MATCH LETTERS TO EMPLOYERS FOR 2004

Again the time of year has arrived when the Social Security Administration (SSA) begins sending letters—commonly referred to as “no-match” letters—to certain employers and wage-earners informing them that, based on the information the employer reported on the wage-earner's W-2 for tax year 2003, the wage-earner's name does not match the Social Security number (SSN) under which his or her wages were reported.

Each year, employers report wages to the SSA and the Internal Revenue Service (IRS) on Forms W-2. Each year, the SSA processes about 240 million W-2s sent by about 6.5 million employers either via electronic media or on paper. These W-2s record the wages earned by about 145 million workers annually.

When an employer submits a W-2 in which the employee's name does not properly match the SSN, the employee's earnings are not credited to his or her SSA account until the agency can clear up the discrepancy. This impacts the wage-earner's eligibility for future Social Security benefits or the amount of benefits the worker will be eligible to receive. While the SSA is able to post about 96.4 percent of all reported earnings to the accounts of the individuals who earned them, those earnings that cannot be matched are posted to the SSA's Earnings Suspense File (ESF), which by 2003 had grown to approximately \$421 billion in wages, representing about 244 million wage items that could not be posted correctly (see www.ssa.gov/oig/communications/testimony_speeches/03102004testimony.htm).

Another discrepancy that leads to a worker's earnings being posted to the ESF results from the worker presenting the employer an individual taxpayer identification number (ITIN) in place of an SSN at the time of hire. Although the ITIN, which the IRS created in 1996 for tax purposes only, is issued by a federal agency, having one does *not* authorize the person to whom it is issued to be employed in the U.S. In fact, a worker presenting an ITIN to an employer actually provides the employer with constructive knowledge of the worker's unlawful status, since only individuals who are not eligible for an SSN can apply for and obtain an ITIN. When a worker provides the ITIN at the time of hire and it is reported by an employer on the W-2, this results in a mismatch, because the SSA's database does not recognize the ITIN number. Consequently, the earnings reported under that ITIN are also posted to the ESF, and the worker does not get credit for wages reported under it until the worker's information is corrected.

In his testimony on Mar. 10, 2004, before the Subcommittee on Oversight and the Subcommittee on Social Security of the House Ways and Means Committee that held a joint hearing on SSN and

ITIN “mismatches and misuse,” SSA Deputy Commissioner James B. Lockhart explained that only a very small portion of the items in the ESF can be accounted for by this “W-2 bearing an ITIN” situation. He explained that a “one-time review of [SSA] records indicated that for the period 1996 (the first year ITINs were issued) through 2002, approximately 342,000 W-2s have been reported under ITINs and remain in the suspense file. This represents less than two-tenths of 1 percent of the W-2s in the suspense file since its beginning through the time of the review.”

In order to address these discrepancies, the SSA sends out notices to workers at their home address, as well as letters to employers. In 2003, the SSA sent 126,250 no-match letters to employers that corresponded to about 7.5 million incorrect W-2s. It also sent approximately 9.5 million letters to wage-earners, of which 1.9 million went to their employers because the SSA did not have good addresses for the wage-earners. The SSA estimates that in 2004 it will send roughly the same number of letters to employers (i.e., about 130,000). The employers who receive such letters are those who have reported more than 10 mismatching employee names and who file W-2s in which mismatches account for more than one-half of one percent of all the earnings reported. Similar to last year, the SSA will send the workers' letters two weeks before sending the employers' no-match letters, in order to give workers time to correct their information before their employers receive the no-match letter.

For advocates dealing with workers at risk of losing their jobs or who suffer some other adverse employment action as a result of the SSA no-match letter, a toolkit on the letters can be downloaded from NILC's website at www.nilc.org/immsemplymnt/SSA-NM_Toolkit/index.htm.

