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Immigration Issues

IMMIGRATION PROVISIONS A STICKING POINT IN ATTEMPT TO RECONCILE 9/11 COMMISSION IMPLEMENTATION BILLS; DL PROVISIONS ALSO TROUBLESOME – A conference committee of U.S. representatives and senators has been unable to reconcile bills passed by their respective chambers to implement the recommendations that the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) made in its final report. The conferees have been working to come up with a final bill, which the commissioners hoped the House of Representatives and the Senate would both approve and the president would sign into law before the Nov. 2 election. The main points of disagreement among the conferees have been the two bills' very different provisions with regard to reorganizing the way the government gathers and processes intelligence, as well as a number of controversial law enforcement and immigration provisions that are in the House bill but not in the Senate bill.

The Senate bill, called the National Intelligence Reform Act of 2004 (S. 2845), passed by a vote of 96 to 2. The 9/11 Recommendations Implementation Act (HR 10) passed the House by a vote of 282 to 134. On a much closer vote, the House earlier had rejected an amendment that would have adopted the Senate bill as it was originally introduced.

Section 3052 of HR 10 would set eligibility and documentation requirements for driver's licenses, and its effect would be to require that states issue driver's licenses only to U.S. citizens and certain immigrants. Under this provision, undocumented non–U.S. citizens and even some noncitizens with lawful immigration status would be ineligible to obtain licenses. The provision also would prohibit the federal government from accepting as proof of the bearer's identity most documents, other than unexpired passports, issued by foreign governments, and it would prevent states from accepting foreign-issued documents (other than unexpired passports) from applicants for driver's licenses or state ID cards.

Under HR 10, states would lose much of their power to set the rules for issuing driver's licenses to their residents, although they would continue to be in charge of issuing licenses. The bill's provisions delineate

- the particular features that would have to be included on the face of a state-issued license or ID;
- the document verification procedures each state must adopt;
- the specific documents that states may accept to verify an applicant's identity;
- the immigration status noncitizens must have in order to obtain a state-issued license;

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FOUNDED IN 1979, THE NATIONAL IMMIGRATION LAW CENTER PROVIDES technical help to legal services programs, community-based nonprofits, 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.

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• the length of time a state must retain source documents;

• the kind of technology states may use in licenses and ID documents, as well as the technology that states must use to store such documents;

• the general procedure a state must follow when a driver presents a license from another state;

• the security clearance requirements state employees involved with issuing licenses must meet; and more.

HR 10 also would radically expand immigration authorities' power, under a process known as expedited removal, to deport noncitizens without an immigration court hearing if they cannot prove that they have been in the U.S. more than five years. In addition, HR 10 would: (1) make certain noncitizens ineligible to ask the federal courts to review their immigration cases by filing petitions for writs of habeas corpus; (2) allow immigration authorities to deport noncitizens to their country of origin even if the country has no functioning government; (3) provide that noncitizens who fit certain criteria must be detained indefinitely; (4) make it more difficult for people fleeing torture to gain asylum in the U.S.; and (5) allow immigration authorities to deport noncitizens before federal courts have decided their cases.

In contrast, the Senate bill's driver's license provision would not make immigration status an eligibility criterion for obtaining a license or ID; and the bill does not have provisions regarding foreign identity documents, expedited removal of noncitizens, asylum, judicial review of immigration cases, or mandatory detention of certain noncitizens. Section 1027 of S. 2845 calls for the Dept. of Transportation (DOT) to issue regulations that include standards for processing of driver's license applications; security standards to prevent tampering with, altering, or counterfeiting driver's licenses; and standards for verification of documentation presented by applicants to prove their identity when they apply for a license or ID. In addition, it provides that federal standards cannot infringe on a state's power to set driver's license eligibility standards. S. 2845 also would require that the DOT, in consultation with the Dept. of Homeland Security (DHS), engage in a "negotiated rulemaking" process with groups that represent the interests of states and drivers. One of the Senate bill's provisions also clarifies that the federal government may not require a single design for all state driver's licenses, and it requires that, as procedures are put in place to enhance the security of driver's licenses and ID documents, steps be taken to protect the privacy, civil, and due process rights of all people who apply for such documents.

Conferees opposed to the House bill's immigration provisions argue that the 9/11 Commission did not recommend them and that immigration restrictionist representatives hijacked the intelligence reorganization process to try to further their restrictionist agenda. The *9/11 Commission Report* recommends that federal standards be established for issuance of identity documents, including driver's licenses, to prevent fraud and "ensure that people are who they say they are." But it does not recommend that immigrants be prevented from obtaining driver's licenses, nor that they be arbitrarily prevented from using identity documents issued by foreign governments.

The following provides brief summaries of HR 10's foreign identity document and driver's license–related provisions, as well as arguments against these provisions:

Foreign Identity Documents. Section 3006 of HR 10 would prohibit the federal government from accepting any document as proof of identification, regardless of the document's reliability or any other prudential considerations, except:

• a document issued by the attorney general or the secretary of Homeland Security under one of the immigration laws;

• a domestically issued document that the secretary of Homeland Security designates as reliable and that cannot be issued to a non–U.S. citizen who is unlawfully present in the U.S.; or

• an unexpired foreign passport.

In addition, section 3052 provides that the only foreign-issued document that the states could accept as proof of identification from someone applying for a driver's license or state ID card would be an official passport.

Although these provisions do not mention the Mexican consular ID card (*matrícula consular*) by name, they target its acceptance. In the past, some members of Congress have tried repeatedly to prohibit banks or the federal government from accepting the *matrícula consular* or other forms of ID issued by foreign governments, only to be voted down each time. But if HR 10's restrictions on accepting foreign identity documents were to be enacted, their effects would be much more far-reaching than merely restricting the acceptability of consular IDs.

HR 10's foreign identity document–related provisions also would severely restrict the acceptability within the U.S. of other documents issued by countries around the world to their citizens, including national ID cards, birth certificates, foreign driver's licenses, and school ID cards. If these provisions were to be enacted, even noncitizens who are lawfully present in the U.S. might find it impossible to produce an acceptable document that proves their identity. For example, Canadians who enter the U.S. for a temporary stay are not required to carry a passport, but under HR 10's provisions they would not be allowed to present other documents to prove their identity. And people who have applied for asylum in the U.S. often do not have a passport because they cannot safely obtain a passport from the government that is persecuting them. If HR 10's provisions were to be enacted, it is possible that asylum applicants would not be able to present alternative foreign ID during their asylum proceedings or when seeking release from detention.

Furthermore, if they were enacted, HR 10's provisions could actually prevent noncitizens from obtaining legal immigration status in the U.S. Current immigration law recognizes that a variety of foreign documents prove the identity of the person to whom they were issued. For example, an applicant for temporary protected status (TPS) must present proof of his or her identity and nationality, such as a passport, a birth certificate accompanied by a photo ID, a national identity document issued by the applicant's country of origin that bears a photo a or fingerprint, or even an affidavit explaining why that evidence is not available and affirming that the applicant is a national of a country whose nationals or former residents are eligible for TPS.

A congressionally mandated policy of rejecting most foreign identity documents also would conflict with the Bush administration's current stance with respect to such documents as it is articulated in the "statements of administration position" issued by the White House on Oct. 7 and Oct. 18, 2004. The Oct. 7 statement says that the "Administration has concerns with the

overbroad alien identification standards proposed by the [House] bill that are unrelated to security concerns." Moreover, both the U.S. Dept. of Justice and the Dept. of the Treasury have stated, in effect, that efforts by certain members of Congress to limit financial institutions' ability to accept the *matrícula consular* from depositors or customers are misguided and counterproductive.

Enacting HR 10's provisions regarding foreign documents also would undermine the work of a Homeland Security Council–led task force of executive branch agencies. According to a Government Accountability Office (GAO) report titled *Border Security: Consular Identification Cars Accepted within United States, but Consistent Federal Guidance Needed*, the task force—which includes members from the Departments of Homeland Security, State, Justice, Treasury, Transportation, Education, and Health and Human Services, as well as from the Office of the Vice President and the General Services Administration—is examining the issue of establishing "a consistent federal policy regarding use and acceptance of foreign-issued [consular ID] cards" such as the *matrícula consular*.

Finally, HR 10's foreign ID documents–related provisions would subvert the policies of many state and local governments and police departments that consider it in the best interests of their communities to accept the *matrícula consular* as a form of ID. The GAO report cited above reports that as of Feb. 2004, 1,159 police departments, 363 cities, 153 counties, and 160 financial institutions in the U.S. accepted the Mexican consular ID.

