NATIONAL IMMIGRATION LAW CENTER

# Immigrants' Rights Update

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## Immigration Issues

**HOUSE APPROPRIATIONS COMMITTEE VOTES AGAINST *MATRÍCULA CONSULAR*** – The Appropriations Committee of the U.S. House of Representatives recently voted to retain an amendment to the Transportation and Treasury appropriations bill that, in effect, would prevent banks from accepting the *matrícula consular* as proof of identity from people seeking to open bank accounts. The vote, which took place on July 22, was very close—26 votes in favor of keeping the anti-*matrícula consular* amendment and 25 votes against it. Four Republican committee members voted with most of the Democratic members to remove the amendment, while one Democrat voted with the Republicans to keep it.

The *matrícula consular* is an identity card that Mexican consulates issue to Mexican citizens residing outside Mexico. Many local government agencies, including police departments, accept the card as a valid form of identification.

The anti-*matrícula consular* language became part of the appropriations bill on July 15 when the Transportation, Treasury and Independent Agencies Subcommittee of the Appropriations Committee approved the amendment, which was offered by Rep. John Culberson (R-TX). The amendment provides: "None of the funds made available in this Act to the Secretary of the Treasury may be used to publish, implement, administer, or enforce regulations that permit financial institutions to accept the matricula consular identification card as a form of identification." If it were to become law, the amendment would block U.S. Treasury Dept.–issued rules that implement section 326 of the USA PATRIOT Act. The subcommittee approved the amendment shortly after Culberson offered it and without holding hearings on it.

The Treasury Dept. issued its final regulations implementing section 326 on May 9, 2003. Those regulations require financial institutions such as banks, credit unions, and thrifts to develop a written customer identification program that is subject to evaluation by regulators; they give banks flexibility to adopt verification procedures appropriate to their circumstances; and they

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**3435 WILSHIRE BOULEVARD, SUITE 2850 • LOS ANGELES, CA 90010 • 213 639-3900 • fax 213 639-3911 • www.nilc.org**

place the responsibility squarely on banks to establish procedures that allow them to form a reasonable belief that they know each customer's true identity. In establishing their procedures, many banks decided to accept the *matrícula consular* as proof of the bearer's identity. The Mexican consular ID card has been issued by the government of Mexico to its nationals overseas since 1871.

On July 1, 2003—less than two months after it issued the final rule—the Treasury Dept. issued a notice asking the public and interested parties to provide additional comments regarding whether banks should be prohibited from accepting foreign government–issued documents other than passports as acceptable forms of ID. This highly unusual action reportedly was prompted by pressure from certain members of Congress. (For more on this, see "Acceptance of the *Matrícula Consular* in the U.S. Is Under Attack," IMMIGRANTS' RIGHTS UPDATE, July 15, 2003, p. 3.)

Commentators overwhelmingly supported acceptance of foreign identity documents. Of the 23,898 comments submitted, 19,770 (or 83 percent of the total) asked that the rules remain unchanged. (See "Commentators Favor *Matrícula Consular,* but ID Acceptance Encounters Other Roadblocks," IRU, Sept. 4, 2003, p. 3.) On Sept. 18, 2003, the Treasury Dept. announced that the rules allowing banks to accept such documents from persons seeking to open accounts would remain unchanged.

Extreme immigration restrictionists in Congress have used that decision to advance their agenda, appealing to fear by arguing that banks' acceptance of the *matrícula consular* poses a threat to national security.

Before the Appropriations Committee voted, many advocates, banks, financial associations, and even the secretary of the Treasury contacted committee members, urging that the anti–*matrícula consular* provision be removed from the bill. In a July 21, 2004, letter addressed to the Appropriations Committee chairman and ranking member, the Treasury secretary wrote:

> [The] Administration believes as a general matter that Americans are better protected if consumers of all nationalities are invited into the financial mainstream. Having consumers use regulated financial services providers offers better protections than leaving sectors of the population to underground providers, such as unregulated hawalas[*], where they may be more exposed to elements involved in money laundering and terrorist financing. Because this provision could drive large sections of the U.S. population to underground financial services, it would weaken the Government's ability to enforce our money laundering and terrorist financing laws.

Despite the letter and a reminder to committee members from the chairman that the Bush administration opposes the Culberson language, most Republicans on the committee voted against removing it.

Committee members who spoke against removing the provision provided no evidence that the Treasury Dept. rules have not worked. Instead, they cited the June 2003 testimony of an FBI official who questioned the reliability of the *matrícula* card, claiming that it is easy to obtain through fraud and lacks adequate security measures to prevent it from being easily forged. That testimony cited examples of "alien smugglers" being arrested with "as many as seven different Matricula Consular cards in their possession" and an Iranian national who was arrested with a *matrícula* card in his name.

Since June 2003, however, the Mexican government has implemented a system that relies on a centralized database to help ensure that only one *matrícula* card will be issued to any individual. As Appropriations Committee members pointed out during the debate over the amendment, the *matrícula* card is far more secure than many ID documents issued by government entities within the United States. They noted, for example, that there is no shortage of false IDs and driver's licenses available for use by underage young people intent on buying liquor. Yet of all the identity documents issued by governments in or outside the U.S., the Culberson amendment would explicitly ban only the *matrícula consular* as proof of identity in opening a bank account in the U.S.

The *matrícula* card contains many security features designed to discourage forgeries and to ensure that Mexican and U.S. law enforcement officials are able to determine a particular card's authenticity. But no identity document, including none produced and accepted in the U.S., is 100 percent counterfeit-proof or immune from being used fraudulently. If a particular identity document were to be deemed unacceptable simply because it sometimes has been abused, then no identity document currently accepted by banks would be acceptable.

The Treasury Dept.–issued rules that give banks the discretion to accept a Mexican consular ID are aimed at stopping, detecting, and prosecuting international money laundering and the financing of terrorism around the globe. Banks and thrifts, in contrast to some other providers of financial services, are subject to federal regulation, routine examinations, and extensive recordkeeping and reporting requirements. This enhances the ability of federal officials to monitor international money transmissions and distinguish legitimate transfers from those conducted for money-laundering or terrorist-financing purposes. Discouraging millions of people who reside in the U.S. from using the legitimate, regulated banking system would seem to run directly counter to the goal of ensuring the nation's security.

Both the chairman and the ranking member of the House Committee on Financial Services argued against the Culberson language, writing to the Appropriations Committee on July 15, 2004, that "[w]hile the intent of the proponents of the amendment may have been to discourage the acceptance of a particular form of identification issued by the Mexican government, by casting doubt on the legitimacy of the entire customer identification and verification regime established by section 326, the practical effect of the amendment is to strike a serious blow at the government's efforts to combat terrorist financing."

Furthermore, preventing Mexican immigrants from opening bank accounts is bad economics. When they open bank accounts, this increases the overall percentage of income that goes

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* *Hawala* is a system whereby a person can send (or remit) money to a person in another part of the world without having to use the formal banking system or leave a "paper trail." According to Interpol, the *hawala* system "was developed in India, before the introduction of western banking practices."

into savings and makes more money available for reinvestment in the country's economy. Banks' acceptance of consular ID cards helps bring immigrants out of the informal and unregulated economy and into the financial mainstream. When immigrants cannot open checking and savings accounts, they are forced to carry and store large amounts of cash and rely on illegal loans; their financial transactions are harder to track and to tax; and they are less likely to feel that they have a financial stake in the communities where they reside. This not only penalizes them; it also penalizes the U.S. and its economy.

Enabling immigrants to open bank accounts helps deter robberies and assaults and reduces the threat of crime in the communities where they live. More than four out of five people who do not have bank accounts use check-cashing outlets and, therefore, often must carry large sums of cash, making them easier targets for crime—especially theft or robbery. When immigrants deposit their money in banks, they are less tempting targets for criminals seeking cash. For this reason, police departments across the country support the use of consular ID cards and efforts to link immigrant workers to mainstream financial institutions, because they help reduce crime and violence and promote good community policing.

The anti–*matrícula consular* provision is not law—yet. Most likely, the Treasury and Transportation appropriations bill will reach the House floor not as a stand-alone bill but rather as part of an omnibus appropriations bill. The challenge for groups and financial institutions that support acceptance of the *matrícula consular* is to make sure that a similar provision is not included in an omnibus spending bill. The close vote in the Appropriations Committee and the White House's apparent opposition to the Culberson language give reason to hope that it still may be removed.

