



## Immigration Issues

### **JUSTICE DEPT. CONTEMPLATES EXTENDING IMMIGRATION ENFORCEMENT RESPONSIBILITIES TO STATE AND LOCAL AGENCIES**

– According to press reports, the U.S. Dept. of Justice may be planning to take the unprecedented position that state and local law enforcement officers have authority to enforce civil federal immigration laws. In an Apr. 3, 2002, article, the *San Diego Union-Tribune* reported that the DOJ was about to release a legal opinion concluding that state and local officers have “inherent authority” to enforce immigration laws. This report sparked substantial major critical reaction, not only from immigrant communities but also from local law enforcement officials concerned with the impact such a policy would have on their efforts to build trust and work with immigrant communities in order to improve the reporting of crimes. In the wake of this reaction, the DOJ delayed release of the opinion and

at this issue’s press time has not acted on it.

The proposed new DOJ position apparently is intended to circumvent section 287(g) of the Immigration and Nationality Act, which Congress enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Section 287(g) allows the attorney general to enter written agreements with states or local jurisdictions under which state and local officers can be deputized to serve under the direction and supervision of the attorney general for immigration enforcement purposes. However, the statute requires that such officers receive “adequate training regarding the enforcement of relevant Federal immigration laws,” and for liability purposes they are to be considered “acting under color of Federal authority.” Prior to this enactment, courts generally held that state and local officers could not make arrests based on civil immigration provisions, although depending on state law restrictions they might have authority to make arrests for federal criminal immigration violations and to cooper-

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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,*

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ate with or provide other assistance to INS enforcement efforts. *See generally*, Hawley, D.L., "The Powers of Local Law Enforcement to Enforce Immigration Laws," IMMIGRATION BRIEFINGS, June 1999.

Since the enactment of this provision in 1996, no state or local government has entered into such an agreement. In 1998, the police chief of Salt Lake City, Utah, proposed entering such an agreement, but the city council ultimately rejected the proposal in the face of strong criticism. Subsequently, until this year, no state or local jurisdiction has seriously proposed such a step. In the wake of the attacks of Sept. 11, 2001, however, some states have begun considering entering such agreements, and in March 2002 it was reported that Florida is negotiating an agreement with DOJ to deputize 35 state troopers, sheriff's deputies, and city police officers to make immigration arrests. However, to date no agreement has been finalized.

The proposed new DOJ position apparently would allow state and local law enforcement officers to make immigration arrests without having agreements ensuring their training and federal supervision. Such a position would constitute a stark reversal of the agency's position in recent years. The concerns being raised by local law enforcement officers in reaction to press reports of the new position center on their fears that it will undo the progress they have made in developing trust in new immigrant communities to come forward and report crimes to the police. *See* "Police Want No Part in Enforcing Immigration Law," *Los Angeles Times*, Apr. 5, 2002.

**INS PROPOSES NEW RESTRICTIONS ON VISITOR AND STUDENT VISAS, "SURRENDER" REQUIREMENT FOR IMMIGRANTS WITH FINAL REMOVAL ORDERS** – The Immigration and Naturalization Service has announced a number of new measures to restrict visitors and students and to require that immigrants with administratively final orders of removal "surrender" themselves to the INS. According to an Apr. 8, 2002, news release, the new measures, contained in three rules, are intended "to enhance homeland security and strengthen and control immigration."

The measures include an interim rule, effective immediately upon publication of the rule, prohibiting nonimmigrant business (B-1) and tourist (B-2) visitors from attending school in the United States before they receive approval of requests to change to student status. The INS is also issuing a proposed rule that would reduce the initial admission periods for B-1 and B-2 visitors, limit the conditions for which extensions of their stay can be granted and the maximum length of such extensions, and prohibit them from changing to student status unless they had stated an intention to study at the time they were admitted as visitors. Finally, a second proposed rule would require immigrants with orders of removal to surrender themselves to the INS within 30 days of when their orders became administratively final. Individuals who fail to do so would become ineligible for discretionary relief for a period of ten years. At this issue's publication deadline, the rules had not yet been published in the Federal Register.