Driver's Licenses. In its final report, the 9/11 Commission did not call for imposing restrictions on noncitizens' access to driver's licenses. Yet section 3052 of HR 10 would impose such strict requirements related to issuing driver's licenses and IDs that it would leave the states virtually no discretion to set policies tailored to each state's own unique circumstances and needs. In addition, HR 10 would effectively force states to share driver's license–related information electronically with all the other states, without mandating any safeguards for ensuring that drivers' privacy and civil rights are not abused in the sharing of this data. Under such a system, a state-issued driver's license would be a national ID card in all but name.

In contrast, the driver's license provisions of the Senate bill, S. 2845, would not themselves impose license eligibility, identity documentation, document verification, and other such requirements on the states, but rather they would provide for a negotiated rule-making process through which specific license and ID–related requirements would be established. Moreover, S. 2845 specifically provides that such standards could not override a state's eligibility standards. However, it does leave open the possibility that the standards would in fact be restrictive and that they would constitute a first step toward instituting a national ID card. As a result, groups as disparate as the American Civil Liberties Union and the American Conservative Union oppose the driver's license/ID provisions of both the Senate and House bills.

Immigrants' advocates, along with many chiefs of police and other law enforcement officials, argue that for the sake of security it is better if all noncitizen drivers can be reliably identified in an emergency, an arrest, or an urgent investigation, just like all other drivers; that it is unsafe to have millions of drivers on the roads who have not been tested and cannot obtain insurance; and that failure to license millions of drivers encourages identity theft and development of a black market in false documents, both of which undermine the purpose of establishing standards.

The 9/11 Commission staff report titled *9/11 and Terrorist Travel*, which was issued on Aug. 21, 2004, sets out the information that is available on the types of visas the 9/11 terrorists had, their entries into the U.S., and the driver's licenses they obtained and used. As the staff report makes clear, some of the hijackers were mistakenly issued valid visas or lawfully admitted to the U.S.; the rest were here legally. Five of the terrorists obtained their licenses fraudulently by falsely claiming *state* residency, which is different from lawful residency for immigration purposes. (Since 9/11, some states have tightened their procedures for establishing that applicants for driver's licenses in fact reside in the state in which they are applying for a license.)

All the 9/11 terrorists, therefore, had the immigration documents necessary to establish that their immigration status was lawful. And they did not need U.S.-issued driver's licenses to board the airplanes they hijacked on 9/11; if they had not had driver's licenses to present before boarding, they could have presented their foreign passports instead. Under HR 10's provisions, noncitizens would still be allowed to present foreign passports to establish their identity before boarding flights in the U.S.

HR 10 would mandate expanded communication between license-issuing agencies and require states to capture and store digital images of identity source documents. Privacy experts argue that such a requirement would actually facilitate identity theft. Finally, section 3053 of the bill would defer to the American Association of Motor Vehicle Administrators (AAMVA)—a nongovernmental, nonprofit organization with its own institutional agenda and little accountability to the public—over other parties that would be affected were HR 10's provisions to be enacted. Although HR 10 does not identify the AAMVA by name, section 3053 is designed to require states to comply with the AAMVA's "Driver License Agreement," and it does not mandate that state elected officials or organizations that represent drivers or other stakeholders be consulted.

Conclusion. Although federal legislation that would impair the ability of noncitizens to obtain driver's licenses or use foreign identity documents has not yet been passed, the 9/11 Commission implementation bills will likely come to life again in a lame duck session of this Congress or when the next Congress begins work. Immigrants' advocates must also be prepared for the issues to be raised outside the context of the attempt to translate the commission's recommendations into law.

AG ISSUES REGULATIONS GOVERNING 212(c) RELIEF FOR LPRs WITH CONVICTIONS BASED ON PLEA AGREEMENTS MADE PRIOR TO APR. 1, 1997 – The U.S. attorney general has issued a final rule that establishes procedures governing applications for relief under section 212(c) of the Immigration and Nationality Act. The rule implements a narrow interpretation of the Supreme Court's ruling in *INS v. St. Cyr,* 533 U.S. 289 (2001), by allowing individuals in the same situation as the petitioners in *St. Cyr* to move to reopen their cases to apply for 212(c) relief. The final rule adopts the rule that was proposed in Aug. 2002, with no significant change (see "AG Issues Proposed Rule Governing 212(c) Relief for LPRs With Certain Convictions Prior to Apr. 1, 1997," IMMIGRANTS' RIGHTS UPDATE, Sept. 10, 2002, p. 7). The effective date of the final rule

is Oct. 28, 2004.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) barred 212(c) relief for individuals who are deportable because of specified criminal offenses, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) repealed section 212(c). However, in *St. Cyr,* the Court ruled that the AEDPA restrictions on eligibility for 212(c) relief do not apply to individuals who agreed to plead guilty to the disqualifying conviction prior to the enactment of the AEDPA, and that this relief remains available for such individuals even if they are in removal proceedings under the IIRIRA.

The final rule allows such individuals to file a special motion to reopen not subject to the normal time and number restrictions for motions to reopen, but the special motion to reopen must be filed by Apr. 26, 2005. The special motion does not automatically stay removal, so a request for a stay of removal should be filed in conjunction with the motion.

Under the rule, 212(c) relief is not available to individuals whose convictions were the result of a trial rather than a guilty plea. Relief is also not available to individuals who were already deported as a result of the AG's retroactive interpretation of the AEDPA, nor to those who returned to the U.S. illegally after having received a final order of deportation or exclusion.

In order to qualify for 212(c) relief under the rule, an individual must meet the following criteria: he or she must (1) be a lawful permanent resident or have been an LPR prior to receiving a final order of deportation or removal; (2) have a lawful unrelinquished domicile in the United States for at least seven years (or have had a lawful unrelinquished domicile for at least seven years prior to receiving a final order of deportation or removal); (3) be admissible (the only grounds of inadmissibility that would apply under the rule are INA sections 212(a)(3) (for security and terrorism grounds) and 212(a)(10)(C); (4) be deportable or removable on a ground that is comparable to a ground of exclusion or inadmissibility; and (5) not be barred from applying for 212(c) relief under the law as it existed at the time that the individual pled guilty or *nolo contendere.*

The requirement described in (4), above, is based on the history of section 212(c), which was originally enacted as a waiver of grounds of exclusion. But it was subsequently applied by the Board of Immigration Appeals to waive grounds of deportability, where the ground was analogous to a ground of exclusion that can be waived by section 212(c). Thus, the BIA held that 212(c) relief was not available for an individual deportable for entry without inspection, because there was no ground of exclusion corresponding to this ground of deportability. *Matter of Hernandez-Casillas,* 20 I. & N. Dec. 280 (Att'y. Gen. 1991).

Because section 212(c) was amended by the AEDPA, the requirement described in (5), above, applies differently to individuals who were convicted prior to the enactment of the AEDPA and those convicted subsequently. For individuals who pled to a crime prior to the Apr. 24, 1996, enactment of the AEDPA, it means that if the individual was convicted of an aggravated felony, he or she must not have actually been incarcerated for five years or more, since this would disqualify the individual from 212(c) relief under pre-AEDPA law. For individuals who pled to a conviction between Apr. 24, 1996, and the Apr. 1, 1997, effective date of the IIRIRA, the individual must be eligible for relief under section 212(c) as it was modified by the AEDPA. In other words, the individual is not eligible for relief if he or she received a conviction for an aggravated felony, a controlled substance offense, a firearms offense, or two or more crimes involving moral turpitude for which the individual received a sentence of at least one year.

Individuals who have final orders of deportation, exclusion, or removal but who are eligible for relief under the rule may file a motion to reopen their cases under the rule, but must do so on or before April 26, 2005. The motion must be identified as a "special motion to seek 212(c) relief" and must be accompanied by form I-191 and required attachments. The filing of a special motion does not stay the execution of a final order, and applicants who need a stay would also have to file an application for a stay.

69 FR 57826–35 (Sept. 28, 2004).

REFUGEE ADMISSIONS FOR FY 2005 SET AT 70,000 – After consulting with Congress, President Bush has determined that during fiscal year (FY) 2005 the United States may admit up to 70,000 refugees. Federal FY 2005 began Oct. 1, 2004, and will end Sept. 30, 2005.

