



## Immigration Issues

**DHS EXPANDS USE OF EXPEDITED REMOVAL** – The Dept. of Homeland Security has published a notice in the Federal Register announcing the agency’s intention to expand the use of expedited removal.

Expedited removal is a procedure established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that allows immigration officers to issue expedited removal orders, resulting in removals from the United States of non-U.S. citizens that generally are carried out with no hearing or review by an immigration judge. Under the statute, the procedure may be used against noncitizens who have not been admitted or paroled into the U.S. and who are determined to be inadmissible on one of two grounds: (1) having procured an immigration benefit through fraud or misrepresentation, or (2) lacking a valid visa or other entry document. Until now, the DHS has used the procedure only against arriving noncitizens at designated ports of entry. Under the new expansion of the program, the DHS will use expedited removal against noncitizens encountered within 100 miles of the border who entered the U.S. without inspection less than 14 days before the time they are encountered.

The notice explains that as a matter of prosecutorial discretion the DHS currently plans to apply the expanded expedited removal procedure principally against nationals of countries other than

Mexico or Canada; nationals of these two countries will be placed in expedited proceedings only if they have “histories of criminal or immigration violations, such as smugglers or aliens who have made numerous illegal entries.” The notice also acknowledges that noncitizens in a variety of circumstances “may possess equities that weigh against the use of expedited removal proceedings.” People in this category include unaccompanied minors, members of the class action settlement in *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D.Cal. 1991), and persons eligible for non-lawful permanent resident cancellation of removal. For this reason, immigration officers will have discretion to permit noncitizens to withdraw their application for admission to the U.S. and accept voluntary return, or to be placed in regular removal proceedings.

The notice explains that individuals subject to expedited removal who indicate an intention to apply for asylum will be interviewed by an asylum officer and, if they are found to have a “credible fear,” will be referred to an immigration judge—as will those who assert that they fear being persecuted or tortured should they be removed to their country of origin. Individuals subject to expedited removal who claim lawful permanent resident, refugee, or asylee status or U.S. citizenship also may have their claims reviewed by an immigration judge.

The notice also explains that individuals placed in expedited removal proceedings will be detained without bail and not pa-

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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 specialize 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.

roled except as a matter of discretion for a medical emergency or for a law enforcement purpose.

The DHS decided to implement the notice immediately, finding that to delay implementation in order to allow for public notice and comment “would be impracticable, unnecessary, and contrary to the public interest.” The notice took effect on its publication date of Aug. 11, 2004. 69 FR 48877–81 (Aug. 11, 2004).

**ANTI-MATRÍCULA PROPOSAL DEFEATED; FINANCIAL INSTITUTIONS CAN CONTINUE ACCEPTING CONSULAR IDs**

– In a vote of 222 to 177, the U.S. House of Representatives passed a bipartisan amendment, H.Amdt. 754, introduced by Reps. Michael Oxley (R-OH), Barney Frank (D-MA), Jim Kolbe (R-AZ), Ed Pastor (D-AZ), and Rubén Hinojosa (D-TX) to strike the so-called Culberson amendment that would have prohibited the Treasury Dept. from implementing regulations that allow financial institutions to accept *matrícula consular* identification cards as part of a valid customer identification program under the USA PATRIOT Act.

On July 22, 2004, the House’s Committee on Appropriations voted in favor of an amendment to the Transportation, Treasury, and Independent Agencies Appropriations Act (HR 5025) for 2005, which was introduced by Rep. John Culberson (R-TX) (see “House Appropriations Committee Votes against *Matrícula Consular*,” IMMIGRANTS’ RIGHTS UPDATE, Aug. 9, 2004, p. 1). While the anti-*matrícula consular* provision introduced by Culberson passed by one vote in the Committee on Appropriations, it did not survive the floor debate on the Appropriations bill that took place on Sept. 14, 2004.

Oxley framed the debate at the outset when he said:

Our amendment will strike ill advised language adopted in the Committee on Appropriations that, if allowed to remain in the bill, would prevent the Treasury Department from enforcing regulations implementing customer identification provisions in the USA PATRIOT Act that are critically important to combating money laundering and disrupting the financing of terrorism. . . . The Bush administration and the Treasury Department have registered their strong support for this amendment, arguing that denying access to the mainstream financial system serves only to drive consumers into the underground financial economy, making it virtually impossible to track their financial activity and frustrating the government’s efforts to enforce anti-money laundering and antiterrorist financing laws. In the words of [Treasury] Secretary Snow, if the section my amendment seeks to strike becomes law, “it will be a step backwards in the financial war on terror.”

Culberson, however, argued that his amendment would not have been necessary if the regulations adopted by the Treasury Dept. were sufficient to address the intention of the PATRIOT Act to accurately identify and track individuals opening bank accounts. The “Treasury rule says that any foreign government-issued document that evidences nationality, as long as it bears a photograph, is valid to open a bank account,” Culberson said. “That is in complete violation of the PATRIOT Act. So the regulation the Treasury Department adopted does not even meet the express letter of the law in the PATRIOT Act. So we had no other

choice but to cut off the funding to this regulation.”

In response, Rep. Ed Pastor (D-AZ) called into question the motive underlying Culberson’s amendment, noting that it targeted only *matrícula consular* ID cards, which are used primarily by citizens of Mexico.

Hinojosa, one of the cosponsors of the effort to strike the Culberson amendment, reiterated that the *matrícula consular* is secure and that financial institutions should be allowed to accept it as a valid form of ID for those wishing to open a new account. He said that more than 160 counties, 1,180 police departments, 377 cities, 33 states, and 178 financial institutions currently support and accept the use of the *matrícula consular* “as a means to reduce crime and violence, improve the U.S. economy, and strengthen our line of defense against terrorists attempting to gain access to our financial institutions.”