**NEW TENNESSEE LAW CREATES "DRIVING CERTIFICATE" FOR MOST NONCITIZENS** – Tennessee has enacted a law that restricts driver's license eligibility to U.S. citizens, lawful permanent residents, refugees, parolees, and asylees. All other applicants, regardless of their immigration status, are now eligible for a "certificate for driving" that on its face bears the notation (in red lettering on a white background): "FOR DRIVING PURPOSES ONLY. NOT VALID FOR IDENTIFICATION." The new law took effect May 29, 2004.

Before the new law took effect, all applicants, regardless of their immigration status, were eligible for a driver's license if they could provide documentation of their identity and their residence in Tennessee. Claims that the former law compromised state and national security forced the new compromise between supporters and opponents of the former law.

In late June, the Tennessee Dept. of Safety and the Tennessee Office of Homeland Security sent a letter to the Tennessee Association of Chiefs of Police stating that the certificate is not a valid form of identification. The response to the letter has been varied, with the Nashville Police Dept. and Tennessee Highway Patrol stating that their officers will accept the certificate as ID from those whom officers stop for traffic violations, and the Memphis Police Dept. stating that its officers will not accept the certificate as ID. Still other jurisdictions have yet to take a position on the issue, so drivers may be subject to different enforcement policies as they cross county and city lines. Advocates fear that immigrants will not apply for the new certificate because of this uncertainty.

Advocates are also concerned that the certificate, which identifies the bearer as an immigrant, will lead to discrimination. To track this issue, the Tennessee Immigrant and Refugee Rights Coalition (TIRRC) has created a complaint form and hotline that is available in five different languages. For more information and updates on the new law, see the TIRRC website at http://www.tnimmigrant.org/TN_Coalition/DL_Info_Page.htm.

The new law also has prompted a class action lawsuit, which was filed by the League of Latin American Citizens (LULAC) and several Tennessee residents against the state's governor, the commissioner of the Tennessee Dept. of Safety (TDOS), and two of the TDOS's employees. (For more on this lawsuit, see "Class Action Filed against Tennessee's 'Certificate for Driving' Law; DL-Related Litigation Pending in Other States," p. 6 of this issue.)

**DHS & AG ISSUE PROPOSED RULE ON COUNTRIES TO WHICH NONCITIZENS CAN BE REMOVED** – The secretary of Homeland Security and the attorney general have jointly published a proposed rule that would amend the regulations of both agencies concerning the execution of removal orders, specifically with respect to the choice of the country to which a non–U.S. citizen can be removed. The proposed rule would allow the U.S. to remove noncitizens to countries that are not willing to accept them, and to countries that have no established government able to give such acceptance. The rule addresses an issue that is currently before the Supreme Court in the appeal of a ruling of the Eighth Circuit Court of Appeals—*Jama v. INS,* 329 F.3d 630 (8th Cir. 2003), *cert. granted,* 124 S.Ct. 1407 (2004).

In *Jama,* the issue is whether the Immigration and Nationality Act authorizes the Dept. of Homeland Security (DHS) to remove a Somali national to Somalia despite the absence of a government able to accept him. Although the Eighth Circuit concluded that a government's acceptance was not required, the Ninth Circuit has ruled that the INA requires such acceptance, upholding a nationwide injunction against removals to Somalia. *Ali v. Ashcroft,* 346 F.3d 873 (9th Cir. 2003) (see "9th Circuit Upholds Nationwide Injunction of Removals to Somalia," IMMIGRANTS' RIGHTS UPDATE, Oct. 21, 2003, p. 6). And most recently, in *El Himri v. Ashcroft,* __ F.3d __, No. 03-71152 (9th Cir. Aug. 2, 2004), the Ninth Circuit granted the petition for review of two stateless Palestinians born in Kuwait, finding that the immigration judge violated the INA by ordering the petitioners' removal to Jordan without having any evidence that the government of Jordan would be willing to accept them.

The proposed rule provides that an order of an immigration judge designating one or more countries of deportation does not limit the authority of the DHS to remove noncitizens to nondesignated countries, and specifies that in various circumstances "acceptance is not required to remove an alien to a receiving country." The proposed rule also deletes various provisions in the current regulations that do require consideration of a "receiving country's willingness to accept the alien into its territory," such as 8 CFR sec. 241.13(f). The supplementary informa-

tion to the rule explains that the "practical significance" of the question of whether a government's acceptance is legally required to carry out a removal is limited to situations where a country lacks a functioning central government, because it is the "general practice" of the executive branch "not to attempt to remove an individual . . . to a country whose government refuses to accept him." However, the terms of the rule would allow the U.S. to forcibly remove individuals despite the express refusal of the receiving government to accept them.

The DHS and the attorney general invite public comment on the proposed rule, and comments must be received on or before Aug. 18, 2004. 69 Fed. Reg. 42901–12 (July 19, 2004).

**MEXICANS DETAINED FOR ILLEGAL ENTRY IN ARIZONA-SONORA REGION CAN OPT FOR "INTERIOR REPATRIATION"** – Under a U.S. Dept. of Homeland Security pilot program conducted in cooperation with the government of Mexico, Mexican nationals whom DHS agents arrest for illegal entry into the U.S. in what a DHS press release calls the "Arizona-Sonora region" are being given the option of being sent, at U.S. taxpayers' expense, back to their hometowns in Mexico. Detained Mexicans who opt to be repatriated to their hometowns are flown by charter airplane from Tucson, Arizona, to either Mexico City or Guadalajara, Mexico, from where they are provided transportation by bus to their own towns.

The DHS undersecretary for border and transportation security, Asa Hutchinson, said that the program, which began in July and will end Sept. 30 at the latest, is intended "to save lives by safely returning Mexican nationals to their homes, away from the dangers of the Arizona-Sonora desert where smugglers and the harsh summer climate contribute to the deaths and injuries of illegal border crossers."

Under the agreement with Mexico, only Mexican nationals who are charged with no crime other than illegal entry into the U.S. are eligible for the program. Eligible Mexicans who volunteer to be repatriated through the program are referred to the Mexican consul, who interviews them and determines whether they do indeed want to be returned to their hometowns. The DHS has agreed not to handcuff or otherwise restrain participants in this program while they are en route "unless exceptional safety conditions warrant it in an individual case." Eligible persons who decline to be sent back to their hometowns are "repatriated to the northern border of Mexico through regular means," the DHS press release says.

When the pilot program ends, the U.S. and Mexican governments will evaluate it and "recommend future plans."

**TPS FOR MONTSERRAT TO TERMINATE FEB. 27, 2005** – The designation of Montserrat as a country whose nationals (and persons of no nationality who last habitually resided there) may be eligible for temporary protected status (TPS) in the United States will expire on Aug. 27, 2004, and the secretary of Homeland Security has determined that conditions in Montserrat "no longer support the TPS designation and is therefore terminating the TPS designation of Montserrat," according to the Federal Register notice announcing the decision. This termination is effective Feb. 27, 2005. Persons with TPS granted under the program for Montserrat will automatically retain their TPS status and employment authorization until Feb. 27 of next year, whereupon their immigration status will revert to what it was prior to their being granted TPS, unless they have acquired another status in the interim. The six-month grace period (between Aug. 27 and Feb. 27) is being granted to provide for "an orderly transition," according to the Federal Register notice.

The automatic extension of employment authorization applies to anyone who received an employment authorization document (EAD) under the TPS program for Montserrat. These EADs were issued on either Form I-766 (Employment Authorization Document) or Form I-688B (Employment Authorization Card), and they bear an expiration date of Aug. 27, 2004. On its face, the I-766 will contain, under "Category," the notation "A-12" or "C-19"; or the I-688B will contain, under "Provision of Law," the notation "274A.12(A)(12)" or "274A.12(C)(19)."

Despite the expiration date these EADs bear, employers are required to accept them as proof of employment eligibility until Feb. 27, 2005. The Federal Register notice suggests that workers who opt to use the EADs as proof of work authorization when completing the I-9 employment eligibility verification process should "also present to their employer a copy of this Federal Register notice regarding the automatic extension." Under the antidiscrimination provision of the law that requires employers to verify their employees' eligibility to work in the U.S., employers should accept any of the EAD variations described in the previous paragraph without requesting further documentary proof of the bearer's work authorization. For example, they should not request proof that the bearer is a citizen of Montserrat.