The presidential determination allocates just 50,000 refugee admissions numbers to five different regions of the world, leaving 20,000 of the numbers in an "unallocated reserve," to be used if needed. This despite the fact that currently there are an estimated 12 million refugees in the world and that the president said, in his 2002 report to Congress regarding his administration's plans for setting refugee admissions numbers, that he expected to increase them to 90,000 by the end of his first term in office, according to the Lutheran Immigration and Refugee Service.

The presidential determination authorizes the Secretary of State "to use unallocated numbers in regions where the need for additional numbers arises" and "to transfer unused numbers allocated to a particular region to one or more other regions . . . ."

The 70,000 prospective refugee admissions have been allocated among the world's geographic regions as follows: Africa (20,000); East Asia, including Amerasians and their family members admitted to the U.S. with federal refugee resettlement assistance (13,000); Europe and Central Asia, including persons who were nationals or "habitual residents" of the former Soviet Union prior to Sept. 2, 1991 (9,500); the former Soviet Union (14,000); Latin America and the Caribbean (5,000); the Near East and South Asia (2,500); and the unallocated reserve (20,000). In addition, 10,000 refugee admission numbers are to be made available for the adjustment to permanent residence of persons who have been granted asylum in the U.S.

According to the presidential determination, the administration will grant refugee admission to nationals or habitual residents of Cuba, Vietnam, and countries of the former Soviet Union even if they are still in their countries of origin.

Presidential Determination No. 2004-53 (Sept. 30, 2004).

TPS EXTENDED AND REDESIGNATED FOR SUDAN, AND EXTENDED FOR BURUNDI – The secretary of Homeland Security has published notices in the Federal Register extending the designations of Sudan and Burundi as countries whose nationals and former residents currently in the United States are eligible for temporary protected status (TPS); and he has redesignated Sudan for TPS, so that nationals and former residents of Sudan who have not

previously been granted TPS may apply for it now.

The current TPS programs for people from Sudan and Burundi, both of which were due to expire on Nov. 2, 2004, have been extended to Nov. 2, 2005. The 60-day reregistration period for both programs (for people who have already been granted TPS) began Oct. 7, 2004, and will remain in effect until Dec. 6, 2004. The *redesignation* of Sudan for TPS is effective from Nov. 2, 2004, until Nov. 2, 2005. To be granted benefits under the redesignation, nationals of Sudan and persons of no nationality who last habitually resided there must register for TPS during a 6-month registration period that began on Oct. 7, 2004, and will end on Apr. 5, 2005.

The attorney general first designated Sudan and Burundi for TPS in Nov. 1997 because of ongoing armed conflict in each country. The attorney general extended the designation for each country in Nov. 1998, and in Nov. 1999 the attorney general redesignated each country for TPS, which allowed persons from Sudan and Burundi who arrived in the U.S. after Nov. 1997 to apply for TPS. Since then, the designations of each country have been renewed annually.

The current notice regarding Sudan explains that armed conflict related to Sudan's 20-year-old north-south civil war, which has killed about 2 million people and displaced over 5 million, continues. In addition, tens of thousands of Sudanese have been killed by armed conflict in the western region of Darfur and about 1 million have been displaced. According to the Federal Register notice, "Reports of killings, rapes, beatings, looting and burning of property throughout the Darfur region continue."

In Burundi, armed conflict among government forces and at least two different rebel groups continues to kill or displace hundreds of thousands of people. All the warring parties continue to violate the human rights of the civilian population, and nearly 14 percent of Burundi's population needs emergency food and agricultural assistance, according to the Federal Register notice.

The Immigration and Nationality Act authorizes the secretary of Homeland Security to grant TPS to individuals in the U.S. 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 people of no nationality who last habitually resided in a country whose nationals are eligible for TPS. The Dept. of Homeland Security (DHS) estimates that there are 449 persons from Sudan who have been granted TPS and are eligible for re*registration,* and that there are fewer than 1,500 people from Sudan who may be eligible to apply for TPS under the re*designation.* The DHS estimates that about 19 people from Burundi are eligible to reregister for TPS.

To *reregister* for TPS, nationals and former residents of Sudan and Burundi who already have TPS must file the following during the 60-day registration period (Oct. 7–Dec. 6, 2004): (1) Form I-821, Application for Temporary Protected Status (without the filing fee); (2) Form I-765, Application for Employment Authorization; (3) two identification photographs ("full face frontal, 2 inches x 2 inches"); and (4) a "biometrics fee" of $70 for each applicant 14 years old or older.

All people seeking to reregister must be refingerprinted, hence each applicant over age 14 must submit the $70 biometrics services fee. Applicants who seek work authorization under the extensions of TPS for Sudanese and Burundians 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 must submit their applications to the U.S. Citizenship and Immigration Services (USCIS) district office that has jurisdiction over the applicant's place of residence.

"Late initial registration" is also available under the extension for *Burundi.* In order to apply for late initial registration, a person must:

- be a national of Burundi (or a person with no nationality who last habitually resided there);
- have been continuously physically present in the U.S. since Nov. 9, 1999;
- have continuously resided in the U.S. since Nov. 9, 1999; 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 Nov. 4, 1997, to Nov. 3, 1998) or during the registration period for the redesignation (Nov. 4, 1999, through Nov. 3, 2000), 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.

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

- be a national of Sudan, or have no nationality and have last habitually resided in Sudan;
- have been continuously physically present in the U.S. since Oct. 7, 2004;
- have continuously resided in the United States since Oct. 7, 2004;
- 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 Oct. 7, 2004, and Apr. 5, 2005.

To apply for TPS under the redesignation for Sudan, 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 ("full face frontal," 2 inches x 2 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) for each applicant over 14 years of age.

An applicant must file the forms with the USCIS district 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, http://uscis.gov, or by calling the USCIS National Customer Service Center at 1-800-375-5283. Application forms may be obtained from the USCIS website, from local USCIS offices, or by contacting the USCIS Forms Line: 1-800-870-3676.

69 FR 60168–72 (Oct. 7, 2004) (Sudan);
69 FR 60165–68 (Oct. 7, 2004) (Burundi).

TPS FOR HONDURANS AND NICARAGUANS EXTENDED 18 MOS. – The Dept. of Homeland Security recently announced that the temporary protected status (TPS) programs for people from Nicaragua and Honduras have been extended until July 5, 2006. Under this extension, non–U.S. citizens who already have been granted TPS under these programs will be eligible to reregister for them and thus maintain their lawful status and eligibility to be employed in the U.S. for another 18 months.

The 60-day reregistration period for these programs began on Nov. 1. More details will be available in the next issue of IMMIGRANTS' RIGHTS UPDATE.

CORRECTION: ENDING DATE FOR TERMINATED LIBERIA TPS PROGRAM IS OCT. 24; EFFECTIVE DATE OF NEW PROGRAM UNDER REDESIGNATION REMAINS OCT. 1 – The Dept. of Homeland Security erred when it announced in the Aug. 25, 2004, Federal Register that the previous temporary protected status (TPS) program for people from Liberia would end on Oct. 1, 2004 (see "TPS Simultaneously Terminated and Redesignated for Liberia," IMMIGRANTS' RIGHTS UPDATE, Sept. 21, 2004, p. 4). Instead, the ending date for the previous TPS program for Liberia is *Oct. 24, 2004*. In addition, the validity of Form I-688B employment authorization documents issued to beneficiaries of the Liberia TPS program that bear (1) an expiration date of Oct. 1, 2004, and (2) a notation of either "274a.12(a)(12)" or "274a.12(c)(19)" is extended to Oct. 24, 2004.

Under section 244(b)(3)(B) of the Immigration and Nationality Act, the designation of a country as one whose nationals and former residents are eligible for TPS may not be terminated earlier than 60 days from the time the termination notice is published in the Federal Register. Since the Dept. of Homeland Security published the termination notice on Aug. 24, the designation of Liberia could not legally terminate until Oct. 24.

However, the date on which the redesignation of Liberia for TPS became effective remains Oct. 1, 2004.

69 FR 58934 (Oct. 1, 2004).

STATE DEPT. INSTRUCTS REGARDING 2006 DIVERSITY VISA LOTTERY – The U.S. State Dept. has issued instructions regarding how to enter the diversity immigrant visa lottery under the 2006 diversity immigrant visa program ("DV-2006"). Registrations for the lottery will be accepted only in electronic form during a 2-month registration period beginning at noon Eastern Standard Time on Friday, Nov. 5, 2004, and ending at noon EST on Friday, Jan. 7, 2005. If more than one electronic entry is received for any applicant, all the applicant's entries will be disqualified, regardless of who submitted the additional entry(ies).