“The *matrícula* cannot be used for obtaining any citizenship benefits, such as work authorization, the right to vote or access to public benefits,” Hinojosa said. “Rather, it enhances public safety and national security.”

Culberson and other opponents of the *matrícula consular* also raised national security concerns, stating that the FBI and Justice Dept. allege that “consular ID cards that foreign nationals would use to open bank accounts are widely known to be easily forged.” Moreover, Rep. Dana Rohrabacher (R-CA) argued that allowing financial institutions to accept the *matrícula consular* “would make it easier for these banks to do business with illegal immigrants, and they would make a profit from it; but our country would be far less safe, and our children will be less safe if we do this.”

The two sides in the debate disagreed sharply as to whether the FBI and the Justice Dept. were for or against the acceptance of *matrícula consular* cards. Culberson and others claimed that these agencies were opposed to the Oxley-Frank-Kolbe-Pastor-Hinojosa amendment, while the amendment’s proponents asserted that the agencies actually supported it.

To clarify the matter, Rep. Spencer Bachus (R-AL), a subcommittee chairperson of the Committee on Financial Services, explained that the section of the USA PATRIOT Act that Culberson’s amendment would affect—section 326—is not self-executing and requires the issuance of regulations. The Culberson provision would prevent the Treasury Dept. from administering or enforcing regulations pursuant to section 326, thus effectively shutting down any implementation or enforcement of the provisions in that section. Bachus further explained that the vice chair of the 9/11 Commission had recently testified before the House’s Committee on Financial Services and commended it for the passage of section 326, calling it the cornerstone of anti-money laundering efforts.

In countering Culberson’s allegations that the FBI and the Justice Dept. were opposed to the bipartisan amendment to preserve the use of *matrícula consular* cards, Bachus presented a letter for the record written by Deputy Atty. Gen. James B. Comey and addressed to Speaker of the House Dennis Hastert. The letter, dated Sept. 14, 2004, stated:

The Department of Justice fully supports the Administration’s current policy under the USA PATRIOT Act that requires banks and other financial institutions to

establish reasonable procedures for the identification and verification of new account holders, which is set forth in regulations of the Department of the Treasury. Therefore the [Justice] Department supports the Oxley-Frank-Kolbe amendment to H.R. 5025 that preserves these regulations. . . . The Department of Justice, including the FBI, continue[s] to work closely with the Treasury Department on this and other issues related to halting all financing of terrorists.

In the final roll call vote, 49 Republicans supported the Oxley-Frank-Kolbe-Pastor-Hinojosa amendment and 16 Democrats opposed it. This legislative victory was a joint effort by financial institutions, immigrants' rights groups, consumer groups, and many others who worked in coalition to defeat, once again, efforts to limit the acceptance of consular ID cards by banks, credit unions, thrifts, and other financial entities.

#### **ADVOCATES WARY ABOUT RUSH TO IMPLEMENT RECOMMENDATIONS IN 9/11 COMMISSION'S REPORT**

—The recommendations of the final report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) are intended to enhance the ability of the United States to fight terrorism. But it will be critical to ensure that in the rush to translate the commission's recommendations into law and policy, care is taken to avoid trampling the rights of the overwhelming majority of immigrants who are not terrorists.

Of particular interest to anyone interested in preserving immigrants' rights is the commission's recommendation under the heading "Immigration Law and Enforcement":

Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists. [p. 390]

Significantly, the recommendation does not call specifically for the creation of a national identity card. But at least some of the commission's members seem to have this in mind. Since the report was published, the commission's chair and vice-chair both have stated that they neither object to the establishment of a national ID card nor believe that this is where a federal ID standard-setting process would lead. This is, of course, an issue that affects citizens as well as noncitizen immigrants. Privacy and civil rights groups immediately warned that establishing a national ID card would open the door to more abuse. For example, in its white paper, "Civil Liberties and the 9/11 Commission," the ACLU warns that a national ID card "would be highly unreliable, problematic for personal privacy and [a] new avenue for racial profiling" ([www.aclu.org/Files/OpenFile.cfm?id=16203](http://www.aclu.org/Files/OpenFile.cfm?id=16203)).

Even more importantly, the 9/11 Commission's report does not call for limiting immigrants' eligibility for driver's licenses, nor does it suggest that people be restricted from presenting foreign documents, such as passports or consular IDs, to establish their identity when they apply for a driver's license. This indicates

that the commission did not conclude that such measures are required to ensure the nation's security. A fair interpretation of the commission's recommendation is that the standards the federal government sets "for the issuance of birth certificates and sources of identification, such as driver's licenses," should be limited to ones that improve the security or reliability of the documents. Measures that could be taken along this line might include establishing training programs to improve the ability of state departments of motor vehicles to detect fraudulent documents; adopting new technological means of enhancing document security, such as using holograms, ultra-fine lines, and visual and hidden security features; implementing better audit and verification systems; and stepping up efforts to detect and prevent fraud within state departments of motor vehicles. It is not surprising, however, that immigration restrictionists such as the Federation for American Immigration Reform have interpreted the commission's recommendation as seeking to limit immigrants' access to driver's licenses (see, for example, [www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=1199&c=14](http://www.fairus.org/ImmigrationIssueCenters/ImmigrationIssueCenters.cfm?ID=1199&c=14)).

Bills currently being prepared in both the House and Senate to implement the 9/11 Commission's recommendations would give the Dept. of Homeland Security the responsibility of determining the federal standards for driver's licenses and IDs. Because the commission's recommendation concerning IDs does not specifically suggest that Congress should oversee the implementation of this responsibility, the danger exists that measures which the commission did not recommend, such as establishing a national ID card or mandating limits on immigrants' access to driver's licenses, could be put into place by a department that often seems hostile to the interests of immigrants and the protection of civil liberties.