Employers with questions regarding the automatic extension of work authorization may call the U.S. Dept. of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) employer hotline at 1-800-255-8155 or 1-800-362-2735 (Telecommunications Device for the Deaf, or TDD). Employees or job applicants may call the OSC employee hotline at 1-800-255-7688 or 1-800-237-2515 (TDD) for information regarding the automatic extension.

Montserratians were granted the benefit of applying for TPS in 1997 because volcanic eruptions on their 39-square-mile island made it impossible for Montserrat to adequately handle the return of its nationals from abroad. As the eruptions have continued, the designation of Montserrat under the TPS program has been extended six times. Now, however, the DHS secretary has decided that since it is likely that the eruptions will continue for decades, the situation that led to Montserrat's designation can no longer be considered "'temporary' as required by Congress when it enacted the TPS statute." INA §§ 244(b)(1)(B) and (C).

According to the Federal Register notice, people from Monserrat who have TPS "are urged to use the time before [Feb. 27] . . . to prepare for and arrange their departure from the United States or, in the alternative, apply for other immigration benefits for which they are eligible." The notice points out that nationals of Montserrat are eligible to apply for British citizenship because they are "British Overseas Territory Citizens."

69 Fed. Reg. 40642–45 (July 6, 2004).

**PHOTOS SUBMITTED TO USCIS MUST NOW BE "FULL FRONTAL"** – As of Aug. 2, 2004, U.S. Citizenship and Immigration Services (USCIS) has changed its photo requirements so that now all photos sub-

mitted as part of applications to USCIS must be of the applicant's full face, i.e., with the applicant directly facing the camera. Prior to this change, applicants could submit photos with a "three-quarter face" view of the applicant's face.

According to a USCIS press release, "USCIS will accept both three-quarter and full color frontal photographs until September 1, 2004 after which only full frontal color will be accepted" [sic]. Furthermore, according to the press release: "All photos must be of just the applicant. Where more than one photo is required, all photos of the person must be identical. All photos must meet the specifications for full frontal/passport photos and must be no more than 30 days old when an application is filed." (Answers to frequently asked questions about passport photos are available on the U.S. State Dept.'s website, at http://travel.state.gov/passport/pptphotos/faqs.html.)

**BIA UPHOLDS AUTHORITY OF IMMIGRATION JUDGES TO GRANT WAIVERS FOR ASYLEES SEEKING TO ADJUST TO LPR STATUS** – The Board of Immigration Appeals has ruled that immigration judges have exclusive jurisdiction to adjudicate applications for adjustment of status filed by asylees in removal proceedings and for waivers of admissibility under sections 209(b) and (c) of the Immigration and Nationality Act. The BIA also concluded that an IJ is not required to terminate asylum status pursuant to INA section 208(c)(2) for an asylee who has been convicted of an aggravated felony where the asylee qualifies for and merits adjustment of status and a waiver of inadmissibility. The BIA issued its precedent decision on appeal from an IJ decision granting adjustment and a waiver to a Nigerian asylee.

The respondent in this case, Ms. K-A-, was admitted to the U.S. as a nonimmigrant visitor in 1992 and was granted asylum in 1995. She is the mother of two U.S. citizen children, one of whom suffers from cerebral palsy. In 2001, she was convicted of second-degree criminal possession of a forged instrument and sentenced to at least one year in prison. In 2003, the Dept. of Homeland Security initiated removal proceedings against the respondent, charging her with being removable for having been convicted for an aggravated felony and for having committed a crime of moral turpitude within five years of admission, as the offense was committed in 1997. The DHS also issued a notice of intent to terminate the respondent's asylum status, based on the aggravated felony conviction.

At the respondent's removal hearing, the DHS formally requested that the IJ terminate her asylum status. The IJ declined to do so, finding that the respondent's applications for adjustment of status and a waiver of inadmissibility constituted "relief from termination" as well as relief from removal. The IJ granted this relief, finding that a favorable exercise of discretion was warranted based on the hardship that the respondent's removal to Nigeria would cause to her disabled citizen child. The DHS appealed, resulting in the BIA precedent decision.

The DHS raised two issues on appeal. First, it contended that it has original jurisdiction over asylee applications for adjustment and waivers under INA sec. 209 and that an IJ may consider such applications only when they are renewed in proceedings after an initial denial by the DHS. In making this argument, the DHS relied on the BIA's decision in *Matter of H-N-,* 22 I. & N. Dec. 1039 (BIA 1999), in which the BIA held that an IJ could exercise jurisdiction over a refugee's application for a sec. 209(c) waiver only after it was first denied by the Immigration and Naturalization Service (the predecessor to the DHS). The BIA rejected this argument, distinguishing *H-N-* because different regulations govern refugee and asylee adjustment. The BIA noted that the regulation for asylee adjustment—8 CFR sec. 1209.2(c)—expressly provides that adjustment applications for asylees who are in proceedings can be filed and considered only in proceedings.

The second argument raised by the DHS was that the IJ should have granted the motion to terminate asylum status before considering whether the respondent should be granted adjustment and a waiver. However, the BIA concluded that termination is not mandated by the statute, which provides that the attorney general "may" terminate the status. INA § 208(c)(2). The BIA concluded that the IJ acted properly in denying the motion to terminate and granting adjustment and a waiver in this case. The BIA noted that because these waivers are discretionary, and because only in exceptional circumstances should they be granted to individuals convicted of dangerous or violent crimes, asylees who have been convicted of an aggravated felony will be able to obtain this relief only in rare situations.

*Matter of K-A-,* 23 I. & N. Dec. 661 (BIA 2004).

# Litigation

**SUPREME COURT UPHOLDS STATE LAW REQUIRING INDIVIDUALS TO IDENTIFY THEMSELVES WHEN ASKED DURING INVESTIGATIVE STOP** – In a 5-4 decision, the U.S. Supreme Court has upheld a Nevada law that authorizes police officers to detain individuals who are encountered under suspicious circumstances and who refuse to identify themselves when asked to do so.

The Court's ruling is very narrow, relying on the limited reach of the Nevada statute, which applies only to situations where an officer reasonably suspects that a crime has been or is being committed, and which requires the individual who is stopped to provide his or her name but not answer any other question or provide any other information. The decision does not resolve whether a statute that required presentation of a driver's license or other identity documents would be constitutional. Nor does the decision require that a suspect identify him or herself in every situation, as the Court recognized that there may be cases where just providing one's name may present a "real and appreciable fear" of self-incrimination by so doing.

The defendant in this case, Dudley Hiibel, is a Nevada rancher. A deputy sheriff investigating a report of a fight encountered Hiibel standing by a parked truck on a rural road. The deputy noticed that a woman was in the truck, that there were skid marks behind the truck indicating that it might have come to a sudden stop, and that Hiibel appeared to be intoxicated. When the deputy asked Hiibel to produce identification, Hiibel refused the request, telling the officer that he had done nothing wrong. After the officer repeatedly asked him to identify himself, Hiibel put his hands behind his back and told the officer to arrest him and take him to jail. Ultimately, the deputy arrested Hiibel and took him to

jail after asking him 11 times to identify himself.

The only charge brought against Hiibel was for violation of Nevada Revised Statutes sec. 199.280, which allows an officer to detain a person stopped under suspicious circumstances "only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." Hiibel was convicted and fined $250, and the conviction was upheld by the Nevada Supreme Court. Hiibel then sought review in the U.S. Supreme Court, which granted certiorari, resulting in the recent decision.

In upholding the statute, a majority of the Court distinguished its prior ruling in *Brown v. Texas,* 443 U.S. 47 (1979), which had invalidated a "stop and identify" statute that did not require that the initial stop be "based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity" (quoting the majority opinion).

The Court also distinguished *Kolender v. Lawson,* 461 U.S. 352 (1983), where the Court had invalidated a California loitering statute on vagueness grounds. The California statute had been interpreted to require a suspect to provide an officer with "credible and reliable" identification when asked to do so, and the Court found that this requirement did not adequately apprise individuals of what must be done to comply with the statute. The Court noted that in this case Hiibel did not allege that the statute was void for vagueness. Moreover, the majority noted that in this case the Nevada statute requires "only that a suspect disclose his name" and "does not require a suspect to give the officer a driver's license or any other document."