The visa lottery was introduced in 1986 as a temporary procedure to increase immigration from countries that, especially since the 1960s, have sent relatively few immigrants to the U.S. In 1988 the program was extended for two years. The Immigration Act of 1990 then created a transitional program for three more years, followed in fiscal year 1995 by a permanent program.

Under the permanent program, 55,000 immigrant visas are allocated to the different regions of the world under a formula intended to allocate more visas to areas that have sent relatively few immigrants in the previous five years than to those that have contributed large numbers of immigrants. Natives of countries that have sent more than 50,000 immigrants to the U.S. in the past five years are not eligible, and no one country can receive more than seven percent of the diversity visas issued in a single year. (However, because the Nicaraguan and Central American Relief Act (NACARA) allocates 5,000 of the DV visas per year, beginning with DV-1999, for use in the NACARA program, only 50,000 visas are available for DV-2006.)

Eligibility for Lottery. To be eligible for the visa lottery, a person must meet two basic requirements: (1) He or she must be a native of one of the limited number of countries whose natives qualify for diversity visas (NOTE*:* Persons from these countries who are already in the U.S. are eligible to apply); and (2) the person must meet either the *education* or *training* requirement of the DV program (discussed below). In addition, the individual must submit a properly completed lottery entry within the registration period.

Natives of the following regions and countries are eligible to enter the DV-2006 lottery and, if selected in the lottery, to apply for a DV visa:

• AFRICA. Natives of all countries qualify.

• ASIA. Natives of most countries in Asia, including Indonesia and the countries of the Middle East, qualify. So do persons who are natives of Hong Kong S.A.R., Macau S.A.R., and Taiwan. However, natives of the following countries do *not* qualify: mainland China (i.e., people born in mainland China do not qualify), India, Pakistan, Philippines, South Korea, and Vietnam.

• EUROPE. Natives of most European countries, including their overseas components and dependent areas, qualify. However, natives of Russia do *not* qualify, nor do natives of the United Kingdom (except natives of Northern Ireland *do* qualify), nor do natives of the U.K.'s dependent territories (i.e., Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena, and Turks and Caicos Islands).

• NORTH AMERICA. Only natives of The Bahamas qualify; natives of either Canada or Mexico do *not* qualify.

• OCEANIA. Natives of all countries qualify. Oceania includes Australia (as well as its components and dependent areas over-

seas), New Zealand (including its components and dependent areas overseas), Papua New Guinea, and all countries of the South Pacific).

• SOUTH AMERICA, CENTRAL AMERICA, AND THE CARIBBEAN. Natives of all countries except the following qualify: Colombia, Dominican Republic, El Salvador, Haiti, and Jamaica.

A *native* of a country is someone who was born in the country or someone who is chargeable to it under Immigration and Nationality Act sec. 202(b). The rules of chargeability allow the following categories of people to apply for lottery visas as natives of a qualifying country: (1) the spouse of someone born in one of the qualifying countries; (2) the minor dependent child of a parent who was born in a qualifying country; and (3) a person, regardless of age, (a) who was born in a country of which neither parent was a native or resident at the time of the person's birth, and (b) one of whose parents is a native of a qualifying country.

The education or training requirement for the DV program are that visa applicants either (1) must have a high school education (12-year course of elementary and secondary education) or its equivalent, or (2) for two of the past five years must have worked in a job that requires at least two years of training and experience to perform. The work experience of applicants will be evaluated using the U.S. Dept. of Labor's O*Net OnLine database.

Though the DV program imposes no age limits on who can apply, usually persons under 18 will be unable to satisfy the education/work requirement. Persons who are selected for visas can adjust status in the U.S. if they are otherwise qualified for adjustment of status. Finally, persons who are in the process of applying for a visa under a different visa category also can apply under the DV program.

A husband and wife can each submit a lottery entry; if either is selected, the other (if otherwise eligible) will qualify for a derivative visa. However, no person may submit more than one lottery entry. If more than one entry is submitted for any person, that person will be disqualified from the program.

Application Process. A basic requirement to participate in the visa lottery is that the native of a qualifying country must submit one electronic diversity visa entry form within the application period. The form will be accessible beginning Nov. 5, 2004, only at www.dvlottery.state.gov. According to the State Dept.'s instructions, "Failure to complete the form in its entirety will disqualify the applicant's entry." The entry form requires that the applicant provide the following information:

1. APPLICANT'S FULL NAME. Last/family name, first name, and middle name.

2. APPLICANT'S DATE OF BIRTH. Day, month, year.

3. APPLICANT'S GENDER. Male or female.

4. CITY/TOWN OF BIRTH.

5. COUNTRY OF BIRTH. The name of the country should be that which is currently in use for the place where the applicant was born.

6. PHOTOS. All required photographs must be submitted electronically, as attachments to the electronic entry form. The digital file for each submitted photo may be produced either by photographing the subject with a digital camera or by electronically scanning a photographic print. Each digital photo file must be in the JPEG format; it must be of either a color or grayscale image (no monochrome images accepted); if it is a digital photo, its resolution must be 320 pixels wide by 240 pixels high and its color depth must be either 24- or 8-bit color, or 8-bit grayscale. Any scans of photographic prints submitted must be 2 inches by 2 inches (50mm x 50mm) square and scanned at a resolution of 150 dots per inch (dpi), with a color depth of 24- or 8-bit color, or 8-bit grayscale. The maximum acceptable size of each photo file is 62,500 bytes.

One "recent" photo each is required of the applicant and of the applicant's spouse and each of his or her children under age 21 (natural as well as legally-adopted children and stepchildren), except that no photo is required of any child who is already a lawful permanent resident or a citizen of the U.S. A photo for each non-LPR and non–U.S. citizen family member must be submitted, even for members who no longer reside with the applicant and regardless of whether they will accompany or follow to join the applicant in the U.S. Group or family photos are not acceptable; a separate photo must be attached for each family member.

The subject of each photo must be directly facing the camera, with the head not tilted (i.e., tilted neither down, up, nor to the side). About 50 percent of the photo's area should be taken up by the head. The photo should be shot against a neutral, light-colored background, and the face should be in focus. The person photographed may not wear a hat, dark glasses, or other paraphernalia that might obscure the face. A photo in which the subject is wearing a head covering or hat is acceptable only when the item is worn for religious reasons, and even in such a case the headwear must not obscure any part of the face. Any photo depicting the DV lottery entrant wearing tribal, military, airline, or other headwear not specifically religious in nature will be rejected.

7. MAILING ADDRESS. Address, city/town, district/country/province/state, postal code/zip code, country.

8. PHONE NUMBER. Optional.

9. E-MAIL ADDRESS. Optional.

10. COUNTRY OF ELIGIBILITY, IF APPLICANT'S NATIVE COUNTRY IS DIFFERENT FROM COUNTRY OF BIRTH. If the applicant is claiming nativity based on being a national of a country other than his or her country of birth, that information must be submitted in the entry. If an applicant is claiming nativity through a spouse or parent, this should be indicated in the entry.

11. MARITAL STATUS. The options from which the applicant must choose are: unmarried, married, divorced, widowed, *or* legally separated.

12. NUMBER OF APPLICANT'S CHILDREN WHO ARE UNMARRIED AND UNDER 21 YEARS OF AGE. Children who are either lawful permanent residents or citizens of the U.S. should not be included in this count.

13. SPOUSE INFORMATION. Name, date of birth, gender, city/town of birth, country of birth, photograph.

14. CHILDREN INFORMATION (for each child for whom a photo is required (see number 6, "PHOTOS," above)). Name, date of birth, gender, city/town of birth, country of birth, photograph.

No fee is charged for submitting a visa lottery entry. After the end of the registration period, a computer will randomly select entries from among all the entries received for each geographic region. Each entry received during the lottery registration period will have an equal chance of being selected within its region. Within about five to seven months of the end of the registration period, lottery winners will be sent a letter notifying them that

they have been selected and providing instructions for how they can apply for an immigrant visa. Spouses and unmarried children under age 21 of successful visa applicants may also apply for visas to accompany or follow to join the principal applicant, but processing of entries and issuance of diversity visas to successful applicants and their eligible family members *must* occur by midnight on Sept. 30, 2006 (DV-2006 visas will be issued only between Oct. 1, 2005, and Sept. 30, 2006).