The report itself contains little concrete support for the proposition that establishing federal standards for identification documents would foil the plans of determined terrorists. In the paragraph that precedes the recommendation, the commission notes that virtually all of the 9/11 hijackers had acquired "some form of U.S. identification document, some by fraud. Acquisition of these forms of identification would have assisted them in boarding commercial flights, renting cars, and other necessary activities" (p. 390). But the terrorists had passports that enabled them to board airplanes and that, under current or probable future standards, would likely have enabled them to obtain driver's licenses. The hijackers who obtained driver's licenses fraudulently in Virginia were able to do so because someone signed an affidavit falsely attesting to their residency in the state. That gap in the system might be plugged by more rigorous enforcement of the requirement that a person applying for a Virginia driver's license prove that he or she actually resides in Virginia, but it won't necessarily be fixed by a new set of standards imposed by the federal government.

The "Immigration Law and Enforcement" section of the report does set an important tone in its first paragraph when it asserts that "Our borders and immigration system, including law enforcement, ought to set a message of welcome, tolerance, and justice to members of immigrant communities in the United States and in their countries of origin. We should reach out to immigrant communities. Good immigration services are one way of doing so that is valuable in every way—including intelligence." Any leg-

islation that purports to implement the report's recommendations should be measured against this standard.

Moreover, such legislation should make it more, rather than less, possible for immigrants to obtain valid identification documents in the U.S. The commission recognizes that sources of identification should ensure that "people are who they say they are." Encouraging rather than preventing access to valid identification documents serves a clear national security purpose. If everyone living in the U.S. could obtain a valid state-issued ID, law enforcement authorities would waste less of their resources on verifying the identity of immigrants with whom they deal and law-abiding immigrants would have less reason to fear contact with authorities. Legislation that, in effect, would encourage more people currently living in the U.S. to obtain fraudulent documents would be completely counterproductive. Finally, well-conceived legislation would not lose sight of the basic underlying purpose for issuing driver's licenses: ensuring that all drivers who share our country's roads actually know how to drive.

While the report comments that there is "a growing role for state and local law enforcement agencies" in thwarting terrorism, it is noteworthy that the commission does not even hint in its recommendations that state or local police should enforce federal immigration law.

Democrats and Republicans in the House and Senate have asserted that legislation should be introduced that tracks the commission's recommendations. In this election season, it remains to be seen whether their efforts will translate into bills that have the potential to provide real national security protections, or whether the legislation will be written to function primarily as an appeal by immigration restrictionists for the votes of those who make up their "base."

**DRIVER'S LICENSES: ILLINOIS CREATES EXCEPTION TO SOCIAL SECURITY NUMBER REQUIREMENT; N.Y. ASSEMBLY HOLDS HEARING ON SSN VERIFICATION PROCESS**

– Illinois has enacted a law that will allow immigrants who are lawfully present in the United States but ineligible for a Social Security number (SSN) to apply for a "temporary visitor's driver's license." The law will go into effect on Jan. 1, 2005. And in New York, the state assembly's Standing Committee on Transportation held a hearing on Aug. 19 to examine the New York Dept. of Motor Vehicles' process for verifying the SSNs of license-holders and applicants.

Under current law, Illinois requires all driver's license applicants to present an SSN unless they have "bona fide" religious convictions against obtaining one. Supporters of the law that takes effect Jan. 1 argued that many lawfully present immigrants, such as students and family members of immigrants with work visas, are ineligible for an SSN and need to drive to attend school or for work.

The new law will allow immigrants who are ineligible for an SSN to apply for a temporary visitor's driver's license if they can prove that they are a resident of Illinois and that their presence in the U.S. is lawful. The temporary license will be valid for three years or for the period of time the individual is authorized to remain in the U.S., whichever period is shorter. The statute instructs the Illinois secretary of state to adopt rules regarding the design and content of the license.

Meanwhile in New York, those who testified in favor of a process that would allow all drivers, regardless of their immigration status, to obtain licenses included the president-elect of the American Immigration Lawyers Association, the executive director of the New York Immigration Coalition, a professor at the United States Military Academy at West Point, and affected immigrants.

The hearing was scheduled because the New York Dept. of Motor Vehicles is currently in the process of verifying the 10 to 11 million SSNs in its database with the Social Security Administration (SSA). The stated purpose of the DMV's effort is to verify the identities of individuals in the DMV database and uncover any instances in which SSNs have been used fraudulently. New York DMV officials estimate that, as a result of this program, between 275,000 and 300,000 licenses will be revoked or suspended because their holders presented fraudulent SSNs when applying for licenses.

Like most states, New York requires driver's license applicants to present an SSN. However, also like most states, New York allows applicants who are ineligible for an SSN to present alternative documentation (for an overview of states' policies with regard to driver's license, see [www.nilc.org/immspb/DLs/state\\_dl\\_rqmnts\\_ovrvw\\_071404.pdf](http://www.nilc.org/immspb/DLs/state_dl_rqmnts_ovrvw_071404.pdf)). Thus, in New York a driver's license applicant may present a letter from the SSA stating that the applicant is not eligible for an SSN. Although no state law authorizes it to do so, the New York DMV also requires applicants without an SSN to prove that they are lawfully in the U.S. New York immigrants' rights advocates estimate that of the licenses that will be suspended, 200,000 will be those issued to immigrants who are ineligible for an SSN and cannot provide proof of lawful status.

The Puerto Rican Legal Defense and Education Fund has filed a lawsuit challenging the New York DMV's authority to impose a lawful presence requirement on driver's license applicants. For more on this lawsuit, see "Lawsuit Challenges N.Y. Requirement That License Applicants Present SSN and/or Proof of Lawful Residence," p. 6 of this issue.