In previous years, there has been some confusion as to whether the IRS will penalize employers based on their having received an SSA no-match letter. During this recent joint hearing, IRS Commissioner Mark Everson clarified once again that while the IRS has the authority to impose a \$50 penalty for each incorrect SSN appearing on a W-2 form up to a maximum of \$250,000, it has not issued any such penalty. Because the SSA does not have any authority to enforce the requirement that employers report correct information, it is only when the IRS subsequently notifies an employer—not when the SSA sends the employer a no-match letter—that a penalty may be considered. Employers are required to show that they have acted with “due diligence” to report correct information, and they may show that they relied in “good faith” on the information provided by their employees when the latter completed their W-4 forms.

Everson further explained that if the IRS does notify an employer of a mismatch, “any employer who has retained the Form W-4 in its records will be able to document an initial solicitation of an SSN and thus that they acted in a responsible manner. For purposes of establishing reasonable cause in connection with the Form W-2 penalty provisions in the tax code and applicable regulations, it is the solicitation of the employee's Social Security number that is important, not the [employee's] response,” Everson said. (For more information on IRS penalties, see *Brief Explanation of the IRS Fine Relating to the SSA No-Match Letter*, available at www.nilc.org/immsemplymnt/SSA-NM_Pack/C10_SSA_NM_IRS,Smp,Ntc-h.pdf.)

The IRS has been working with the SSA to assess the appro-

priate steps the agency should take to improve reporting requirements for employers. One such effort in which the IRS conducted compliance checks of 78 employers found that the employers had acted with due diligence. Specifically, the IRS audited 50 large businesses in the U.S. that appear on the SSA's list of employers with high numbers of mismatches but that have a high percentage of accurate reporting and "have an average mismatch rate of only 1.5 percent." All 50 companies had programs and processes in place to maintain Forms W-2 and W-4, as well as a process for resoliciting the required information upon receipt of a mismatch letter from the IRS. The agency also audited 28 smaller businesses that appear on the list of employers with the highest mismatch error rates. These employers generally issued less than 1,000 Forms W-2 but had error rates of over 93 percent. However, these employers appeared to have high turnover and frequently used day laborers. They also had processes in place showing they were trying to comply. No penalty potential was identified, and therefore no fines were assessed on any of the 78 companies.

In response to calls for increasing penalties or enforcement efforts based on the no-match letters, the IRS cautioned against raising the due diligence requirements that employers have to show they have complied with in response to a notification of discrepancies as described above, because "it could have a negative impact on the participation of employers and employees in the tax system." IRS staff believe that any increase in enforcement would require the agency to reallocate resources to increase compliance in an area that is already generally compliant, and would decrease tax revenue from other areas. However, Everson admitted that the "current penalty regime is not an effective means to address the problem of SSN mismatches." He further raised the concern that any potential changes would first need also to amend Internal Revenue Code sec. 6103 to allow for more information-sharing between agencies or with employers, beyond what is currently allowed by law.

Everson's statements are extremely important and should be helpful for workers' advocates trying to educate employers about their rights and obligations in responding to a no-match letter, and about distinguishing a notice sent by the SSA from one sent by the IRS. Finally, advocates will need to remain vigilant regarding any proposals to increase enforcement as is often called for by the SSA's Office of Inspector General and certain Congress members, because any future penalties—or even the belief among employers that they could be fined—will lead employers to continue employing workers off the books and subjecting them to exploitation. A result of this would be to push workers further into the underground economy.

APPELLATE COURT DISMISSES RICO CLAIM AGAINST EMPLOYER FOR ALLEGEDLY HIRING UNDOCUMENTED WORKERS – The U.S. Court of Appeals for the Seventh Circuit has dismissed a case brought by two former workers at IBP, Inc.'s meat-processing plant in Joslin, Illinois, who contended that their wages were being depressed because IBP allegedly recruited and hired undocumented workers. The plaintiffs brought their suit as a class action under the Racketeer Influenced and Corrupt Organizations Act (RICO) on behalf of all persons authorized to work in the U.S. who have been or are now employed at IBP. The appellate court dismissed

the plaintiffs' suit for failure to state a claim on which relief may be granted.