The Court concluded that requiring a suspect to provide his or her name in the context of a brief investigative stop is consistent with the principles of *Terry v. Ohio,* 392 U.S. 1 (1968), the landmark case recognizing the right of police to briefly stop and investigate suspects based on "reasonable suspicion" short of the "probable cause" required for an arrest. The Court found it does not violate the Fourth Amendment to inquire into a suspect's identity in the course of a *Terry* stop, where the inquiry is "reasonably related to the circumstances justifying the stop."

The Court also rejected Hiibel's claim that the statute violated his Fifth Amendment right against self-incrimination, finding that in this case Hiibel's refusal to identify himself "was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it 'would furnish a link in the chain of evidence needed to prosecute' him" (quoting *Hoffman v. United States,* 341 U.S. 479, 486 (1951)). However, the Court expressly rejected the state's invitation to rule that evidence of identity is "nontestimonial," i.e., that by its very nature requiring an individual to disclose his or her identity can never violate the Fifth Amendment. Rather, while finding that "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances," the majority expressly recognized that such cases may arise.

Justice Stevens dissented on the ground that the statute violates the Fifth Amendment privilege against self-incrimination. He would find that evidence of identity is testimonial, and that the majority's interpretation of the privilege is unduly restrictive.

Justices Breyer, Souter, and Ginsberg dissented on the ground that the majority opinion conflicts with clearly established Fourth Amendment precedent. The dissenters argued that a fundamental principle of a *Terry* stop is that, while an officer is permitted to stop a suspect and ask a moderate amount of questions without having "probable cause" for arrest, a suspect cannot be prosecuted for refusing to answer the questions.

The opinion is likely to cause uncertainty among both police and the public as to the scope of a person's rights when confronted by police. An encounter with police is likely to be a sudden event rather than a clearly-defined *Terry* stop. In real life it may be difficult to distinguish between casual conversation and a situation where one is reasonably suspected of criminal conduct. However, if an individual clearly states that he or she does not choose to speak with an officer, as is one's right in any casual conversation, the burden is on the officer to indicate that a response is required. Another likely cause for confusion is that neither the police nor the public are likely to be aware of whether the state where the encounter occurs has a statute that requires a suspect to identify himself or herself that is sufficiently narrow to meet the Supreme Court's criteria for constitutionality. And while the decision acknowledges that in some circumstances requiring a suspect to identify him for herself violates the privilege against self-incrimination, those circumstances are not clear, and the cost of invoking the privilege is likely to be arrest and detention.

For immigration purposes, it is important to stress the limited scope of the ruling. Immigrants who are stopped by police and asked to identify themselves, in jurisdictions with laws that so require, generally must provide their names, but the ruling requires nothing further. Because one is not likely to know whether the particular state (or county) one is in has such a law, it is probably safer to give one's name, but no documents or other information, when requested by state or local police. However, because immigration officers have no authority to enforce state or local laws, the ruling does not apply to them.

*Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.,* No. 03-5554 (June 21, 2004).

**CLASS ACTION FILED AGAINST TENNESSEE'S "CERTIFICATE FOR DRIVING" LAW; DL-RELATED LITIGATION PENDING IN OTHER STATES** – Tennessee's new "certificate for driving" has been challenged in a lawsuit filed by the League of Latin American Citizens (LULAC) and several Tennessee residents against the state's governor, the commissioner of the Tennessee Dept. of Safety (TDOS), and two of the TDOS's employees (*League of Latin American Citizens (LULAC) et al. v. Bredesen et al.,* No. 3:04-613 (U.S.D.C. Middle Dist. Tenn. 2004)). Under a law that went into effect on July 1, 2004, only U.S. citizens and lawful permanent residents may obtain a regular Tennessee driver's license, while nonimmigrant non–U.S. citizens (e.g., people who are in the U.S. on student or temporary work visas) and undocumented persons must obtain a certificate for driving in order to drive legally. (For more background on this law, see "New Tennessee Law Creates 'Driving Certificate' for Most Noncitizens," p. 3 of this issue.)

The certificate states on its face, in red lettering on a white background: "FOR DRIVING PURPOSES ONLY. NOT VALID FOR IDENTIFICATION." The TDOS began issuing it one year after Tennessee passed a law banning acceptance of the Mexican *matrícula consular* as proof of driver's license applicants' iden-

tification. The caveat against the certificate being used as ID puts Tennessee drivers who do not have any other form of officially recognized ID in a bind. Under Tennessee law, persons charged with traffic violations are entitled to receive a citation in lieu of arrest if they can present satisfactory evidence of their identification. Drivers who have only a certificate for driving risk being arrested if the police stop them for a traffic violation. Some jurisdictions within Tennessee have indicated that their officers will accept the certificate as proof of identification for the purpose of issuing driving citations, while others have said their officers will not. As a result, certificate-holders cannot be sure, when they are pulled over by a police officer, whether the officer is likely to issue them a simple traffic citation or arrest them.

According to the lawsuit, TDOS employees also have confiscated lawful driver's licenses, Social Security cards, and immigration and other identification documents from noncitizen driver's license applicants, judging mistakenly that the documents were false. And in at least one instance, a TDOS employee confiscated documents from a Puerto Rico–born U.S. citizen out of ignorance of the fact that Puerto Ricans are U.S. citizens by birth.

The lawsuit challenges the constitutionality of the certificate-for-driving law, arguing that it establishes an irrebuttable presumption that noncitizens (other than lawful permanent residents) are a threat to homeland security, discriminates against them solely because of their alienage or national origin, and restricts their right to travel. The plaintiffs charge that the provision banning acceptance of the *matrícula consular* as proof of identity but not banning acceptance of identity cards issued by all other foreign governments, as well as TDOS employees' seizing of applicants' immigration and other documents, violates the Fourth and Fourteenth Amendments to the U.S. Constitution. Plaintiffs also charge that a law which gives police officers virtually complete discretion to determine what constitutes satisfactory evidence of identification is unconstitutionally vague.

The plaintiffs, who are represented by Nashville attorney Jerry Gonzalez, are seeking class action status for the case and reportedly will ask for a preliminary injunction enjoining implementation of the new law.

Criticism of Tennessee's new law has come from all sides—from immigrants eligible to apply for the certificate, because they fear it will mark them as being undocumented or will be confusing, and from immigration restrictionists, including some Tennessee legislators. According to a July 27, 2004, *Los Angeles Times* article, about 1,200 of the new cards have been issued since the law took effect on July 1. Other states are likely to consider enacting similar provisions if the new law survives constitutional challenge and attempts to amend or repeal it.

Lawsuits challenging rules that restrict immigrants' access to driver's licenses are pending in other states, too:

• Noncitizens who have nonimmigrant visas or have applied for lawful permanent residence are challenging Alabama rules that prevent them from taking the driver's license exam. They allege that the rules conflict with Alabama statutes that do not discriminate against noncitizens, violate the Fourteenth Amendment to the U.S. Constitution, and unconstitutionally attempt to regulate immigration, an area preempted by the federal government. Defendants have filed a motion to dismiss the lawsuit. *Castro et al. v. Coppage and Alabama Dept. of Public Safety,* No. 2:04cv400-W (U.S.D.C. Mid. Dist. Ala.).

• In Indiana, two plaintiffs have challenged rules administratively imposed by the Bureau of Motor Vehicles and the Indiana Counter-Terrorism and Security Council requiring that driver's license applicants provide a Social Security number as well as proof that they are lawfully present in the U.S. These requirements took effect on July 15, 2002. The lawsuit was filed in 2002, and the parties filed cross motions for summary judgment, which are pending. *Roe v. Coleman,* Marion County Superior Court, Indiana.

• A class action lawsuit filed in Iowa also challenges requirements that driver's license applicants present proof of lawful presence and a Social Security number. The defendants' motion to dismiss was granted, and the plaintiffs have appealed to the state supreme court. Each side has filed briefs, and the parties are awaiting a decision. *Sanchez et al. v. Iowa et al.,* No. 04-0176 (Supreme Court of Iowa).