**TPS SIMULTANEOUSLY TERMINATED AND REDESIGNATED FOR LIBERIA**

– The secretary of Homeland Security has terminated the current designation of Liberia as a country whose nationals (and people of no nationality who last habitually resided there) are eligible for temporary protected status (TPS), but he simultaneously has redesignated Liberia for TPS. The TPS of Liberians who have the status under the current program will end on Oct. 1, 2004, according to the Federal Register notice announcing the decision. The redesignation for Liberia is effective from Oct. 1, 2004, until Oct. 1, 2005, but in order to benefit from it, current Liberia TPS-holders will have to submit a new TPS application.

According to the Federal Register notice's supplementary information, the secretary of Homeland Security is terminating the current TPS program because Liberia's civil war has ended and therefore "the conditions that prompted designation of Liberia for TPS are no longer met." He has redesignated Liberia for TPS, however, because "the damage caused by the civil war has led to extraordinary and temporary conditions in Liberia that prevent the safe return" of Liberians to their country.

To be granted benefits under the new TPS program, nationals of Liberia and persons of no nationality who last habitually resided there must register for TPS during a six-month registration period that began on Aug. 25, 2004, and will end on Feb. 21, 2005.

The Immigration and Nationality Act authorizes the secretary of Homeland Security to grant TPS to individuals in the United States who are nationals of countries that are experiencing armed conflict, environmental disaster, or other extraordinary and temporary adverse conditions. TPS also may be granted to individuals of no nationality who last habitually resided in a country whose nationals are eligible for TPS. The Dept. of Homeland Security estimates that there are 3,792 persons from Liberia who are eligible for TPS under the "redesignation" program.

To be eligible for TPS under the redesignation for Liberia, an applicant must

- be a national of Liberia, or have no nationality and have last habitually resided in Liberia;
- have been "continuously physically present in the United States" since Aug. 25, 2004;
- have "continuously resided in the United States" since Oct. 1, 2002;
- be admissible as an immigrant except as provided under INA sec. 244(c)(2)(A);
- not be ineligible under INA sec. 244(c)(2)(B) (i.e., must not have committed a felony and two misdemeanors in the U.S. or be ineligible for admission under INA section 208(b)(2), which bars persecutors of others, persons who have committed certain crimes, and security risks); and
- must apply for TPS between Aug. 25, 2004, and Feb. 21, 2005.

To register for TPS under the redesignation, an applicant must submit

- Form I-821 (Application for Temporary Protected Status) with the \$50 filing fee;
- Form I-765 (Application for Employment Authorization);
- two identification photographs (1½ x 1½ inches);
- supporting evidence of identity, nationality, and proof of residence, as provided in 8 CFR sec. 244.9; and
- a \$70 "biometrics fee" (for fingerprinting), unless the applicant is under 14 years of age.

An applicant must file the forms with the U.S. Citizenship and Immigration Services office that has jurisdiction over the applicant's place of residence. If the applicant wishes only to register for TPS and does not want employment authorization, he or she must still submit Form I-765 but need not pay the \$175 filing fee. Applicants seeking employment authorization who cannot pay the filing fee can submit a fee waiver request and affidavit with the employment authorization application (for waiver requirements, see 8 CFR sec. 244.20).

According to the Federal Register notice's supplementary information, "An interim employment authorization document will not be issued to an applicant unless the Form I-765, as part of the TPS registration package, has been pending with [USCIS] more than 90 days after all requested initial evidence has been received, including collection of the applicant's fingerprints at an Application Support Center."

Information concerning TPS is available at the USCIS website, [www.uscis.gov](http://www.uscis.gov), or by calling the USCIS National Customer Service Center at 1-800-375-5283. Applicants may obtain forms from

the USCIS website or by contacting the USCIS Forms Line: 1-800-870-3676. 69 FR 52297-99 (Aug. 25, 2004).

**TPS EXTENDED FOR SOMALIA**—The secretary of Homeland Security has published a notice in the Federal Register extending the designation of Somalia as a country whose nationals and former residents currently in the United States qualify for temporary protected status (TPS). The TPS program for people from Somalia, which was due to expire on Sept. 17, 2004, has been extended to Sept. 17, 2005. The 60-day reregistration period for Somalian TPS began Aug. 6, 2004, and will remain in effect until Oct. 5, 2004.

The attorney general first designated Somalia for TPS in Sept. 1991 because of ongoing armed conflict there. Subsequently, the designation was extended annually, and in Sept. 2001 the attorney general redesignated the country for TPS, which allowed persons from Somalia who arrived in the U.S. after Sept. 1991 to apply for TPS. The current notice extending the designation for Somalia explains that it has been 13 years since Somalia has had a functioning central government, that fighting continues there between rival clans and factions, and that many Somalis have limited access to food as a result of disrupted agriculture and drought. In addition, "Somalia currently lacks the institutions [necessary] to address the demands of a large volume of returnees from the United States."

To register for the extension, nationals of Somalia (and individuals of no nationality who last habitually resided there) previously granted TPS must apply during the 60-day registration period. They need only file Form I-821, Application for Temporary Protected Status (without the filing fee), Form I-765, Application for Employment Authorization, and two identification photographs (1½" x 1½").

Applicants who seek work authorization under the extension must submit the \$175 filing fee or a fee waiver request with the Form I-765; those who do not need work authorization must still submit Form I-765, but without the fee. Applicants who previously registered for TPS and were fingerprinted do not need to be refingerprinted and do not need to submit the \$70 "biometric services" fee. However, prior registrants who were not previously fingerprinted because they were under 14 years of age but who now must be fingerprinted must pay this latter fee.

Applicants must submit their applications to the BCIS district office that has jurisdiction over the applicant's place of residence.