In order to be granted an immigrant visa, lottery winners must meet all eligibility requirements under U.S. law. Such requirements include those relating to special processing established in response to the terrorist attacks of Sept. 11, 2001. These requirements may significantly increase the level of scrutiny and time necessary to process applications for natives of some countries listed as eligible for DV-2006. Therefore, to increase the likelihood of being issued an immigrant visa by Sept. 30, 2006, lottery winners should submit their immigrant visa applications as soon as possible after being notified that they have won.

The DV-2006 instructions take pains to state that the DV lottery is operated entirely by the U.S. government and that no outside entity is sanctioned by the State Dept. to help prepare entrants' computerized entries. In terms of its chances of being selected in the random selection process, each properly completed electronic entry form has an equal chance of being selected, regardless of whether it is submitted directly by a private party or through the a paid intermediary.

The instructions for participating in DV-2006, including answers to frequently asked questions, are available on the State Dept.'s website, at http://travel.state.gov/visa/immigrants_types_diversity3.html.

US-VISIT TO BEGIN TEST EXPANSION IN TEXAS, ARIZONA, AND MICHIGAN – The Dept. of Homeland Security (DHS) has announced that the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program will begin a test expansion of its operations to three land ports of entry on Nov. 15, 2004. The sites are Laredo, TX, Douglas, AZ, and Port Huron, MI.

US-VISIT is the electronic entry/exit system aimed at keeping accurate track of who has entered the country, who has exited it, and who has overstayed his or her nonimmigrant visa. Beginning on Jan. 5, 2004, it required photographing and fingerprinting of nonimmigrant visitors to the U.S. as they entered the country at 115 airports and 14 major seaports.

By Dec. 31 of this year, US-VISIT must be deployed in the secondary inspection areas at the 50 busiest ports of entry and in the remaining ports of entry by Dec. 31, 2005.

According to an Oct. 14, 2004, DHS press release, "nearly 300" people have been detained out of the 10 million who have been screened under US-VISIT. They include "federal penitentiary escapees, convicted rapists, drug traffickers, individuals convicted of manslaughter and credit card fraud, a convicted armed robber, and numerous immigration violators and individuals attempting visa fraud."

Canadians, who do not need a passport or visa to enter the U.S., and Mexicans who enter with a Border Crossing Card will remain exempt from the program. Visitors from the 27 "visa-waiver countries"—i.e., those whose nationals are not required to obtain a visa in order to visit the U.S.— originally were not required to be processed through US-VISIT. However, beginning on Sept. 30, 2004, these countries, which include the United Kingdom, France, Spain, Ireland, Japan, and 22 others (mostly in Europe), were added to the list of those whose nationals must be fingerprinted and photographed when they enter the U.S. as visitors. According to the Electronic Privacy Information Center (www.epic.org/privacy/us-visit/), the expansions will result in the U.S. government collecting biometrics from about 33,000 more travelers every day.

25 STATES CONSIDER DRIVER'S LICENSE LEGISLATION IN 2004 – At least 46 bills were considered in 25 states in 2004 that addressed immigrants' access to state driver's licenses. While the California debate on granting licenses to immigrants, regardless of their status, dominated the news coverage, the majority of bills did not address the issue of eligibility based on immigration status. Rather, most bills addressed which documents states should accept as proof of identification to obtain a license and what alternative documents are acceptable if an applicant is not eligible for a Social Security number (SSN). There were attempts in four states to restrict the issuance of driver's licenses only to people who are lawfully present in the United States. All of those efforts failed.

Documents accepted as proof of identification. States vary greatly in what documents they accept as proof of identification from people applying for driver's licenses. Many states recognize that in order for their residents who are foreign-born to be able to obtain licenses, the state licensing agency must accept a variety of foreign documents. This year, approximately ten states considered bills that would have either expanded or restricted their acceptance of foreign ID documents, including passports, birth certificates, and consular ID cards. However, South Dakota is the only state that passed such a law. The new law prohibits a state agency, state-supported university, or postsecondary technical institute from accepting the *matrícula consular* card or "substantially similar document issued by the Mexican Consulate" as proof of identification for any purpose. Ten states currently accept consular ID cards as a form of identification.

Alternatives to the Social Security Number Requirement. Currently, 47 states allow driver's license applicants who are not eligible to be issued an SSN to present an alternative to the SSN when applying for a license. Alternatives to presenting an SSN include presenting an affidavit verifying that the applicant is not eligible for an SSN, or verification from the Social Security Administration that the applicant is not eligible for an SSN, or an Individual Taxpayer Identification Number (ITIN), which is issued by the U.S. Internal Revenue Service to people who are required to have a taxpayer ID number but are not eligible for an SSN. In 2004, two states changed their policies with respect to such alternatives to the SSN. After passing a law in 2003 that allowed for the acceptance of the ITIN, in 2004 Kansas rescinded this provision and now accepts a sworn statement that the applicant is not eligible for an SSN. Illinois also changed its policy in 2004. Before the new law passed, Illinois required all driver's license applicants to present an SSN, unless they had "bona fide" religious convictions against obtaining one. The state now grants temporary licenses to immigrants who are lawfully in the U.S. and ineligible for an SSN. (For more information on the Illinois law, see "Driver's Licenses: Illinois Creates Exception to Social Security Number

Requirement; N.Y. Assembly Holds Hearing on SSN Verification Process," IMMIGRANTS' RIGHTS UPDATE, Sept. 21, 2004, p. 4.)

In Michigan, Utah, Washington, and Wisconsin there were failed attempts to restrict eligibility for driver's licenses only to people who are lawfully in the U.S. The most heated battle took place in Utah, where an organization called UFIRE (Utahns for Immigration Reform and Enforcement) led a battle to overturn a 1999 law that allows immigrants who are ineligible for an SSN to obtain a license regardless of their status if they present alternative documentation. While UFIRE attempted to scare policymakers and the public with false claims that the 1999 provision undermines national security, the diverse driver's license coalition comprised of immigrant advocates, religious leaders, and law enforcement was able to defeat the attempt to overturn it.

More information on driver's license–related developments, both at the state and federal levels, that affect immigrants is available on NILC's website, at www.nilc.org/immspbs/DLs/index.htm.

Litigation

DISTRICT COURT APPROVES STIPULATION CLARIFYING APPLICATION OF *ORANTES* INJUNCTION TO UNACCOMPANIED MINORS – The federal district court in Los Angeles has approved a stipulation by the parties in a class action lawsuit that in 1988 resulted in the issuance of a nationwide permanent injunction on behalf of Salvadorans detained by the former Immigration and Naturalization Service. *Orantes-Hernandez v. Meese,* 685 F.Supp. 1488 (C.D.Cal. 1988), aff'd. sub nom *Orantes-Hernandez v. Thornburgh,* 919 F.2d 549 (9th Cir. 1990). The stipulation concerns a provision of the injunction that requires immigration authorities to keep unrepresented detained Salvadorans within the district in which they were apprehended for at least seven days, to afford them the opportunity to obtain counsel (i.e., they may not be transferred to another district within seven days of the time they are detained). The stipulation clarifies that this provision is not intended to prevent the transfer of detained unaccompanied minor Salvadorans, where a district has no facilities appropriate for the detention of minors and certain safeguards are met.

The 1988 injunction was issued, after a trial lasting more than a year, because the court found that the INS engaged in a nationwide pattern and practice of coercing and encouraging Salvadorans to accept voluntary departure and not to apply for asylum. The injunction requires the INS and its successors to provide notice to detained Salvadorans of the right to apply for asylum and prohibits them from coercing or otherwise discouraging Salvadorans from seeking asylum. It also requires the INS and its successors to afford detained Salvadorans access to counsel, telephones, writing materials, and legal rights materials. In addition, the defendants are required to inform attorneys of the location of detained class members and are prohibited from transferring unrepresented class members out of the district of their apprehension for seven days to afford them an opportunity to obtain legal representation in the area where they are detained. In 1989, as a result of violations of the injunction in south Texas, the injunction was modified to require the INS also to allow counsel for plaintiffs and nonprofit legal services organizations to make legal rights presentations to detained class members at the Port Isabel Service Processing Center. Many of the injunction's provisions have been adopted by the INS and its successors as policies for the treatment of non–class member detainees as well as Salvadorans.

The Office of Refugee Resettlement (ORR) of the U.S. Dept. of Health and Human Services, as part of the reorganization and elimination of the INS, has taken over responsibility for the care of unaccompanied minors in immigration custody. The ORR requested the stipulation in this case to clarify that the injunction's seven-day prohibition on transfers is not intended to prevent transfers that are necessary to ensure that minors are held in appropriate facilities.