The plaintiffs, Deborah Baker and Richard Enyeart, alleged that IBP knowingly employed undocumented workers and that this resulted in the plaintiffs' wages being depressed. Specifically, the plaintiffs contended that IBP not only knows "in a statistical sense" that many of its non-U.S. citizen employees lack work authorization, but it also can identify which workers are not authorized, and it "winks at obviously fake green cards and other spurious credentials." The plaintiffs also claimed that IBP alerts its undocumented workers to stay at home on the days when immigration officials conduct inspections, and that when immigration officials detect and remove IBP's employees from the U.S., the company pays "recruiters" to smuggle them back into the country and immediately re-employs them under new aliases and fake identification. Moreover, the plaintiffs alleged that IBP has arrangements with immigrant organizations under which these groups refer known undocumented workers to IBP for employment. The plaintiffs claimed that as a result of these alleged practices, their wages had been depressed by about \$4 per hour.

In bringing their lawsuit under the RICO statute, the plaintiffs argued that the statute establishes a private cause of action for losses caused by a pattern of racketeering activity, including violations of the Immigration and Nationality Act, if such activity was for financial gain. According to the plaintiffs, the defendants' racketeering activity consisted of IBP's alleged hiring, protecting, and recruiting of undocumented workers, all of which violate INA sec. 274. They argued that IBP has gained financially from this activity because it has expanded the pool of available labor and thus depressed the price that labor can command.

The federal district court judge had dismissed the plaintiffs' claim for lack of jurisdiction. Specifically, the district court held that the claim should have been submitted to the National Labor Relations Board (NLRB), given that the workers at IBP have a union certified by the NLRB. The plaintiffs appealed this decision, and the court of appeals modified the district court's judgment to a dismissal for failure to state a claim for which relief may be granted. The appellate court based its decision on two findings: (1) the rule of primary jurisdiction applies because the workers are unionized and the complaint at its core is about the adequacy of wages IBP pays—an issue of mandatory negotiations between IBP and the union; and (2) the plaintiffs' RICO claim fails because IBP is not an "enterprise" as required by the statute.

In making its first finding, the appellate court re-examined the question of jurisdiction. The court determined that this case did not present a preemption or subject-matter jurisdiction issue. It did not present a preemption issue because the questions all relate to federal statutes, and federal statutes cannot preempt other federal statutes. The court found that it does have subject-matter jurisdiction because RICO is a federal statute, and therefore a claim brought under it arises under federal law. The court also found subject-matter jurisdiction under 29 USC sec. 185, which authorizes federal courts to hear many labor-relations disputes.

The court found that the case at hand instead implicated the rule of primary jurisdiction. This rule gives the appropriate administrative agency the first crack at certain claims. In this case, the court found that there are federal-question issues that in-

clude issues within the NLRB's charge. In particular, the court cited the defendant IBP's claim that the action that is "arguably prohibited" is the plaintiffs' failure to bargain with the union, a violation of National Labor Relations Act (NLRA) sec. 8(a)(5).

Given that the case involved an alleged violation of a statute that the NLRB is charged with implementing (i.e., the NLRA), the appellate court found that the NLRB has primary jurisdiction over the case. However, the court stated that since the doctrine of primary jurisdiction is implemented by abstention, the court must stay rather than dismiss the litigation. Once the agency (in this case, the NLRB) has heard the case and made its decision, the parties may return to federal court for the resolution of any remaining issues. As a result, the appellate court found that the district court's dismissal for lack of subject-matter jurisdiction was inappropriate.

The appellate court went further, however, and determined that the suit brought by the plaintiffs at its core is about the adequacy of the wages IBP pays. The inquiry the court then turned to is whether the NLRB has jurisdiction to hear such a case. To answer this question, the court found dispositive the fact that the IBP workers not only had an exclusive bargaining representative (the union), but also are employed under a collective bargaining agreement. In short, the court stated that even if the NLRB is out of the picture, it still does not follow that the plaintiffs are entitled to represent all of IBP's other employment-authorized workers. The plaintiffs have a representative, one that under the NLRA is supposed to be "exclusive" with respect to wages: their union. Individual workers may step into the union's shoes only if it has violated its duty of fair representation.