Late initial registration is also available under the extension. In order to apply, an applicant must:

- be a national of Somalia (or a person with no nationality who last habitually resided there);
- have been continuously physically present in the U.S. since Sept. 4, 2001;
- have continuously resided in the U.S. since Sept. 4, 2001; and
- be admissible as an immigrant, except as otherwise provided under Immigration and Nationality Act sec. 244(c)(2)(A), and not ineligible under INA sec. 244(c)(2)(B).

Each applicant for late initial registration must also be able to show that during the registration period for the initial designation (from Sept. 16, 1991, to Sept. 16, 1992) or during the registration period for the redesignation (Sept. 4, 2001, through Sept. 17,

2002), he or she:

- was a nonimmigrant or had been granted voluntary departure status or any relief from removal;
- had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal pending or subject to further review or appeal;
- was a parolee or had a request for reparole pending; or
- was the spouse or child of an individual currently eligible to be a TPS registrant. 69 FR 47937-40 (Aug. 6, 2004).

## Litigation

**LAWSUIT CHALLENGES N.Y. REQUIREMENT THAT LICENSE APPLICANTS PRESENT SSN AND/OR PROOF OF LAWFUL RESIDENCE** – Immigrants are challenging the New York Dept. of Motor Vehicles' refusal to issue new or renewal driver's licenses or ID cards to large numbers of actual and potential applicants because of its policy and practice of requiring that applicants present an acceptable Social Security number (SSN) and/or documentation showing that they are lawfully present in the United States.

Some of the lawsuit's seven immigrant plaintiffs are not eligible to be issued an SSN and so were not permitted to renew their licenses, even when they fulfilled the alternative requirement under state regulations of presenting a letter from the Social Security Administration stating that they are ineligible for an SSN. New York DMV personnel told them that they also had to provide proof of legal immigration status.

One of the plaintiffs, whom the federal government had granted temporary protected status, was denied a learner's permit because the expiration date of her Dept. of Homeland Security-issued employment authorization document was two days short of six months from the date the learner's permit would have been issued. Although the EAD was renewable, the DMV apparently required that a document proving the license applicant's lawful immigration status have an expiration date no earlier than six months from the date the license would be issued.

Another plaintiff, who had been granted asylum in the U.S. and had applied for adjustment of status to lawful permanent residence, was issued a learner's permit that expired on the same date that his refugee travel document expired. He subsequently was denied a driver's license because the DMV claimed his visa had expired, despite the fact that the expiration of an asylee's refugee travel document does not indicate that the asylee's lawful status has lapsed or been revoked.

The lawsuit's plaintiffs face extreme hardship and deprivation if they cannot obtain licenses: loss of their livelihoods, as well as difficulties getting their children to school or obtaining food, medical care, and other services. The lawsuit alleges that no statutory authority exists for the DMV requiring that applicants present an SSN or proof of lawful status as a condition for obtaining a driver's license or ID and that, with respect to this policy, the DMV violated rule-making provisions under state law. They also allege that the state's failure to give them written notice of actions taken against them or an opportunity to be heard, as well as its failure to promulgate meaningful standards as to what documents are acceptable to support a driver's license application,

violates the due process clauses of both New York's constitution and the U.S. Constitution.

As the plaintiffs point out, enforcing U.S. immigration law is the responsibility of the federal government, not of a state DMV. Moreover, they assert, denying immigrants licenses is counterproductive to promoting security, since it weakens the state's ability to track state residents' whereabouts or to compel them to comply with insurance and other government mandates.

The requirement that applicants for driver's licenses or state-issued IDs present an SSN did not exist in New York before 1995. That year, the requirement was instituted by statute in order to make it easier to track down parents who fail to pay court-ordered child support. According to DMV-issued regulations implementing the statute, driver's license and ID card applicants are required to present either an SSN *or* a letter from the Social Security Administration (SSA) stating that they are ineligible for an SSN.

Beginning in 2003, the DMV began to cross-check SSNs that had been presented by driver's license applicants against SSN-related information provided by the SSA. According to information cited in the lawsuit, SSNs presented by at least 600,000 license or ID card-holders did not jibe with the SSA's database. Beginning in Jan. 2004, the DMV began to send "verification letters" to license/ID-holders for whom an SSN-related discrepancy exists. The letter instructs the recipient to verify his or her SSN data with the DMV within 15 days, warning that failure to do so will result in unspecified adverse action, including suspension of the person's license. The DMV has announced that, as a result of this new policy, it expects to suspend the licenses or ID cards of about 300,000 people in the near future.

The defendants named in the lawsuit are Gov. George Pataki and New York DMV Commissioner Raymond P. Martinez. The plaintiffs, who have asked for a jury trial, seek an injunction stopping the defendants from requiring production of a valid SSN and/or documentation of lawful status. They are represented by Jackson Chin of the Puerto Rican Legal Defense and Education Fund.

*Cubas et al. v. Pataki et al.*, No. 04112371 (N.Y. Sup. Ct., filed Aug. 27, 2004).

**9TH CIRCUIT FINDS STATE FELONY CONVICTION FOR SIMPLE DRUG POSSESSION IS NOT AN IMMIGRATION AGGRAVATED FELONY** – A panel of the U.S. Court of Appeals for the Ninth Circuit has granted rehearing and issued a new decision in *Cazarez-Gutierrez v. Ashcroft*, finding that a state felony conviction for simple possession of a controlled substance is not an "aggravated felony" for immigration purposes. The ruling establishes that in the Ninth Circuit no state conviction for simple possession of a controlled substance is an "aggravated felony" for immigration purposes, unless the offense either has a trafficking element or is punishable as a felony under federal drug laws.