According to the INS, the proposed surrender rule is substantially the same as a proposed rule that was published on Sept. 4, 1998 (*see* "Rule Would Require Aliens Ordered Removed to Surrender," IMMIGRANTS' RIGHTS UPDATE, Sept. 16, 1998, p. 2). That

rule would have required immigrants to turn themselves in to INS after their removal orders became administratively final, whether because they waived appeal of, or failed to timely file an appeal from, a decision of an immigration judge, or because the Board of Immigration Appeals ordered them removed. The previously published rule required individuals to turn themselves in within 10 days of their orders becoming final, but the new proposed rule apparently will require surrender within 30 days. Surrender was to be accomplished by appearing in person at the INS district office having jurisdiction over the place where the IJ completed the removal proceeding. Individuals who fail to surrender would become ineligible for discretionary relief, including asylum, waivers, adjustment of status, cancellation of removal, voluntary departure, change of nonimmigrant status, and registry, for a period of 10 years. The INS explains that the new rule differs from the previously published rule because the new rule will apply to individuals currently in removal proceedings, as well as to those placed in removal proceedings after a final rule takes effect.

According to the INS, the proposed rule regarding nonimmigrant visitors will replace the current minimum six-month admission period for B-2 visitors for pleasure with "a period of time that is fair and reasonable for the completion of the purpose of the visit." At the time of admission, INS inspectors are to determine an appropriate length of stay based on the nature and purpose of the visit. In cases where inspectors cannot determine the amount of time that is required, they are to grant a 30-day period of stay. For all B visitors, the proposed rule would reduce the maximum initial period of admission from one year to six months.

The proposed rule would also restrict extensions of B visitor status to cases where extension is sought because of "unexpected or compelling humanitarian reasons." The INS explains that such reasons may include medical treatment or a delay in the conclusion of a business matter. The rule would reduce the maximum extension that can be granted from one year to six months.

The proposed rule would also prohibit visitors from changing to F (academic) or M (vocational) student status unless they clearly stated their intention to study in the United States when they initially applied for admission as visitors. The INS explains that the agency recognizes that some prospective students may need to come to the United States as visitors for pleasure in order to tour campuses or attend interviews. The proposed rule will require immigration inspectors to note that the nonimmigrant visitor is a prospective student and make a notation to this effect on the individual's Form I-94 (Arrival/Departure Record).

The INS also explains that the interim rule, which prohibits visitors from starting studies until they have changed student status, will not apply to visitors currently in the United States, since they may have already started a course of study in reliance on existing rules.

The interim rule will take effect once it is published in the Federal Register. The proposed rules are subject to public comment and will not take effect until the agency publishes an interim or final rule. Fact sheets and statements about the new measures are available on the INS website, [www.ins.usdoj.gov](http://www.ins.usdoj.gov).

**AG CREATES PER SE RULE THAT DRUG TRAFFICKING CONVICTIONS ARE PARTICULARLY SERIOUS CRIMES** – After directing the Board of Immigration Appeals to refer three cases to him involving persons

who had past drug trafficking convictions, U.S. Attorney General John Ashcroft has held that each of the three individuals had been convicted of a "particularly serious crime." In doing so, he held that, except in extraordinarily rare situations, drug trafficking convictions presumptively constitute particularly serious crimes. His decision expressly overrules the BIA's decision in *Matter of S-S-*, Int. Dec. 3374 (BIA 1999). Ashcroft also concluded that without conclusive evidence that a non-U.S. citizen who is removed from the U.S. would face torture at the hands of the government of his or her home country, the noncitizen's claims that he or she would face torture do not warrant the granting of deferral of removal pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture, or CAT).