The stipulation allows transfer of an unaccompanied minor class member to a suitable youth facility or foster care home outside of the district of apprehension, within seven days of the apprehension, where three conditions are met. These conditions are that: "(1) release of the minor has first been considered as a preferable alternative to custody but found unwarranted, (2) there is no facility appropriate for the custody of the minor in the district, or no space available at any such facility in the district of apprehension, and (3) transfer is to the nearest appropriate facility outside the district where space is available."

Orantes-Hernandez v. Ashcroft, No. CV 82-1107 KN (C.D.Cal., stipulation and order filed Sept. 28, 2004).

9TH CIRCUIT FINDS ADJUSTMENT OF STATUS AVAILABLE TO NONCITIZEN SUBJECT TO REINSTATEMENT OF REMOVAL – The U.S. Court of Appeals for the Ninth Circuit has ruled that a Mexican national who returned to the United States following a deportation and had his deportation reinstated may nonetheless obtain adjustment of status if his Application for Permission to Reapply for Admission, Form I-212, is granted. The court distinguished *Padilla v. Ashcroft,* 334 F.3d 921 (9th Cir. 2003), in which such relief was found not to be available in reinstatement cases, on the basis that in this case the petitioner, unlike Padilla, had filed the I-212 prior to the reinstatement of his deportation order. The court also found that the petitioner's adjustment is not barred by the "permanent" bar for unlawful reentry following prior removal or unlawful presence of section 212(a)(9)(C) of the Immigration and Nationality Act, because if the I-212 application is granted the grant would be retroactive to the date of the petitioner's entry and he would no longer be subject to the bar.

The petitioner in this case, Gregorio Perez-Gonzalez, is a Mexican national who first entered the U.S. in 1992. In 1994 he was convicted of unlawful possession of a firearm and subsequently placed in deportation proceedings and deported. He returned to the U.S. without inspection in 1995 and married a U.S. citizen in 1997. In 1999 he and his wife had a daughter, and later that year the family traveled to visit relatives in Mexico and then returned to the U.S., again entering without inspection.

In 2001 Perez-Gonzalez's wife filed a visa petition on his behalf, and in April 2002, after the petition was approved, Perez-Gonzalez filed an adjustment application under INA section 245(i). At his interview in June 2002, Perez-Gonzalez was told by the Immigration and Naturalization Service interviewer that because of his prior deportation, he needed to apply for advance permission to reapply for admission, and in July 2002 he filed the I-212 application. In October he was sent a notice for interview at the INS office. When he appeared, he was arrested and not allowed

to speak with his attorney. He was then issued a denial of his Form I-212 application, a denial of his adjustment application, and a Notice of Intent/Decision to Reinstate Prior Order. He filed a petition for review of the reinstated order with the court of appeals, which resulted in the Ninth Circuit's decision.

Ruling on the petition, the court found that the reinstatement statute applies to Perez-Gonzalez, because he was deported and he then reentered the U.S. illegally after Apr. 1, 1997. The court found the case on this point to be squarely controlled by its prior decision in *Gallo-Alvarez v. Ashcroft,* 266 F.3d 1123 (9th Cir. 2001).

The court then considered whether the reinstatement statute categorically bars Perez-Gonzalez from obtaining adjustment of status under INA sec. 245(i). In *Padilla,* the court found that a petitioner who was subject to reinstatement was barred from applying for adjustment under section 245(i). However, the court concluded that this case is distinguishable from *Padilla* because Perez-Gonzalez applied for adjustment and permission to reapply before his prior deportation order was reinstated. The court reasoned that, had the INS granted the applications, "Perez-Gonzalez would no longer be subject to the reinstatement provision as he would no longer be considered an illegal entrant."

The court then considered whether Perez-Gonzalez's Form I-212 was properly denied. The court noted that it would not have jurisdiction to review a discretionary determination to deny this relief. However, in this case the denial was based on a legal determination that Perez-Gonzalez was not eligible for relief, and this determination may be judicially reviewed.

The INS denied the I-212 application on the grounds that this relief is available only "to aliens outside the United States, applying at a port-of-entry, or aliens paroled into the United States." The court noted that this restriction conflicts with the plain language of the regulations, as well as with precedent in which such relief was granted on a *nunc pro tunc* basis to individuals who had already entered the U.S. Thus, the court concluded that the denial was erroneous as a matter of law.

The court then considered the issue of whether this error was prejudicial—whether Perez-Gonzalez could have been granted adjustment had the I-212 been approved *nunc pro tunc*. The court noted that several grounds of inadmissibility apply to Perez-Gonzalez, including being present in the U.S. without admission or parole (INA sec. 212(a)(6)(A)(i)), and the various bars for noncitizens for prior removals or unlawful presence of INA secs. 212(a)(9)(A), (B), and (C). However, the court concluded that none of these bars preclude relief under INA section 245(i) and its implementing regulations, which clearly contemplate the adjustment of individuals who unlawfully entered the U.S. following a prior removal. Perez-Gonzalez also could be inadmissible for misrepresentation (INA sec. 212(a)(6)(C)) for failing to disclose his prior conviction and removal in his adjustment application, but this ground could be cured by a waiver under INA sec. 212(i). The court concluded that had the Form I-212 been approved, Perez-Gonzalez could have been granted adjustment. The court therefore remanded the case to the U.S. Citizenship and Immigration Service for a determination whether to exercise favorable discretion and grant the I-212 and a 212(i) waiver for the possible misrepresentation.

The court declined to resolve Perez-Gonzalez's claim that the reinstatement regulations violated his due process rights, since its decision affords relief on narrower grounds. However, the court did note that "The use of the adjustment of status procedure to surprise applicants with sudden reinstatement of their deportation orders raises fundamental due process concerns."

Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004).

9TH CIRCUIT FINDS HABEAS JURISDICTION TO CONSIDER CONSTITUTIONAL CHALLENGE TO UNDERLYING REMOVAL ORDER IN REINSTATEMENT CASE – The U.S. Court of Appeals for the Ninth Circuit has found that a non–U.S. citizen whose prior removal order has been reinstated under section 241(a)(5) of the Immigration and Nationality Act may challenge the constitutionality of the original removal order in federal district court. Ruling on a petition for review of a reinstated removal order, the court found that it was barred by the statute from reviewing the underlying order, but that that bar does not apply to district court habeas jurisdiction. The court therefore transferred the case to district court for consideration of the constitutionality of the removal order.

The petitioner in this case, Sergio Arreola-Arreola, is a Mexican national who first came to the U.S. in 1957, when he was just under two years old. He subsequently became a lawful permanent resident. In 1996 he was convicted in California state court for driving under the influence of alcohol with three prior convictions. Subsequently he was placed in removal proceedings, and in 1998 an immigration judge found Arreola removable for having been convicted of an "aggravated felony." The IJ also denied his application for cancellation of removal, finding him ineligible due to the aggravated felony conviction. Arreola did not appeal the IJ decision, and he now contends that he unknowingly waived the right to appeal due to ineffective assistance of counsel. Arreola was removed to Mexico and later reentered the U.S.

In Sept. 2000, Arreola was arrested by the Immigration and Naturalization Service and served with a Notice of Intent/Decision to Reinstate Prior Order, Form I-181. He indicated on the form that he would like to make a statement contesting the reinstatement, but the record in this case does not include such a statement. On the same day that the INS arrested Arreola and served the notice, the INS reinstated the original removal order.

Arreola filed a petition for review with the court of appeals to appeal the reinstatement order. He contended both that he was denied due process in the implementation of the reinstatement procedure and that he was denied due process in the original removal proceeding that resulted in the order on which the reinstatement was based. Arreola also argued that the original removal order was unlawful because his conviction for driving under the influence does not constitute an "aggravated felony." After Arreola was removed to Mexico, the Board of Immigration Appeals overruled its determination that such offenses are not aggravated felonies. *In re Magallanes,* 22 I. & N. Dec. 1 (BIA 1998), *overruled by In re Ramos,* 23 I. & N. Dec. 336 (BIA 2002). The Ninth Circuit also has ruled that DUI convictions do not constitute aggravated felonies. *Montiel-Barraza v. INS,* 275 F.3d 1178 (9th Cir. 2002).