The court issued the ruling on a petition for rehearing with an unusual procedural history. The court first ruled on the case in January, finding that the respondent's conviction did not constitute an aggravated felony for immigration purposes. *Cazarez-Gutierrez v. Ashcroft*, 356 F.3d 1015 (9th Cir. 2004). On that basis, the court granted the petition for review and remanded the case to the Board of Immigration Appeals to adjudicate the petitioner's application for cancellation of removal (see "9th Circuit Over-

turns BIA Finding That State Conviction for Simple Drug Possession Is 'Aggravated Felony,'" IMMIGRANTS' RIGHTS UPDATE, Feb. 17, 2004, p. 6). After that opinion issued, the court ordered supplemental briefing on whether the court is divested of jurisdiction over the petition for review by section 242(a)(2)(C) of the Immigration and Nationality Act. Section 242(a)(2)(C) bars appellate jurisdiction over petitions for review filed by immigrants who are removable for having committed certain criminal offenses, including not only aggravated felonies, but also any controlled substance offense. *Cazarez-Gutierrez v. Ashcroft*, 366 F.3d 736 (9th Cir. 2004) (see "9th Circuit Withdraws Opinion in *Cazares-Gutierrez v. Ashcroft*," IRU, May 20, 2004, p. 9).

In the latest ruling, the court reaffirmed its holding that the conviction does not constitute an aggravated felony, basing its jurisdiction for the ruling on its authority to determine its jurisdiction. The court then found that, because the conviction does constitute a controlled substance conviction, it did not have jurisdiction to resolve the petition. Instead, the court determined that the petition for review should be construed as a habeas petition and remanded to federal district court, and the court entered judgment remanding the petition.

*Cazares-Gutierrez v. Ashcroft*, \_\_\_ F.3d \_\_\_, 2004 US App. LEXIS 17947 (9th Cir. Aug. 24, 2004).

#### **DEADLINE FOR FILING MOTIONS TO REOPEN UNDER *BARAHONA* SETTLEMENT EXTENDED TO MAR. 20, 2005**

– The deadline for class members to file motions to reopen their deportation cases under the settlement in *Barahona-Gomez v. Ashcroft* is being extended to Mar. 20, 2005. The settlement provided for the motion-to-reopen period to terminate 18 months after publication of the agreement in the Federal Register. That publication took place on Mar. 20, 2003, and the deadline for motions was therefore Sept. 20, 2004. However, the settlement also provided for this period to be automatically extended a further six months if any class members filed motions within the six months prior to the original deadline. Attorneys for the U.S. Dept. of Justice have now confirmed to class counsel that at least one motion was filed during the latter period, and the deadline is therefore now extended to Mar. 20, 2005.

*Barahona-Gomez* is a class action lawsuit that challenged the actions of Executive Office for Immigration Review officials who in Feb. 1997 issued directives that halted immigration judges and the Board of Immigration Appeals from granting suspension cases, based on their interpretation of the 4,000-person cap on suspension/adjustment grants imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Under the settlement, class members in the U.S. Court of Appeals for the Ninth Circuit who ultimately were or could be denied suspension under the "stop-time rule," but who could have had their suspension applications granted before the rule's Apr. 1, 1997, effective date, will be able to have their cases decided without regard to the stop-time rule.

Under the settlement, individuals may be eligible for relief if they:

1. applied for suspension of deportation;
2. had their hearings take place within the jurisdiction of the Ninth Circuit;

3. had their cases scheduled for an individual hearing on the merits before an immigration judge between Feb. 13, 1997, and Apr. 1, 1997; or had their cases pending at the BIA between Feb. 13, 1997, and Apr. 1, 1997, and the Notice of Appeal had been filed with the BIA on or before Oct. 1, 1996;

4. had the "stop-time rule" (of IIRIRA sec. 309(c)(5)) as the basis for the IJ or the BIA denying or not adjudicating the application for suspension of deportation; and

5. for cases before an IJ, the IJ must have (a) reserved a decision or continued the hearing until after Apr. 1, 1997; (b) issued a decision denying or not adjudicating the application for suspension of deportation; (c) not yet issued a decision; or (d) granted suspension of deportation and the Immigration and Naturalization Service appealed the decision based upon IIRIRA sec. 309(c)(5).

For a detailed explanation of the *Barahona* settlement, see "Court Approves Settlement in Class Action for Suspension Applicants," IMMIGRANTS' RIGHTS UPDATE, Dec. 23, 2002, p. 8. More information, regarding the settlement, as well as the full settlement agreement, is also available on the NILC website, [www.nilc.org](http://www.nilc.org). The full agreement is also available on the EOIR website: [www.usdoj.gov/eoir](http://www.usdoj.gov/eoir).

## **Employment Issues**

#### **OCAHO FINDS THAT INA'S ANTIDISCRIMINATION PROVISION DOESN'T APPLY TO THE U.S. POSTAL SERVICE**

– The Office of the Chief Administrative Hearing Officer (OCAHO) has dismissed a case brought by an individual alleging that the U.S. Postal Service (USPS) committed an unfair immigration-related employment practice by basing its decision not to hire her on her citizenship status and national origin. The OCAHO administrative law judge (ALJ) dismissed the case on the basis that the OCAHO did not have subject-matter jurisdiction because the USPS properly asserted sovereign immunity.

The OCAHO, an agency within the U.S. Dept. of Justice's Executive Office for Immigration Review, is comprised of ALJs who hear and adjudicate cases relating to (1) the unlawful hiring, recruiting, referring for a fee, or continued employment of immigrants ineligible to be employed in the United States, and failure to comply with the Immigration and Nationality Act's employment eligibility verification requirements (an area of the law commonly referred to as "employer sanctions"), (2) immigration document fraud, and (3) INA-proscribed immigration-related unfair employment practices.

The first issue presented in the case, *Santos v. USPS*, was whether the complainant, Jennyfer Joaquina Santos, had been discriminated against in violation of the INA's prohibition against citizenship and national origin discrimination. The second issue before the OCAHO was whether it should dismiss Santos's case based on the USPS's defense that it has sovereign immunity, a doctrine that shields certain government agencies from being sued.