One further instance of driver's license–related litigation merits mention: In 2002 a coalition of Minnesota groups, which included the Minnesota Civil Liberties Union, the American-Arab Anti Discrimination Committee, Jewish Community Action, the Somali Community of Minnesota, and the Somali Justice Advocacy Center, successfully challenged state requirements that driver's license applicants present proof of either U.S. citizenship or lawful presence in the U.S. They argued that the state had imposed the requirements without engaging in a formal rulemaking process. The state Dept. of Public Safety then proposed immigrant-related driver's license restrictions through the formal rulemaking process, which allowed for public participation. The administrative law judge who considered the proposed rules rejected them in large part. However, his decision was overturned by the chief presiding administrative law judge, and the rules requiring that applicants demonstrate lawful presence went into effect.

The National Immigration Law Center will continue to track litigation that challenges state statutes and rules which limit immigrants' access to driver's licenses. Please notify Tyler Moran at moran@nilc.org or Joan Friedland at friedland@nilc-dc.org of new cases, existing cases that this article does not mention, or developments in the pending lawsuits.

# Employment Issues

**NEW MACHINE-READABLE IMMIGRANT VISA IS PROOF OF EMPLOYMENT ELIGIBILITY** – An unexpired foreign passport with the new machine-readable immigrant visa (MRIV), which includes the statement, "UPON ENDORSEMENT SERVES AS TEMPORARY I-551 EVIDENCING PERMANENT RESIDENT STATUS FOR 1 YEAR," is acceptable for establishing a non–U.S. citizen's eligibility to be employed in the United States, according to an Employer Information Bulletin issued July 26, 2004, by U.S. Citizenship and Immigration Services' Office of Business Liaison. Employers must now accept this new evidence of a newly hired worker's lawful permanent residence status when the worker completes the I-9 employment eligibility verification process.

As of June 28, 2004, each new MRIV issued by a U.S. embassy

or consulate includes the new "TEMPORARY I-551" language immediately below the photograph of the person to whom the visa is issued. When admitting a visa-bearer into the U.S. at a port of entry, a Dept. of Homeland Security officer "places an admission stamp on the upper portion of the MRIV, with part of the stamp overlapping the adjoining page (just above the bearer's photograph)," according to the bulletin. For one year from the date of endorsement by the DHS officer, this stamped MRIV is valid as a document that, for purposes of completing the I-9 employment eligibility verification form, establishes both the bearer's identity and employment authorization (i.e., it is considered to be in the same class as the two other documents listed in item 4 of List A, which is on the reverse side of the I-9 form).

A new hire who presents a foreign passport with an endorsed new MRIV within a year of its endorsement need not present any other document to establish his or her employment eligibility. Employers may not require a worker who chooses to present this document when completing the I-9 process to present any other, since requiring workers to present specific documents or more documents than are legally required can be a form of discrimination that violates the Immigration and Nationality Act's antidiscrimination provisions. INA § 274B(6), 8 USC § 1324b(a)(6).

The other two "List A, #4" documents that serve as temporary evidence of lawful permanent resident status are (1) an unexpired foreign passport with an unexpired temporary I-551 stamp, and (2) an unexpired foreign passport with an MRIV and an unexpired temporary I-551 stamp. On or before the date that the temporary I-551 which a worker has presented expires, the worker's employer is required to reverify that the worker continues to be employment-authorized.

A PDF copy of the bulletin discussed here is available at http://uscis.gov/graphics/services/employerinfo/EIB113.pdf.

**UNDER NEW INTERIM RULE, USCIS MAY ISSUE EADs VALID FOR LONGER OR SHORTER THAN ONE YEAR** – Under an interim rule issued July 30, 2004, which took effect immediately, U.S. Citizenship and Immigration Services (USCIS) may now issue to certain non–U.S. citizens employment authorization documents (EADs) that are valid for terms longer or shorter than one year, depending on the circumstances that obtain in each individual case.

Under 8 CFR sec. 274a.12(a), noncitizens with certain immigration statuses are authorized to work in the U.S. by virtue of their particular status. These include lawful permanent residents, lawful temporary residents, refugees and asylees, persons granted temporary protected status, persons with K (fiancée) or T (victims of human trafficking) visas, and others. Despite being automatically eligible to be employed in the U.S., some of these immigrants still must apply to USCIS for a document that establishes their employment authorization. Under 8 CFR sec. 274a.12(c), noncitizens with certain other immigration statuses are required to apply for employment authorization before they may be employed in the U.S. These include people who have pending applications for adjustment of status, applicants for suspension of deportation (such as under the Nicaraguan Adjustment and Central American Relief Act of 1997), and those who are in deferred action status or who have been paroled into the U.S. for a temporary period. In most cases, USCIS has issued EADs that are valid for one year per issuance.

Under the new interim rule, USCIS will now be able to issue EADs that are valid for more or less than one year, depending on a variety of criteria, including: the applicant's immigration status; the amount of time it generally takes to process the underlying application or petition; what background checks are required for the applicant and how much time it generally takes for other government agencies to complete such checks; and other security considerations and factors as deemed appropriate by USCIS. The rule also provides the agency with the discretion to modify an EAD's validity period when it issues renewal or replacement cards. And USCIS now may issue EADs valid for periods of up to five years to persons granted asylum by an immigration judge or the Board of Immigration Appeals.

Under the previous regulations, most EADs issued were valid for one year, so that noncitizens whose underlying immigration status was valid for more than one year or whose underlying application for an immigration benefit was likely to be pending for more than a year were required to apply for renewal cards, thus creating additional work and expense for both them and USCIS. According to the Federal Register notice announcing the new interim rule, the agency plans "to issue field guidance to ensure that adjudicators use standard criteria when exercising their discretion in establishing EAD validity periods." USCIS still believes it is critical for security reasons to have the EAD expire periodically, just as the Form I-551 alien resident ("green") cards—which are issued for a ten-year validity period—do.

According to the Federal Register notice, the specific changes being made to the regulations regarding EADs for asylees under 8 CFR secs. 274a.12(a)(5) and 274a.13(a) are to facilitate USCIS's immediate compliance with its statutory obligation under sec. 309 of the Enhanced Border Security and Visa Entry Reform Act of 2002 ("Border Security Act"), which took effect in May 2002. Historically, persons who have been granted asylum by the immigration courts or the BIA have had then to apply separately for an EAD, despite the fact that, once they are granted asylum, they are automatically eligible to be employed in the U.S. This has created unnecessary hardship for many, since usually there has been a long delay between the time they were granted asylum and the time they received obvious proof, in the form of an EAD, that they are employment-authorized. To address this problem, the Border Security Act requires USCIS to provide such asylees with an employment authorization document "immediately upon . . . being granted asylum."

These interim rules are sure to cause confusion among those who, besides the card-bearers themselves, are most likely to look at EADs: employers. One of the most complicated and burdensome requirements employers must complete is to reverify the employment eligibility of employees whose employment authorization is valid for only limited periods of time. Each reverification must be performed on or before the date the worker's EAD expires. But because applications for EAD renewals are backlogged, workers often have to wait months before receiving an EAD renewal from USCIS. Thus, the agency's plan to issue EADs that are valid for less than a year will likely only increase both the burden on employers who must reverify and the hardship on workers who will have to apply more often for renewals.

This new rule is likely also to make it harder for some employ-

ment-authorized workers to obtain Social Security numbers (SSNs), as well as driver's licenses and state-issued identification cards. Issuance of SSNs to noncitizens is already generally delayed, sometimes for several months, because before issuing an SSN card to a noncitizen applicant the Social Security Administration first confirms the applicant's information through the Systematic Alien Verification for Entitlements (SAVE) system. And some states have restricted the validity of driver's licenses and IDs issued to nonimmigrants to the period of validity of the documents they present to establish that they are lawfully present in the U.S.

The due date for comments on the interim rule is Sept. 28, 2004. Comments submitted via regular mail should be sent to: Director, Regulations and Forms Services Division, Dept. of Homeland Security, 425 I Street, NW., Room 4034, Washington, DC 20536, and should reference "BCIS No. 2152-01." Comments submitted via email should be addressed to rfs.regs@dhs.gov, and the subject box should contain "CIS No. 2152-01."