Ruling on the petition for review, the court found that it has jurisdiction to review the reinstatement proceeding, as previously found in *Castro-Cortez v. INS,* 239 F.3d 1037, 1044 (9th Cir. 2001). However, the court also noted that in *Alvarenga-Villalobos v. Ashcroft,* 271 F.3d 1169, 1174 (9th Cir. 2001), the Ninth Circuit

previously found that the reinstatement procedure comports with due process when the underlying removal proceeding afforded due process to the noncitizen. For this reason, the court found that "Arreola's challenge to the constitutionality of the reinstatement order necessarily depends on a showing that the underlying removal order is unconstitutional." The court also followed *Alvarenga* in rejecting Arreola's claim that his removal order was unlawful because under current law the offense for which he was convicted does not constitute an aggravated felony, since the order was "lawful under the law at the time he was deported." *Alvarenga,* 271 F.3d at 1173.

The court concluded that Arreola's assertions that he unknowingly waived his right to appeal the IJ's decision due to his attorney's ineffective assistance of counsel raised "a serious due process challenge to the reinstatement process as it is applied to him." However, the reinstatement statute provides that when a removal order is reinstated, the prior order "is not subject to being reopened or reviewed." INA sec. 241(a)(5). The court found that this bar to review deprived it of jurisdiction to consider Arreola's due process challenge to the original removal order. However, the court also found, following the Supreme Court's reasoning in *INS v. St. Cyr,* 533 U.S. 289 (2001), that the statutory bar does not apply to habeas corpus review of such a claim.

The court concluded that Arreola's petition for review should be treated as a habeas petition. However, because the appellate court does not have jurisdiction to consider an original habeas petition, the court lacked jurisdiction to rule on the petition. The court therefore considered whether transfer of the petition to district court was proper under 28 U.S.C. sec. 1631, and concluded that it was.

Arreola-Arreola v. Ashcroft, 383 F.3d 956 (9th Cir. 2004).

Employment Issues

WORKER ALLOWED TO REMAIN SILENT AND REFUSE TO DISCLOSE IMMIGRATION STATUS IN A NEGLIGENCE CASE – In a work injury–related lawsuit, a Massachusetts court recently denied the defendants' motion to compel the plaintiff to answer questions regarding his immigration status posed to him at his deposition, as well as the defendants' motion to strike the objections made by the plaintiff's counsel at the deposition. The court also granted the plaintiff's request for a protective order.

The plaintiff, Ivan Pontes, was electrocuted while painting an electrical high tension tower and suffered severe second- and third-degree burns over 30 to 40 percent of his body. In addition to filing a workers' compensation claim against his employer, Pennsylvania Tower Painting Co., Pontes and his wife filed a lawsuit against New England Power Company, Massachusetts Electric Company, National Grid USA, and Pennsylvania Tower Painting Co., alleging that his injury resulted because of the defendants' negligence and failure to warn Pontes of the dangers inherent in the job he was performing. When Pontes appeared for a deposition on Jan. 28, 2004, the defense counsel asked him several questions regarding his immigration status. Plaintiff's counsel objected to these questions, citing Pontes's Fifth Amendment right against self-incrimination, and instructed Pontes not to answer.

In reaching its decision to deny the defendants' motion, the Massachusetts Superior Court first analyzed whether Pontes's assertion of his Fifth Amendment right was justified. The court determined that a "witness may refuse to testify based on their invocation of the [Fifth Amendment] privilege unless it is 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." Citing *Commonwealth v. Funches*, 379 Mass. 283, 289 (1979), quoting *Hoffman v. United States*, 341 U.S. 479, 488 (1951). "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute." Id., 379 Mass. at 289.

The court held that while fear of deportation alone is not a valid basis for asserting the Fifth Amendment privilege, since deportation proceedings are civil proceedings, the Immigration and Nationality Act does make it a crime for an undocumented person to use fraudulent documents to circumvent the I-9 employment eligibility verification process to obtain employment in the U.S. See 8 U.S.C. § 1324c. While Pontes's answers regarding his immigration status in themselves do not amount to a *per se* violation of the INA, the court noted that they undoubtedly could furnish a link in the chain of evidence needed to prosecute Pontes, were he undocumented. The court also found the plaintiff's fear that he would be prosecuted if he directly answered the questions posed to him at the deposition to be entirely reasonable.

After finding that Pontes's invocation of the Fifth Amendment was justified, the court next analyzed whether his immigration status is relevant to any claim or defense in the case before the court. Because the case is at the discovery stage, the court had to determine whether the plaintiff's immigration status is relevant or would lead to the discovery of relevant evidence, and therefore if it is the type of information that is "discoverable" at a deposition. Relying on the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 148 (2002), the defendants argued that Pontes's immigration status *is* relevant to the calculation of damages for his lost earning capacity, because if Pontes were undocumented, he would not be entitled to work in the U.S. On the other hand, Pontes contended that his immigration status is not relevant to the proceedings because the reasoning in *Hoffman Plastic* does not apply to the circumstances of his case.

The court noted that a determination of how much earning capacity an injured plaintiff has lost is based on the degree to which the plaintiff's ability to work has been diminished and not necessarily on what job the plaintiff did previously or will do in the future. "[Lost] earning capacity is based on the amount by which earning capacity is diminished due to the defendant's tortious conduct." See *Shea v. Rettie*, 287 Mass. 454, 456 (1934). Rejecting the defendants' argument, the court held that the "relevant issue in calculating diminished earning capacity is the effect of the work injury on earning capacity, rather than the effect of the employee's alien status on work capacity." See *Moran v. Dickinson*, 204 Mass. 559, 562 (1910); and *Medellín v. Cashman KPA, et al*., Board No. 03324300 (For more on this latter case, see "Massachusetts Board Does Not Extend *Hoffman*'s Reach and Affirms Undocumented Workers' Right to Workers' Compensation," IMMIGRANTS' RIGHTS UPDATE, Feb. 17, 2004, p. 8).

Moreover, the court found that the *Hoffman Plastic* decision was inapplicable in Pontes's case. While the Supreme Court had been concerned with preventing an incentive for undocumented workers to violate the INA in order to obtain jobs in the U.S., the policy underlying Pontes's case is instead to decrease the incentive for employers to violate the INA. The court held that employers would be more inclined to hire undocumented workers if they know their financial liability may be less if an undocumented worker is injured on the job. In addition, the court said, "Employers will also have less incentive to provide adequate workplace safety measures for jobs they intend to fill with illegal immigrants. . . . This affects illegal as well as citizen employees." The court held that the *Hoffman Plastic* decision does not make Pontes's immigration status relevant to these legal proceedings. Finally, the court added that even if the plaintiff's immigration status were relevant, the risk of injury to him would far outweigh the need for its disclosure.

Pontes, et al. v. New England Power Co., et al., 18 Mass. L. Rep. 183 (Mass. Super. Ct. 2004).

GEORGIA APPELLATE COURT UPHOLDS WORKERS' COMPENSATION COVERAGE OF UNDOCUMENTED WORKER – The Court of Appeals of Georgia recently affirmed the right of an injured worker to receive coverage under the state's workers' compensation system. In doing so, the court rejected the employer's argument that an employer-employee relationship between it and the worker did not exist because a federal law prohibits the hiring of undocumented workers. The court also rejected the employer's contention that the worker's use of fraudulent documents to secure her job should preclude her from receiving workers' compensation benefits.

Juana Sandoval Palacias worked as a janitor for Continental PET Technologies, Inc., for five years prior to her accident. After Palacias was injured, she filed a claim with Continental seeking workers' compensation coverage for her medical expenses and lost wages. Continental denied her claim. Following a hearing, an administrative law judge found that Palacias had been injured in the course of her employment and ordered Continental to pay her workers' compensation benefits. The State Board of Workers' Compensation adopted the award determined by the judge, and a superior court affirmed the ruling. Continental brought the case to the Georgia appellate court, claiming that the superior court had erred in failing to reverse the State Board's decision.

Continental did not dispute that Palacias performed services for the company in a manner that rendered her an employee under Georgia law. However, Continental's first claim was that Palacias was barred from seeking workers' compensation benefits because federal law makes it unlawful to employ undocumented workers. Therefore, Continental rationalized, any employment contract between the company and Palacias was void.

The court noted that Georgia's Workers' Compensation Act provides that the definition of "employee" includes "every person in the service of another under any contract of hire or apprenticeship." It found that this broad definition includes undocumented workers and that therefore the question to be decided was whether the "employer sanctions" provisions of the Immigration Reform and Control Act (IRCA) preempt the statute. Specifically, the court had to decide whether Georgia's workers' compensation statute is preempted by IRCA's provisions prohibiting the hiring of undocumented workers and the use of fraudulent documents to obtain employment. Recognizing that the question of preemption is a question of congressional intent, the court found that neither IRCA nor its accompanying regulations "purport to intrude into the area of what protections a State may afford" undocumented workers.