Santos alleged that the USPS had committed an unfair immigration-related employment practice when it decided not to hire her despite the fact that she is a lawful permanent resident of the

U.S. In its reply to this allegation, the USPS through its attorneys stated that it believed that Santos was lawfully admitted to the U.S. only on a temporary basis because she had presented a Social Security card with the notation, "Valid for work only with INS authority." The USPS cited to its handbook, which provides that an individual must be either a U.S. citizen or lawful permanent resident to qualify for employment with the USPS.

The OCAHO noted that both OCAHO and federal circuit case law exists supporting the position that the USPS qualifies as an employer that, under 8 USC sec. 1324b(a)(2)(C), is exempted from the prohibition on discriminating based on citizenship status. (Under this provision, an employer may have a "citizens-only" hiring rule for certain positions if, under a law, regulation, or government contract, the employer is required to hire U.S. citizens for those positions. For example, some employers, such as defense contractors, can require that some of their higher level employees be U.S. citizens so they can obtain the security clearances necessary to work on certain government-funded projects.) However, the OCAHO did not consider whether the USPS's policy, as set forth in its handbook, of hiring only U.S. citizens and LPRs qualifies for the exception provided by sec. 1324b(a)(2)(C). The OCAHO never reached that issue because it found that Santos's eligibility to be employed in the U.S. was a "disputed issue of material fact," which precluded it from entering a summary judgment decision in favor of the USPS.

Ultimately, the OCAHO dismissed the case because it found that the INA's antidiscrimination provision, which was added by the Immigration Reform and Control Act of 1986 (IRCA), does not apply to the USPS. The ALJ noted that in prior cases filed with the OCAHO against the USPS, the latter either did not assert sovereign immunity or the cases were not dismissed on that basis. However, the ALJ found that a recent U.S. Supreme Court decision cited by the USPS "considerably strengthens its position that the doctrine of sovereign immunity insulated the United States Postal Service from cases brought pursuant to [8 USC] Section 1324b" (i.e., the INA/IRCA antidiscrimination provision). In that case, *U.S. Postal Service v. Flamingo Industries (USA) Ltd.*, 124 S. Ct. 1321 (2004), the Court held that the USPS's waiver of its sovereign immunity, contained in section 401 of the Postal Reorganization Act (PRA), does not suffice by its own terms to subject the USPS to antitrust liability under the Sherman Act. The Court held that, absent an *express* statement from Congress that the USPS can be sued for antitrust violations, the PRA does not subject the USPS to antitrust liability.

Applying this holding to Santos's case, the OCAHO found that it had to determine (1) whether a waiver of sovereign immunity for actions against the USPS indeed exists, and (2) whether the IRCA's substantive prohibitions against employment-related discrimination apply to the USPS. The OCAHO first acknowledged that PRA sec. 410 constitutes a waiver of the USPS's sovereign immunity. However, it found that "the substantive prohibitions of IRCA and other relevant statutes do not seem to apply to the USPS." The ALJ noted that nothing in IRCA explicitly subjects the USPS to liability, nor does IRCA otherwise retract federal sovereign immunity. The ALJ compared IRCA to other statutes, such as Title VII of the Civil Rights Act of 1964 (which prohibits employment discrimination based on race, color, religion, sex, or national origin) and the Age Discrimination in Em-

ployment Act, both of which include language expressly permitting the USPS to be sued for violations. The ALJ thus concluded, "This exclusion suggests that Congress intended not to expose the USPS to liability under IRCA." Accordingly, the ALJ held that although the USPS has waived its sovereign immunity, the OCAHO lacks subject-matter jurisdiction to adjudicate Santos's claim because the substantive provisions of IRCA and the PRA do not extend coverage to the USPS.

It is important to note that the ALJ concluded by characterizing the case as constituting a "close decision." The ALJ stated that "while the instant decision is supported by the language of the IRCA, the PRA, and *Flamingo Industries (USA) Ltd.*, I may reconsider my ruling in a future case."

*Santos v. United States Postal Service*,  
9 OCAHO 1105 (Apr. 7, 2004).

#### **OHIO APPEALS COURT UPHOLDS UNDOCUMENTED WORKERS' RIGHT TO WORKERS' COMPENSATION**

– In a recent ruling, an Ohio appellate court affirmed the right of injured workers to receive workers' compensation under state law, regardless of their immigration status.

The case involved a worker, Ghassan Rajeh, who is a citizen of Lebanon. In 1981, Rajeh became a lawful permanent resident of the United States but was ordered deported in 1993 by an immigration judge after he was convicted of an aggravated felony. Rajeh appealed his deportation order, but both the Board of Immigration Appeals and a federal circuit court upheld the IJ's order. Rajeh subsequently was ordered to appear for deportation on two occasions, in 1995 and 1999, but failed to appear either time. As a result, he was arrested in 1999. Rajeh then petitioned the BIA for relief from deportation under the Convention Against Torture (CAT). In Sept. 2001, the BIA granted Rajeh relief under the CAT.

Rajeh obtained a job at Steel City Corporation in March 1997, during the time his deportation order was effective. He did not inform Steel City of his deportation order. Rajeh was injured on June 30, 1997, while moving a skid at Steel City. He subsequently filed for workers' compensation. While the claim initially was accepted, Steel City later petitioned the Industrial Commission of Ohio to deny Rajeh's claim after it learned of his deportation order.