69 Fed. Reg. 45555–57 (July 30, 2004).

**EMPLOYER THAT QUESTIONED NATURALIZED CITIZEN'S EMPLOYMENT ELIGIBILITY DID NOT DISCRIMINATE UNLAWFULLY, COURT FINDS** – In a case in which the naturalized U.S. citizen plaintiff alleged that he was unlawfully terminated from his employment as a result of discrimination based on his race, nationality, or national origin, a federal district court in Kansas granted the defendant employer's motion for summary judgment, finding that the employer provided a valid, nondiscriminatory explanation for suspending the plaintiff. The employer, Elite Logistics, Inc., had suspended the employment-eligible worker, Ramon Zamora, because it suspected that the documents he had used to establish his employment eligibility were fraudulent. The plaintiff filed his complaint under Title VII of the Civil Rights Act of 1964 (Title VII).

Zamora obtained his Social Security card in 1980 or 1981 and became a lawful permanent resident in 1987. Elite Logistics hired him in August 2001. At the time he was hired, Zamora disclosed that he was a Mexican national. He presented his alien registration ("green") card and his Social Security card while completing the I-9 employment eligibility verification process required of all new hires. In December 2001, Elite Logistics received a tip that the Immigration and Naturalization Service might be planning to inspect the company's I-9 records. The company then contracted with two independent contractors, DataSource and Verifications, Inc., to verify the validity of all its (approximately 650) employees' Social Security numbers (SSNs).

In early 2002, DataSource notified Elite Logistics that someone besides Zamora had used Zamora's SSN in California, and Verifications notified the company that someone other than Zamora had used his SSN for credit purposes. Verifications notified Elite Logistics that an official verification of the validity of an employee's SSN can be made only by the employer through the Social Security Administration (SSA). However, Elite Logistics decided to "put the burden of proof on the employee," because DataSource and Verifications had found problems with approximately 35 to 40 of the 650 SSNs they had checked.

On May 10, 2002, Elite Logistics gave Zamora ten days to verify that he was employment-authorized. On May 22, the company called Zamora into its office along with his union steward, who served as interpreter. At this point, Elite Logistics suspended Zamora indefinitely until he could bring in documents that would convince the company that he was eligible to be employed in the U.S. On or about May 22, Zamora brought the employer an INS document showing that he had applied for naturalization in 2001. He also brought his earnings records from the SSA, which showed that, indeed, someone named "R. Zamora" whose date of birth was different from the plaintiff's had used Zamora's SSN.

Elite Logistics became even more concerned about Zamora's SSN when the employer noticed the different birth dates in the SSA records, so Zamora was told to bring in further documentation. Zamora testified in his deposition that he then presented his naturalization certificate but that, instead of accepting *it* as proof of his employment eligibility, the employer told Zamora not to return to work until he obtained a different SSN. The following day, Zamora brought a document from the SSA verifying that the SSN he had been working under had indeed been assigned to him. After the company's secretary confirmed with the SSA that the SSN was assigned to Zamora, he was called and asked to return to work.

While the federal court found that Zamora had established a prima facie case (i.e., that all of the necessary elements were present to show that he had a potential discrimination claim), it also found that Elite Logistics offered legitimate, nondiscriminatory reasons for its conduct, because the company feared the ramifications of an INS inspection. The company argued that "its actions were justified by its good faith attempts to abide by federal laws that make it unlawful to employ [undocumented] immigrants." Relying on *Hoffman Plastic Compounds, Inc. v. NLRB,* 122 S. Ct. 1275 (2002), the court stated that "[e]mployers who violate the [Immigration Reform and Control Act of 1986 (IRCA)] are punished by civil fines and may be subject to criminal prosecution," and held that it was satisfied that "defendant had a legitimate, nondiscriminatory reason for requiring plaintiff to produce documents that adequately evidenced his right to work in this country, for giving him ten-days' notice that he needed to do so, and for taking him off work indefinitely on May 22 when he failed to do so." (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IRU, Apr. 12, 2002, p. 10.)

Finally, the court found no evidence in the record from which a reasonable inference could be made that the justifications presented by the defendant were a pretext for discrimination on the basis of the plaintiff's race, nationality, or national origin. It noted that the plaintiff was treated largely the same as the company's other employees. The defendant may "have been overly stringent in rejecting certain documents as adequate, instead demanding documentation specifically from the Social Security Administration," the court recognized. "But that is insufficient to give rise to an inference of pretext," it held. The court also rejected the plaintiff's argument that the defendant "did not affirmatively initiate an independent investigation of the matter himself by, for example, reviewing copies of documents attached to plaintiff's original I-9 form in his personnel file, taking time to review the other documents plaintiff presented to [defendant], and calling the telephone numbers listed on the various forms," except for the last one from the SSA.

Zamora also argued that under IRCA's anti–"document abuse" provision, it was unlawful for Elite Logistics to reject the various documents he presented to verify his employment eligibility, and to require him to present specific documents from the SSA instead. However, the court held that while it "is true that the IRCA states that an employer should not request 'more or different documents . . . or [refuse] to honor documents tendered that on their face reasonably appear to be genuine,' . . . the IRCA provides that doing so is an 'unfair immigration-related employment practice' only if an employer does so" when it is "'hiring, recruiting, or referring an individual for employment in the United States.' Thus, an employer must accept specific documents only for initial employment purposes, not for purposes of continuing employment." The court rejected the plaintiff's argument and instead stated that the "defendant could not turn a blind eye to the results of the investigations by DataSource and Verifications, which revealed potential problems with the plaintiff's SSN." Furthermore, the court stated that "nothing in the IRCA required [the employer] to accept the other documents plaintiff presented."

Finally, the court's decision does distinguish the allegations made, in this case, of discrimination based on race, nationality, or national origin—which the plaintiff brought under Title VII—from claims of discrimination based on citizenship or alienage. The court cited to *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973), in pointing out that because discrimination based on citizenship or alienage is not covered by Title VII, such discrimination is considered to be an unlawful immigration-related employment practice under the IRCA.

Given the facts of this case and the issues it raises, it is clear that in addition to filing his claim under Title VII, the plaintiff also should have filed document discrimination and citizenship discrimination claims under the IRCA and pursued any administrative remedies available via that route. As the court pointed out, these types of claims are different from those that can be brought under Title VII and generally must first be filed with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), which is part of the Civil Rights Division of the U.S. Dept. of Justice. Nevertheless, because the OSC, which enforces IRCA's antidiscrimination provisions, and the Equal Employment Opportunity Commission (EEOC), which enforces Title VII's antidiscrimination provisions, have entered into a memorandum of understanding, so that claims brought under IRCA are considered to be "cross-filed" under Title VII and vice versa (to protect charging parties who file a claim with the wrong agency or raise claims with one agency over which the other has jurisdiction), it is possible that, under the IRCA, Zamora still may have a live claim. (For more information on filing a discrimination complaint with the OSC, contact Marielena Hincapié (hincapie@nilc.org) or Anita Sinha (sinha@nilc.org); and visit the OSC's website at http://www.usdoj.gov/crt/osc/index.html.)

This case raises a number of important issues and concerns. First, it shows that many employers continue to be confused about which documents establish an employee's work authorization. The fact that Zamora presented both a green card *and* a Social Security card when he was first hired indicates that the employer was probably requiring more documentation of new hires than the IRCA-established I-9 employment eligibility verification process requires. And because Zamora presented proof when he was hired that he was a lawful permanent resident, his employer should not have required him to reverify his employment eligibility. The employer based its demand that Zamora reverify his employment eligibility on information provided by the booming cottage industry of private contractors and new software that make it possible for employers to run all types of checks on their employees. It is bad enough that governmental agencies' databases are severely compromised by errors and outdated data, but now employers also have to contend with these third party verification services that facilitate potentially unlawful employment practices.

And finally, although the federal court in Kansas pointed out that citizenship-based discrimination is unlawful under the IRCA, the court's finding that claims under this provision can be brought only with respect to the hiring, recruitment, or referral stages of employment is clearly erroneous, since under certain circumstances reverifying an employee's work authorization can be a form of "document abuse" discrimination in violation of INA sec. 274B(a)(6), 8 USC sec. 1324b(a)(6), as well as a form of national origin or citizenship discrimination.

The plaintiff has since appealed this decision.

*Zamora v. Elite Logistics, Inc.*,
2004 U.S. Dist. LEXIS 7861 (D. Kan. May 4, 2004).