The court then addressed Continental's claim that the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB* requires a finding that awarding workers' compensation benefits to an undocumented worker contravenes IRCA. In *Hoffman*, the Court held that the policy concerns underlying IRCA prohibit the National Labor Relations Board from conferring back pay awards to undocumented immigrants who have been the victims of violations of the National Labor Relations Act. The Georgia court, however, noted that the *Hoffman* decision did not apply to more "traditional remedies" and that, post-*Hoffman,* two state jurisdictions—Florida and Minnesota—cited to this fact in preserving workers' compensation coverage for undocumented workers. The court therefore found that federal law does not preempt Georgia law on the question of whether or not an undocumented worker can receive workers' compensation benefits.

Continental's second claim was that Palacias should be precluded from workers' compensation coverage because she used fraudulent documents to obtain employment. The court rejected this argument, relying on a decision it issued in 1996 that rejected denial of workers' compensation coverage when the employer failed to show a causal connection between the worker's misrepresentation and the injury suffered by the employee. The court held that, similarly, because Continental failed to illustrate a causal connection in this case, its argument must fail.

Continental PET Technologies, Inc., v. Palacias, 2004 Ga. App. LEXIS 1225 (Sept. 13, 2004).

9TH CIRCUIT VACATES NONCITIZEN'S CRIMINAL CONVICTION FOR FALSE CLAIM TO U.S. CITIZENSHIP ON I-9 FORM – The U.S. Court of Appeals for the Ninth Circuit recently vacated the criminal conviction of a worker who had been convicted of falsely claiming to be a U.S. citizen because, in the process of completing an I-9 employment eligibility verification form, he had checked the box next to the statement, "I attest, under penalty of perjury, that I am . . . [a] citizen or national of the United States."

Ali Abdulati Karaouni, a Lebanese national who entered the U.S. in 1992 and whose authorization to stay and work here expired in Jan. 1994, had been arrested in Sept. 2002 by an agent of the Immigration and Naturalization Service, who also seized documents belonging to Karaouni and interrogated him. Subsequently, Karaouni was arraigned on charges relating to an I-9 form he had filled out in July 1998 when he was hired by St. Agnes Medical Center in Fresno, CA, on which he had attested to being a citizen or national of the U.S. The count that Karaouni was tried for and ultimately convicted of was willfully making a false claim to being a U.S. citizen in violation of 18 USC sec. 911. In June 2003, after a two-day trial, the court sentenced him to three months in prison. Because Karaouni had been incarcerated since his arrest, the court credited him for the time he had served, and he was immediately deported to Lebanon.

Karaouni appealed his criminal conviction to the Ninth Circuit, contending that the evidence that had been presented

against him was insufficient to support his conviction because no rational juror could find beyond a reasonable doubt that, by checking the box on the I-9 form, Karaouni had made a claim to be a U.S. citizen, as opposed to a U.S. national.

In its decision, the Ninth Circuit noted that there are three essential elements of a sec. 911 violation. In Karaouni's case, the government had the burden of proving beyond a reasonable doubt (1) that Karaouni had made a false claim of U.S. citizenship, (2) that his misrepresentation was willful (i.e., voluntary and deliberate), and (3) that it was conveyed to someone with good reason to inquire into his citizenship status. The issue on appeal concerned the first element.

It was undisputed that Karaouni was not a U.S. citizen in July 1998, when he filled out the I-9 form and checked the attestation box. However, Karaouni pointed out that the statement printed on the I-9 form next to the box he checked is phrased in the disjunctive and that therefore no rational juror could find beyond a reasonable doubt that he was claiming to be a U.S. citizen and not a U.S. national.

The court found the syntactic structure of the phrase to be critical, because the legal definitions of a U.S. national and a U.S. citizen are distinct. The court also found that the plain language of 18 USC sec. 911 provides only that a false claim to U.S. *citizenship* is a crime. Therefore, the court concluded that there was insufficient evidence to support Karaouni's conviction. In doing so, it found that the trial court "violated a basic principle of criminal law by allowing the government to prove that an individual committed the charge offense by showing that he committed either that offense or some other act." The court reversed Karaouni's conviction, holding that his answer on the I-9 form cannot constitute an offense under sec. 911 because Karaouni merely attested that he was a U.S. citizen *or* a U.S. national, and a claim to U.S. nationality, even if false, does not violate sec. 911.

U.S. v. Karaouni, 379 F.3d 1139 (9th Cir. 2004).

Public Benefits Issues

BILLS INTRODUCED TO EXTEND SSI ELIGIBILITY TWO YEARS – As thousands of immigrant seniors and persons with disabilities face termination of their Supplemental Security Income (SSI) grants, legislation to extend their eligibility for SSI has been introduced in the Senate. Senators Gordon Smith (R-OR), Herb Kohl (D-WI), and Richard Lugar (R-IN) have introduced S. 2623, the SSI Extension for Elderly and Disabled Refugees Act, which would extend for two additional years the eligibility for SSI of refugees, asylees, and others who were permitted to immigrate to the United States for humanitarian reasons (S. 2623 refers to the latter as "humanitarian immigrants").

SSI provides assistance to cover basic necessities for seniors and persons with disabilities who have little or no other income. Refugees, asylees, and other "humanitarian immigrants" who qualify for SSI are subject to a 1996 welfare law provision that limits their eligibility for SSI benefits to the first seven years after they were granted the relevant immigration status, unless they become U.S. citizens.

A combination of immigration backlogs, processing delays, statutory caps on the number of asylees who can adjust their status to lawful permanent residence, as well as language and other barriers have made it impossible for many of these immigrants to become citizens within the seven-year period mentioned above. According to the Social Security Administration, over 2,000 immigrants had lost benefits by Dec. 2003, because their seven-year period of eligibility had expired. In the coming years, as many as 9,000 immigrant seniors and persons with disabilities will "time out" of the SSI program each year.

In March of this year, a similar bill was introduced in the House of Representatives by Reps. Benjamin Cardin (D-MD), Amory Houghton (R-NY), Nancy Johnson (D-CT), Phil English (R-PA), and Sander Levin (D-MI).

The House and Senate bills would grant two more years of eligibility to the immigrant groups that face termination of SSI benefits. Under these bills, eligible refugees, asylees, and other "humanitarian immigrants" would be able to receive SSI benefits during the first *nine* years (rather than seven years) after having been granted the qualifying immigration status. The bills differ slightly in their treatment of those who already have lost benefits. The House bill (HR 4035) would provide a complete "reach-back," allowing those who already have lost benefits to secure an additional two years of SSI benefits. Under the Senate bill, however, "timed-out" immigrants would qualify for SSI only if they still are within the nine-year window of eligibility. For example, a person who entered the U.S. as a refugee in Sept. 1997 would have lost his or her eligibility for SSI in Sept. 2004 (unless the person became a U.S. citizen before Sept. 2004). If the extension provided for in the Senate bill is enacted on Dec. 1, 2004, the refugee would be eligible to receive SSI for an additional one year and 10 months, until Sept. 2006. But if the extension provided for in the House bill is enacted, the refugee would be eligible for two additional full years of SSI benefits.

Like President Bush's proposed budget for 2005, both bills provide that the extension (to nine years of eligibility) would expire in 2007; after 2007, a person immigrating to the U.S. in one of the qualifying immigration categories (refugee, asylee, etc.) would be eligible for SSI only during the first seven years after having been granted that immigration status.

It is possible that an extension of SSI eligibility for immigrant seniors and persons with disabilities could be incorporated into "must-pass" legislation that Congress will consider during its post-election lame duck session.

TANF EXTENDED UNTIL MAR. 31, 2005 – Congress has passed a bill, HR 5149, that extends the Temporary Assistance for Needy Families (TANF) program for an additional six months, until Mar. 31, 2005. This is the eighth time that TANF has been extended. The TANF extension bill passed on Sept. 30, 2004 .

Congress passed this "clean" extension, which continues the program under its current terms, despite last-minute efforts to include controversial policy changes. Largely because of the hard work of advocates around the country, the Senate opted not to act on legislation (S. 2830) introduced by Senators Rick Santorum (R-PA) and Evan Bayh (D-IN) that would have provided two years of funding for "marriage promotion" and "fatherhood initiatives" in addition to extending TANF for six months.

Lawmakers will revisit the TANF reauthorization debate during the next Congress.

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