This last point led the appellate court into its second finding, namely that the plaintiffs' RICO suit fails because IBP is not an "enterprise" as specified by the statute. Sec. 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." The court, however, rejected the plaintiffs' claim that the "enterprise" is IBP *plus* the persons and organizations that help it find undocumented workers to hire—i.e., that the enterprise is comprised of an aggregation, or a "congeries."

The court first stated that if a congeries were to fall within the RICO statute's definition of an enterprise, it would do so as "a group of individuals associated in fact although not a legal entity." 8 U.S.C. § 1961(4). However, the court found that IBP is not part of such an "association in fact," because it is not clear how IBP plus the persons and organizations that help it find undocumented workers to hire have a common purpose or an essential ingredient. The court found, instead, that the parties making up this alleged congeries have divergent goals. Finally, the court found that even if the congeries were an enterprise, the plaintiffs' claim would still fail because they do not claim that IBP operates or manages that enterprise through a pattern of racketeering activity. Specifically, if the defendant and the enterprise are one and the same, there can be no violation of RICO, and the plaintiffs

in this case merely contend that the defendant operates *itself* unlawfully.

The court's decision concludes by stating that the court's two findings enable it to bypass still another potential problem with the plaintiffs' claim: the difficulty of establishing that unlawful hiring of undocumented workers causes a diminution in the plaintiffs' wages. The decision points out that RICO provides treble damages for direct injuries but not for remote ones. While the Ninth Circuit concluded in *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2001), that the injury workers suffer when wages are depressed by undue competition from undocumented workers is similar to those injuries that can be redressed under the anti-trust laws, this decision states that the showing "may not be so straightforward." (See "9th Circuit Allows Work-Authorized Employees to Proceed with RICO Lawsuit against Agricultural Employers, IMMIGRANTS' RIGHTS UPDATE, Oct. 21, 2002, p. 12.) The Seventh Circuit's decision concludes that the court need not reach the decision of whether it would follow the Ninth Circuit's reasoning in *Mendoza* at this time.

The Seventh Circuit's decision is very important in that it soundly rejects the use of RICO to hold employers financially liable for allegedly hiring undocumented workers, particularly when the plaintiffs are represented by a union. However, the opinion in this case is applicable not only to unionized workplaces; it also rejects the plaintiffs' claim by interpreting the plain language of the statute.

Baker v. IBP, Inc., 357 F.3d 685 (Feb. 4, 2004).

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 2004. 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 USC sec. 1324b.

The OSC invites "community-based organizations, other non-profit organizations, and state and local government entities that work with potential victims of discrimination or that possess the qualifications and experience to educate workers and/or employers about their duties under INA" to submit grant proposals.

The *due date* for grant proposal submissions is *May 6, 2004*, by 6 p.m. The request for proposals was published Mar. 23, 2004. Beginning with this grant cycle, each applicant must supply a Data Universal Numbering System (DUNS) number with its application. To obtain a DUNS number, call 866-705-5711 (toll-free).

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 the OSC's website: <http://www.ojp.usdoj.gov/forms.htm>. For further information about the OSC's grant process, contact Lilia Irizarry at the telephone numbers listed above.

Public Benefits Issues

SOCIAL SECURITY PROTECTION ACT ADDS REQUIREMENT FOR NON-U.S. CITIZEN APPLICANTS – The Social Security Protection Act of 2004 introduced a new requirement for Title II benefit applicants: In order to be considered “fully insured” or “currently insured” for Social Security retirement, survivors’, or disability benefits, a non-U.S. citizen must have been assigned a Social Security number that was, at the time it was assigned or at any later time, valid for work purposes. Alternatively, the applicant must have been

admitted to the United States temporarily for business or as a crewman when the relevant work quarters were earned. These requirements pertain only to applications based on Social Security numbers issued on or after Jan. 1, 2004. Pub. L. No. 108-203 § 211 (Mar. 2, 2004).

Because most applicants for Title II benefits already are required to demonstrate that they are lawfully present in the U.S., the new Social Security number requirement is not expected to restrict access to these benefits significantly. 42 U.S.C. § 402(y).

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