**FEDERAL COURT IN NY AFFIRMS WORKER'S RIGHT TO SEEK BACK PAY IN SEXUAL HARASSMENT SUIT** – In a decision that highlights the importance of not disclosing the immigration status of a plaintiff in an employment or labor dispute proceeding, a federal court found that *Hoffman Plastic Compounds v. NLRB,* 122 S. Ct. 1275 (2002), does not foreclose a back pay award in a sexual harassment suit brought under federal, state, and New York City laws. The court made its finding because there was insufficient evidence in the record for the court to determine whether *Hoffman* applied in the case. (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IRU, Apr. 12, 2002, p. 10.)

In *Molina v. J.F.K. Tailor Corp. and Koo Kim*, a garment worker, Jenny Molina, alleged that she was sexually harassed by Koo Kim, her supervisor and a principal shareholder of J.F.K. Tailor Corporation. Importantly, she identified herself in the complaint only as a "Hispanic female." Molina started working for J.F.K. in 1995 as a seamstress. She alleged that Kim began to harass her sexually in 1997, initially by making comments that were sexual in nature, touching her inappropriately, and urging her to accompany him to his office to have sexual relations with him. Molina alleged that after she was relocated to a sewing machine closer to Kim's office, the sexual harassment became worse. Molina eventually submitted to Kim's sexual demands, engaging in sexual intercourse and other sexual contact with him on a regular basis for three years.

Molina warned Kim directly in 1999 that if his conduct continued, she would report him to a government agency. Kim responded by telling her to look for another job. In August of 2000, Kim told Molina that another manager at J.F.K. with whom he had argued had threatened to reveal Kim's sexual relations with Molina to Kim's wife. A week later, Molina was summoned to Kim's office, where Kim and his wife were present. Kim's wife confronted

Molina, who denied that she had been having sexual relations with Kim. Molina was discharged that same day. In September of 2000, Molina filed a timely discrimination charge with the Equal Employment Opportunity Commission (EEOC) against Kim and J.F.K. The EEOC issued a right-to-sue letter, and in May of 2001 Molina filed a sexual harassment discrimination charge in federal district court.

The magistrate judge in Molina's case was directed by the district court judge to recommend the amount of damages Molina should recover given the defendants' failure to answer or otherwise respond to the complaint. In response to the court's order, Molina submitted a declaration in support of her claim for damages. After the defendants did not respond to the court's order for submissions, the magistrate recommended award amounts for back pay, front pay, and compensatory and punitive damages for Molina.

Although neither party raised the *Hoffman* decision as an issue, the magistrate in his opinion addressed whether *Hoffman* precluded Molina from seeking back pay. Citing, among other cases, *Lopez v. Superflex, Ltd.*, 2002 U.S. Dist. LEXIS 15538 (S.D.N.Y. Aug. 21, 2002) (discussed in "Employee Can Make ADA Claim without Pleading Work Authorization, but Action Could Lead to Adverse Inference about Immigration Status," IMMIGRANTS' RIGHTS UPDATE, Oct. 21, 2002, p. 12), the judge found that "because plaintiff's immigration status is not clearly identified in the record in this case . . . the applicability of *Hoffman Plastic* cannot be determined with certainty [and thus] the Court finds that plaintiff has a viable claim for an award of back pay."

*Molina v. J.F.K. Tailor Corp. and Koo Kim,*
2004 U.S. Dist. LEXIS 7872 (S.D.N.Y. Apr. 30, 2004).

**MICHIGAN SUPREME COURT VACATES ORDER GRANTING MOTION TO APPEAL IN WORKERS' COMPENSATION CASE** – In an appeal from a Michigan Court of Appeals decision finding that undocumented workers are covered by Michigan's workers' compensation law and are entitled to full medical benefits if injured on the job, but that their right to wage-loss benefits ends at the time that the employer "discovers" they are unauthorized to work, the Michigan Supreme Court has vacated its previous order granting the parties' motion to appeal. This means that the lower court's decision, *Sanchez et al. v. Eagle Alloy, Inc.,* 254 Mich. App. 651, 658 N.W.2d 510, remains as the binding precedent regarding undocumented workers' right to workers' compensation benefits in Michigan.

In this case, the employer had "discovered" the plaintiffs' lack of work authorization when, as the court of appeals put it, the workers "admitted use of fake documents to obtain employment." Relying on the U.S. Supreme Court's reasoning in *Hoffman Plastic Compounds, Inc. v. NLRB,* 122 S. Ct. 1275 (2002), the court of appeals concluded that the plaintiffs' use of fake documents to obtain employment constituted a "commission of a crime" under the Michigan workers' compensation statute. The employer had fired the workers after receiving "no-match letters" from the Social Security Administration (SSA) stating that the Social Security numbers the workers were using were invalid. (For more on *Sanchez*, see "Michigan Court of Appeals Limits Workers' Compensation Recovery in Cases Involving Undocumented Workers," IMMIGRANTS' RIGHTS UPDATE, Feb. 21, 2003, p. 11. For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IRU, Apr. 12, 2002, p. 10.)

In vacating its order, the Michigan Supreme Court left undisturbed the lower court's rejection of the employer's argument that the undocumented workers' rights under the workers' compensation scheme should be limited because they had entered into an "illegal contract," thus rendering the employment relationship void. In a dissenting opinion, the supreme court's Justice Markman chastised the majority for not addressing the underlying issues in the case, which the justice considered to be "important not only for their impact upon [undocumented immigrants], but equally for their impact upon the rule of law and the meaning of citizenship." Like the U.S. Supreme Court's analysis in *Hoffman,* Markman's dissent focuses on the workers' wrongdoing. "There is no dispute that illegality permeates the relationship between the parties in this case," Markman wrote. "Plaintiffs obtained forged Social Security and alien identification cards and lied on their employment applications with defendant with regard to their immigration and Social Security status." Also: "It is well-established that a promise or agreement requiring the performance of a criminal or tortious act is illegal, unenforceable, and void."

The dissent asks, rhetorically, whether the decision of the court of appeals presumes "that Michigan law is neutral as between illegal aliens and persons who are citizens or otherwise lawfully within the United States, or is the presumption that illegal aliens do not constitute a part of the civil community in the same way as do citizens and legal aliens?" It concludes, "The overarching issue here pertains to the cognizance that the legal system will take of the uniquely unlawful behavior of illegal aliens, an unlawful behavior that is ongoing and omnipresent."

Given the Michigan Supreme Court's order to vacate the appeal, it is critical that advocates for injured workers in Michigan take every step possible to ensure that no red flags or suspicions are raised regarding a claimant's immigration status. At the very first indication that defense counsel will be seeking discovery on a worker's status, it is important to seek a protective order (see "9th Circuit Upholds Protective Order Limiting Employers' Inquiries into Plaintiffs' Immigration Status," IRU, June 18, 2004, p. 5). Because the facts of this case arise from issues related to the SSA "no-match letter," advocates should stay on top of the developments regarding these letters and particularly educate workers about how to respond when their employers receive no-match letters regarding them. (For more about this issue, see the "Tool Kit for Organizers: Social Security Administration's 'No-Match' Letters," available at http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/index.htm.)

*Sanchez et al. v. Eagle Alloy, Inc.,*
2004 Mich. LEXIS 1557 (July 23, 2004).

**GEORGIA COURT UPHOLDS DEPORTED WORKER'S RIGHT TO RECEIVE WORKERS' COMPENSATION** – An appellate court in Georgia has rejected an employer's argument that *Hoffman Plastic Compounds, Inc. v. NLRB,* 122 S. Ct. 1275 (2002), precludes a worker who was seriously injured while working in the United States, but who was

deported years later, from collecting workers' compensation. (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10.)

The employer, Wet Walls, Inc., began paying the worker, Saul Ledezma, temporary total disability (TTD) benefits after he injured his back and became partially paralyzed while working for Wet Walls in 1989. In 1996, immigration authorities detained Ledezma and deported him from the U.S. After he was deported, Ledezma filed a claim for resumption of TTD benefits, as well as for a lump sum payment of permanent partial disability (PPD) benefits.