The three respondents in the cases Ashcroft reviewed had sought withholding of removal under section 241(b)(3) of the Immigration and Nationality Act and under Article 3 of the CAT, 8 C.F.R. section 208.16, because their drug trafficking convictions constitute aggravated felonies, which bar most forms of relief from removal. Taken together, section 241(b)(3) and the CAT provide that noncitizens may not be removed to their home countries if it is more likely than not that there they will be threatened, harmed, or tortured. Although only one of the three respondents had been granted withholding by an immigration judge, the BIA held that all three were entitled to withholding relief.

Section 241(b)(3) bars withholding relief to individuals who have been convicted of a particularly serious crime. Although "particularly serious crime" is not defined in the statute, section 241(b)(3)(B) provides that an individual who has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime. However, subsection 241(b)(3)(B) also provides that the attorney general is not precluded from determining that, "*notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime*" (emphasis added).

In overturning the BIA's grants of withholding in the three cases, the attorney general relied on this latter provision in section 241(b)(3)(B) to impose a per se rule that drug trafficking crimes constitute particularly serious crimes. In doing so, he overruled *Matter of S-S-*, a case in which the BIA analyzed Congress's elimination, via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), of a previous per se rule that all aggravated felonies are particularly serious crimes. In that case, the BIA held that Congress's elimination of the per se rule warranted individualized, case-by-case reviews to determine which crimes are "particularly serious." The BIA reasoned that Congress's elimination of the per se rule language, coupled with the fact that Congress added language tying the determination of whether a crime is "particularly serious" to the length of the sentence imposed, evidenced a congressional intent that such determinations should be based on the sentence length rather than the type of crime committed.

Disagreeing with the BIA's reasoning, Ashcroft concluded that the statute's provision that a crime for which a five-year imprisonment has been imposed is per se "particularly serious" does not indicate that Congress intended the nature of the crime to receive less consideration in the determination of whether it falls within that category. Moreover, he held that the statute

grants him authority to issue a presumptive rule. He then cited a litany of cases and reports to prove that Congress is particularly concerned about drug trafficking and desires to treat it harshly as a particularly serious crime.

The attorney general nevertheless left room for exceptional cases in which a drug trafficking crime should not be considered a particularly serious crime under his per se rule. For a crime to be exempted under his rule, all of the following must apply: (1) the crime must have involved a very small quantity of controlled substances; (2) the amount of money paid for the drugs in the transaction must have been very modest; (3) the convicted person's involvement in the criminal activity must have been merely peripheral; (4) the crime must not have involved any threatened or express violence; (5) no organized crime or terrorist organization may have been involved in the crime; and (6) the criminal activity must have had no adverse or harmful effect on juveniles. He added that the following, commonplace factors do not justify deviation from the rule: cooperation with law enforcement, limited criminal history, a lowered sentence, or claims of contrition or innocence.

Holding that under the new per se rule the individuals in the three cases are statutorily ineligible for withholding of removal due to their convictions, the attorney general then analyzed their claims under the CAT. The CAT allows deferral of removal notwithstanding prior criminal offenses. In order to make out a claim for relief under the CAT, individuals must show that it is more likely than not that, if they were removed to their country of origin, there they would be tortured by, or with the acquiescence of, government officials acting under color of law. The regulations implementing the CAT allow for relief from removal only if the person applying for relief shows that torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." According to the attorney general, applicants must show that current government officials in the country of origin acting in an official capacity would likely commit the abuse. The treaty does not provide protection against possible violence that might be committed by individuals over whom the government has no reasonable control. Applying these standards, Ashcroft found none of the individuals eligible for relief under the CAT.

*In re Y-L-, In re A-G-, In re R-S-R-*,  
Int. Dec. 3464 (A.G. 2002).