Pursuant to Steel City's request, Rajeh's claim was reexamined by a district hearing officer and then a staff hearing officer. Both officers concluded that Rajeh was not entitled to workers' compensation. The district hearing officer found that while Ohio law does not preclude undocumented workers from participating in the Workers' Compensation Fund, Rajeh was not entitled to payments for temporary total disability (TTD) given that federal law prohibits undocumented immigrants from employment and that, because of this, Rajeh was unable to fulfill the requirement TTD recipients must meet of being able eventually to return to work. The staff hearing officer also denied Rajeh benefits, but on different grounds. The staff hearing officer concluded that Rajeh was not entitled to participate in the Workers' Compensation Fund because he was not a "qualified alien" eligible to receive state public benefits within the meaning of federal law and that he was an "unauthorized alien," which legally precluded him from being

an "employee" (as defined in Ohio's workers' compensation statute) of Steel City.

Rajeh appealed to the Industrial Commission, which refused to hear the appeal. He then filed an appeal notice with the County Common Pleas Court, which awarded summary judgment in favor of Steel City. Rajeh subsequently filed a notice of appeal with the Ohio Court of Appeals. The court addressed two issues and found in Rajeh's favor on both. The first issue was whether Rajeh was an "employee" at the time he was injured. The second issue was whether Ohio's Workers' Compensation Fund constitutes a state public benefit to which only "qualified aliens" are entitled.

In analyzing the first issue, the court looked at whether Rajeh fit the definition of "employee" under Ohio's workers' compensation statute and whether or not federal law precludes undocumented workers from receiving benefits under the statute. The court cited the plain language of the workers' compensation statute, specifically the section that defines "employee." The court emphasized that the definition expressly includes "aliens and minors," and rejected Steel City's argument that the legislature intended "aliens" to mean "legal aliens" only.

In rejecting Steel City's argument, the court noted that the workers' compensation statute includes a section outlining what "employee" does *not* mean, and nowhere in that section is "illegal alien" mentioned. In addition, the court recognized that the Ohio legislature has specifically excluded undocumented workers from eligibility for unemployment compensation. In making this point, the court stated that "Had the legislature also intended to exclude illegal aliens from collecting workers' compensation, presumably it would have taken the same effort to spell out its intent." Lastly, the court cited an Ohio Supreme Court decision, *State ex rel. Papadopoulos v. Indus. Comm.*, 196 N.E. 780 (1935), that declined to differentiate between U.S. citizens and undocumented workers in the context of workers' compensation benefits.

Although the court found that Rajeh clearly was an "employee" as defined by the Ohio statute, it noted that federal law also must be considered in order to fully address the first issue before the court. On this point, Steel City argued that because Rajeh could not be legally employed under federal immigration law, he cannot be an "employee" under state workers' compensation law. The court rejected this argument, relying primarily on public policy concerns. The court acknowledged that "one of the purposes of the workers' compensation system is to promote a safe and injury-free work environment." It reasoned that if undocumented workers were exempt from collecting workers' compensation, "underhanded employers might be prone to hire illegal aliens." Since such employers would not suffer consequences if these employees were injured at work, they "may become lax in workplace safety." The court acknowledged additional policy concerns articulated by other courts that have upheld the right of undocumented workers to collect workers' compensation. Relying on statutory language and public policy interests, the court held that Rajeh had been an "employee" who under Ohio law is entitled to recover from the Workers' Compensation Fund.

The court then addressed the second issue, namely, whether the federal law requirement that state benefits be available only

to "qualified aliens" precludes Rajeh from receiving workers' compensation. The law at issue, 8 USC sec. 1621, provides that an "alien who is not a qualified alien (as defined in [8 USC sec. 1641]) . . . [or] a nonimmigrant under the Immigration and Nationality Act . . . is not eligible for any State or local public benefit . . ." The court found that workers' compensation is not a "state benefit" as defined by federal law. Instead, it held that workers' compensation statutes provide for a "substitutionary remedy for a negligence suit." The court concluded that because workers' compensation is not a "state or local public benefit" under federal law, Rajeh did not have to be a "qualified alien" in order to participate in the Workers' Compensation Fund.

*Rajeh v. Steel City Corp. et al.*, 2004 Ohio App. LEXIS 2890 (Ohio Ct.App. June 15, 2004).

## Public Benefits Issues

### **CMS STILL HAS NOT FINALIZED PROCESS FOR HEALTH CARE PROVIDER REIMBURSEMENT UNDER "SECTION 1011"** – Questions remain about

the implementation of section 1011 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Section 1011 appropriates \$1 billion over four years to reimburse hospitals, physicians, and emergency transportation providers for uncompensated emergency health services to immigrants who are undocumented or paroled into the United States to receive services, or to Mexican citizens with "border crossing" cards. The statute provides that payments will be made directly to providers but does not specify a method for allocating the payments.

On July 21, 2004, the federal Centers for Medicare and Medicaid Services (CMS) issued a policy paper on its proposed implementation of section 1011. The paper proposes an individual claims-based payment methodology. The process laid out in the CMS paper would require providers to question patients about their immigration status and retain records of patients' status and individual identifying information. Health care providers and advocates objected to the CMS's proposed approach, citing concerns about deterring immigrant families from seeking needed health services and placing burdens on health care providers. These concerns received substantial media coverage and attention from members of Congress. (For more on this, see "Centers for Medicare and Medicaid Services Details Proposed Process for Distributing Emergency Services Reimbursement Funds," IMMIGRANTS' RIGHTS UPDATE, Aug. 9, 2004, p. 13.)

On Sept. 1, the statutory deadline for the CMS to establish a process for eligible providers to claim section 1011 reimbursement, the CMS released provider enrollment forms through a Paperwork Reduction Act filing with the Office of Management and Budget. The CMS did not release any details about the process for providers to claim reimbursement, but simply stated in its filing that it would issue its payment methodology "shortly." Advocates, health care providers, and some members of Congress continue to encourage CMS to abandon the individual claims-based payment method for reimbursing providers and to adopt in its place a statistical methodology that does not require providers to question patients about their status.

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