The State Board of Workers' Compensation administrative law judge ordered Wet Walls to pay Ledezma both TTD and PPD benefits. Wet Walls appealed to the workers' compensation board's appellate division, which affirmed the award of TTD benefits. The appellate division found, however, that Ledezma was not entitled to PPD benefits because his entitlement to TTD benefits precluded such an award under Georgia's workers' compensation statute. Wet Walls subsequently appealed to the state superior court, which affirmed the original ruling made by the workers' compensation board. Wet Walls appealed once again, and the case went before the Georgia Court of Appeals.

Wet Walls argued that requiring it to pay benefits to a non–U.S. citizen who is incapable of working in the U.S. "contravenes the doctrine set forth in *Hoffman Plastic Compounds*." The court of appeals characterized Wet Walls' argument as "not entirely clear." The court found that "[b]y contending, albeit indirectly, that this Court is bound by *Hoffman,* the employer seems to suggest that federal law preempts state law in this regard. This argument is not well-founded." Recognizing that the issue of whether *Hoffman* preempts state workers' compensation laws is a question of first impression in Georgia, the court relied on other state courts that found no conflict between the Immigration Reform and Control Act of 1986 (IRCA), which requires that employers verify the employment eligibility of all new hires and provides for sanctions against employers that fail to comply adequately with this requirement, and state workers' compensation statutes that do not prohibit undocumented workers from receiving benefits.

Wet Walls set forth two additional arguments that it should not be made to pay Ledezma workers' compensation. It contended that, because under IRCA it cannot re-employ Ledezma, it should be permitted to stop paying him income benefits. Wet Walls also argued that requiring it to pay benefits to a deported immigrant, who is incapable of working in the U.S., violates the right of equal protection under the law. The court of appeals rejected both of Wet Walls' additional arguments as lacking merit, given that since Ledezma has been deemed "totally disabled and unable to work," it is his physical condition and not IRCA or the fact that he has been deported that renders him incapable of working.

The court of appeals did, however, rule in favor of Wet Walls as to Ledezma's claim for PPD benefits for the time he was incarcerated by immigration authorities. In doing so, it agreed with the reasoning of the workers' compensation board's appellate division that Ledezma is not entitled to PPD benefits because Georgia law precludes the payment of PPD benefits while an employee is entitled to TTD benefits. On appeal to the workers' compensation board's appellate division, Ledezma had argued that since he was no longer receiving TTD benefits at the time he was incarcerated, the employer was required to commence payment of PPD benefits. The court of appeals disagreed with Ledezma, finding that Georgia law conditions payment of benefits on whether an employee is *entitled* to benefits, not whether an employee is *receiving* compensation. The court pointed out that Ledezma had been totally disabled from employment since his injury, and thus he had been entitled to receive TTD benefits since that date. It therefore concluded that "[t]he only reason he has not received benefits is because of his incarceration. And we see no reason to require an employer to commence PPD benefits when an employee is incarcerated because to do so might provide a windfall to the employee."

Wet Walls has filed an appeal to the Georgia Supreme Court.

*Wet Walls, Inc., et. al. v. Ledezma,* 2004 Ga. App. LEXIS 454 (Ga. Ct. App. Mar. 30, 2004).

**GRANTS AWARDED FOR TRAINING ON PREVENTION OF IMMIGRATION-RELATED EMPLOYMENT DISCRIMINATION** – The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) announced recently that it has awarded $745,000 in grants to thirteen nonprofit groups across the United States for the purpose of conducting public education programs for workers and employers on the topic of immigration-related job discrimination. These projects are funded from Oct. 1, 2004, through Sept. 30, 2005. The OSC is part of the Civil Rights Division of the U.S. Dept. of Justice.

The grantees will assist discrimination victims in filing charges; conduct seminars for workers, employers and immigration service providers; distribute educational materials in various languages; and place advertisements in local communities through both mainstream and ethnic media. The organizations that received the OSC grants include the Asian Pacific American Legal Center of Southern California, in partnership with the Asian Law Caucus; the Central American Resource Center (CARECEN) in Los Angeles; James Madison University; Catholic Charities of St. Petersburg, Florida; Heartland Alliance for Human Needs and Human Rights, in partnership with the Chicago Interfaith Committee on Workers Issues; the New York City Commission on Human Rights, in partnership with the New York Immigration Coalition; the Legal Aid Society of Mid-New York; Legal Aid Services of Oregon, in partnership with the Oregon Legal Center; Catholic Charities of Dallas; Catholic Charities of Houston; the Arab Community Center for Economic and Social Services (ACCESS); and the AFL-CIO's Working for America Institute.

NILC also was awarded a grant for a project that focuses on conducting trainings to service providers that serve low-income immigrants, technical assistance to service providers on issues related to the anti-discrimination provisions of the Immigration and Nationality Act, and policy analysis and advocacy on these issues and others affecting low-wage immigrant workers.

For more information about protections against employment discrimination based upon citizenship, immigration status, and national origin, the OSC can be contacted at any of the following toll-free phone numbers: employers call 1-800-255-8155 (or TDD

for hearing impaired: 1-800-362-2735); workers call 1-800-255-7688 (or TDD for hearing impaired: 1-800-237-2515). Or visit the OSC's website at www.usdoj.gov/crt/osc.

**PRESIDENT BUSH NOMINATES A NEW OSC SPECIAL COUNSEL** – President George W. Bush has nominated Florida attorney William Sanchez to head the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), which is part of the Civil Rights Division of the U.S. Dept. of Justice.

Sanchez is currently senior partner in the law firm of William J. Sanchez, P.A., specializing in immigration and international law. Prior to establishing his own firm, he was an international law professor at Ateneo University in Manila, Philippines. Earlier in his career, he worked as a staff attorney at the Haitian Refugee Center in Miami, Florida. Sanchez earned his bachelor's degree from the University of Miami and his J.D. from Georgetown University.

His nomination for a four-year term as Special Counsel was sent to the Senate on June 1, 2004, and was scheduled for a hearing before the Senate Judiciary Committee on July 22, 2004. His confirmation is pending.

# Public Benefits Issues

**CENTERS FOR MEDICARE AND MEDICAID SERVICES DETAILS PROPOSED PROCESS FOR DISTRIBUTING EMERGENCY SERVICES REIMBURSEMENT FUNDS** – The Centers for Medicare and Medicaid Services (CMS) has released a "policy paper" that details its proposed process for distributing funds allocated under section 1011 of the Medicare Prescription Drug, Modernization and Improvement Act ("section 1011"). Section 1011 appropriates a billion dollars over a four-year period to reimburse hospitals, physicians, and emergency transportation–providers for unreimbursed emergency services to non–U.S. citizens who are undocumented, have temporary permission to enter into the United States on "border crossing cards," or are paroled into the U.S. to receive emergency health care.

The Medicare law provides that the reimbursement funds be distributed directly to the healthcare providers but does not set forth a process for determining the amounts providers will receive. NILC, healthcare providers, and other advocates urged the CMS to adopt a "proxy"-based reimbursement methodology to avoid deterring undocumented persons and their families from seeking needed health care. A proxy method would use a formula to determine the proportion of a provider's total uncompensated care costs attributable to persons within the reimburseable categories. The CMS's policy paper rejects the "proxy" proposal and relies on an individual claims–based method to allocate section 1011 funds among providers. The CMS's proposed process requires providers to query individual patients about their immigration status and encourages providers to obtain documents, such as foreign driver's licenses, that the CMS perceives to identify persons as undocumented.

The CMS has provided a form for providers to use in making the immigration status determination. The proposed policy paper states that providers may make the immigration status determination through their state's Medicaid application but asks providers to supplement the application with the level of information provided on the form. The form contains individual identifying information, including the patient's name, address and telephone number; asks questions about the patient's immigration status; and collects information about documentation in the patient's possession, including falsified driver's licenses and Social Security numbers.

The policy paper contemplates that providers will submit aggregated claims for reimbursement to the CMS on a quarterly basis. The policy paper requires hospitals and other providers to maintain the records of patients' status for auditing purposes and does not include any provisions for protecting the confidentiality of these records.

The CMS did not publish the policy paper in the Federal Register and has declined requests that it engage in a formal notice-and-comment rulemaking process. The CMS is accepting comments until Aug. 16, 2004. The policy paper is posted on NILC's website at www.nilc.org/immspbs/health/Issue_Briefs/Sec1011Reimbrsmnt.pdf.

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

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

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