**BIA: MOTION TO REOPEN TO APPLY FOR ADJUSTMENT BASED ON MARRIAGE OCCURRING AFTER PROCEEDINGS COMMENCED MAY BE GRANTED PRIOR TO VISA PETITION APPROVAL IN SOME CIRCUMSTANCES**

— The Board of Immigration Appeals has issued an en banc decision granting a motion to reopen to apply for adjustment filed by a respondent who married a U.S. citizen after the Immigration and Naturalization Service had commenced deportation proceedings against the respondent. The decision modifies the BIA's previous rulings in *Matter of Arthur*, 20 I. & N. Dec. 475 (BIA 1992), and *Matter of H-A-*, Int. Dec. 3394 (BIA 1999), which held that a motion to reopen to apply for adjustment based on a marriage entered after the commencement of proceedings could not be granted unless the INS had previously approved the visa petition. The new decision specifies a narrow set of circumstances in which such motions may be granted.



Under 8 C.F.R. section 242.2(a)(ii), an adjustment application can be filed simultaneously with a visa petition if a visa would be "immediately available" once the petition was approved (thus, for example, immediate relative petitions can be filed concurrently with adjustment applications, but petitions for visas in backlogged preferences cannot). Because of this provision, in *Matter of Garcia*, 16 I. & N. Dec. 653 (BIA 1976), the BIA adopted a rule treating pending visa petitions as "prima facie approvable" for purposes of adjudicating a motion to reopen deportation proceedings to apply for adjustment of status. Under this rule, motions to reopen for adjustment generally should be granted "unless clear ineligibility is apparent on the record."

However, in *Arthur* the BIA modified this rule with respect to respondents who marry after the commencement of proceedings. Section 245(e) of the Immigration and Nationality Act, enacted in 1990 as a modification of the Immigration Marriage Fraud Amendments of 1986, established a higher-than-normal standard that respondents seeking to adjust based on a marriage commenced after the start of proceedings must meet. Such respondents must show "by clear and convincing evidence" that the marriage was entered into in good faith. The BIA decided not to treat the visa petition as prima facie approvable in this situation, reasoning that to do so would conflict with the higher evidentiary requirement of section 245(e).

In *Matter of H-A-*, the BIA reaffirmed its ruling in *Arthur*. In *H-A-*, the respondent had filed a timely motion to reopen to apply for adjustment based on a marriage entered after proceedings began, and the BIA denied the motion because there was no approved petition, following *Arthur*. After the visa petition was approved, the respondent filed a motion to reconsider the denial of the motion, and the BIA denied that as untimely. Construing the motion as a motion to reopen, since the respondent sought to submit new evidence, the BIA also concluded that it was prohibited by the regulations that limit respondents to filing one motion to reopen.

In deciding to modify the rule of *Arthur* and *H-A-*, the BIA noted that the rule, in conjunction with the regulatory time and numerical limits for motions to reopen and the inability of the INS to adjudicate visa petitions within 90 days, serves "to deprive a small class of respondents, who are otherwise prima facie eligible for adjustment, of the opportunity" to apply. The BIA therefore modified the rule to allow reopening for adjustment, in the exercise of discretion, only where five conditions are met:

1. the motion to reopen must be timely filed (within 90 days of a final order);
2. the motion must not be numerically barred;
3. the motion must not be barred by *Matter of Shaar*, 21 I. & N. Dec. 541 (BIA 1996), or other procedural grounds (in *Shaar*, the BIA held that a respondent seeking to reopen deportation proceedings who had failed to depart the U.S. prior to the lapse of a granted period of voluntary departure was ineligible for relief for a five-year period under former INA section 242B(e)(2)(A));
4. the respondent must present clear and convincing evidence indicating a strong likelihood that the marriage is bona fide; and
5. the motion must not be opposed by the INS, or INS's opposition must be based solely on *Matter of Arthur* and *Matter of H-A-*.

*Matter of Velarde-Pacheco*,  
23 I. & N. Dec. 253, Int. Dec. 3463 (BIA Mar. 6, 2002).

#### **BIA RULES THAT STATE DEFERRED ADJUDICATION OF FIRST-TIME DRUG OFFENSE DOES NOT ELIMINATE EFFECT OF CONVICTION FOR IMMIGRATION PURPOSES**

– The Board of Immigration Appeals has issued an en banc precedent decision finding that a Texas deferred adjudication of guilt for felony possession of a controlled substance must be treated as an aggravated felony conviction for immigration purposes. The decision reaffirms *Matter of Roldan*, Int. Dec. 3377 (BIA 1999), and declines to apply outside the Ninth Circuit the ruling in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (which overruled *Roldan* as to convictions that could have been given first offender treatment under federal law had they been prosecuted federally). The new ruling also holds that the BIA's decision in *Matter of K-V-D-*, Int. Dec. 3422 (BIA 1999) (finding that a drug conviction must be punishable as a felony under federal law in order to constitute an aggravated felony), does not apply in the Fifth Circuit, in light of a recent decision of that court.

The respondent in this case, a Ms. Salazar, is a Mexican national who first entered the U.S. at the age of six and had resided in the U.S. as a lawful permanent resident for nearly twenty years at the time she was arrested in Texas on a charge of possession of marijuana. In 1997 she pled guilty to the charge and received a deferred adjudication of guilt, under which she was placed on probation.

At her removal hearing in 1999, Salazar contended that her deferred adjudication did not constitute a "conviction" under section 101(a)(48)(A) of the Immigration and Nationality Act. The immigration judge rejected this argument, ruling that under *Matter of Punu*, Int. Dec. 3364 (BIA 1998), a Texas deferred adjudication constitutes a conviction. However, the IJ found that the conviction was not an "aggravated felony" because it would not amount to a felony under comparable federal law. The IJ also found that Salazar was not deportable under INA section 237(a)(2)(B) (for having a controlled substance conviction) because had she been prosecuted under federal law she would have been eligible for first offender treatment under the Federal First Offender Act (FFOA), 18 U.S.C. section 3607(a). The Immigration and Naturalization Service appealed this decision.

While this appeal was pending, the BIA issued its decision in *Roldan*. In that decision, the BIA found that the definition of "conviction" enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) precludes the BIA from giving immigration effect to expungements or other state procedures that erase a defendant's record of guilt for rehabilitative purposes. The BIA further concluded that the statute bars it from giving effect to expungements even where the conviction could have been expunged under the FFOA had the respondent been prosecuted federally.

The BIA's decision in *Roldan* was overturned by the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). In that decision, the court found the BIA's conclusion that the IIRIRA generally eliminated the immigration effect of expungements and other state rehabilitative procedures to be "highly unpersuasive," but the court resolved the appeal on other grounds. The court concluded that the IIRIRA did not repeal the FFOA, which provides that federal first offender treatment of a first-time drug offense eliminates the effects of the conviction for all purposes. The court further found that the constitutional guarantee of equal

protection requires that the BIA give effect to state expungements of drug convictions, where first offender treatment would have been available had the respondent been prosecuted federally.

In the instant case, the BIA reaffirmed *Roldan* and declined to apply the Ninth Circuit's ruling in *Lujan-Armendariz* to cases arising outside of the Ninth Circuit. A majority of the BIA concluded that this result is required by the statutory definition of "conviction." Since this case arose in the Fifth Circuit, the BIA declined to treat the conviction as if it were subject to the FFOA.

The BIA also revisited its ruling in *Matter of K-V-D-* and decided not to apply that decision in the Fifth Circuit. In *K-V-D-*, the BIA concluded that, in order for a state drug conviction to be considered a "trafficking" crime so as to constitute an "aggravated felony" for immigration purposes, it must be prosecutable as a felony were it to be charged federally. The BIA reached this conclusion despite Fifth Circuit precedent finding that state convictions that could not be prosecuted as federal felonies constitute aggravated felonies for purposes of triggering enhancements under federal sentencing guidelines. The BIA reasoned that the distinction between sentence enhancement and deportability may justify different results, noting that other circuits have so reasoned.

However, in *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2000), another ruling under the federal sentencing guidelines, the Fifth Circuit expressly disapproved of the BIA's reasoning in *K-V-D-*. In light of this decision, the BIA has now decided not to apply *K-V-D-* in cases arising in the Fifth Circuit. Accordingly, even though Salazar's state conviction for possession of marijuana could not have been prosecuted federally as a felony, the BIA concluded that it constitutes an aggravated felony, barring her from eligibility for cancellation of removal.

*Matter of Salazar-Regino*, 23 I. & N. Dec. 223, Int. Dec. 3462 (BIA 2002).

#### **STATE DEPT. ISSUES GUIDANCE ON FORTY QUARTERS AND AFFIDAVIT OF SUPPORT**

Following the lead of the Immigration and Naturalization Service, the U.S. State Dept. has issued a memo clarifying that persons seeking to immigrate to the U.S. need not obtain an enforceable affidavit of support (Form I-864A) if they can show that they have been employed for forty quarters (i.e., for forty "qualifying quarters" of a year, as calculated by the Social Security Administration). Thus, the "forty quarters exemption" now applies to persons who seek to immigrate through consular processing. The INS issued the memo laying out its forty quarters exemption policy on May 17, 2001 (see "INS Issues Guidance Identifying Situations Where Affidavits of Support Are Not Required," IMMIGRANTS' RIGHTS UPDATE, June 29, 2001, p. 6). The State Dept. memo is dated Feb. 22, 2002.

The enforceable affidavit of support is required of persons who apply for a family-based immigrant visa or family-based adjustment of status on or after Dec. 19, 1997. The I-864 affidavit is also required of employment-based applicants in cases where a relative of the applicant either filed the employment-based petition on behalf of the visa applicant or has a significant ownership interest in the entity that filed the petition. The enforceable affidavit of support is a contract that requires the affiant to maintain

the immigrant at 125 percent of the federal poverty level should the immigrant not be able to support him or herself. The income maintenance requirement continues until the sponsor dies, the immigrant becomes a U.S. citizen, or the immigrant obtains credit for forty qualifying quarters.

Qualifying quarters are wage units that are earned while working. The Social Security Administration calculates qualifying quarters in three-month increments. Qualifying quarters are calculated based on the amount of income that is earned. The minimum amount that may be earned per quarter is \$830. However, if someone earns \$2,490 (i.e., three times \$830) in a monthly period, he or she will earn three quarters. Immigration practitioners should note that quarters earned while an individual is in an unlawful status may be counted towards the forty quarters threshold.

According to the State Dept. memo, all quarters worked by a parent of an immigrant while the immigrant was under 18 years of age may be credited to the immigrant child, even if the parent-child relationship did not exist when the parent worked the forty quarters. In like manner, a spouse may count quarters worked by his or her spouse during their marriage, provided that they stay married. A spouse can be given credit for his or her deceased spouse's quarters as well.

The memo also instructs that sponsored immigrants cannot be credited with any quarters during which they received any federal means-tested benefit if that benefit was received after Dec. 31, 1996. Federal means-tested benefits include Temporary Assistance for Needy Families (TANF), food stamps, Medicaid, and what the memo calls "Social Security Insurance" (most likely referring to Supplemental Security Income, or SSI) and "State Child Insurance" (most likely referring to benefits under the State Child Health Insurance Program, or SCHIP). Moreover, the memo directs consular posts to request copies of certified earnings records as well as a signed statement from the person who earned the quarters, certifying under penalty of perjury that he or she did not receive any federal means-tested benefit during any of the quarters that he or she is using to qualify that were earned after Dec. 31, 1996.

The State Dept. memo also provides examples of sponsored immigrants who would benefit under the new forty quarters policy:

- An immigrant who entered the U.S. on an H-2A temporary agricultural worker visa, worked legally for five years, and later worked out of status. The individual later worked legally under the temporary protected status program and, still later, worked another two years while not being authorized to work.
- A student who worked legally on an F-1 visa, and later worked as a temporary employee while under an H1B visa, and later became an intracompany transferee on an L-1 visa.

Finally, the memo reminds State Dept. officers that visa applicants who submit a valid affidavit of support or show that they have forty qualifying quarters of employment must still be evaluated as to whether they are likely to become a public charge should they be granted the visa. The memo instructs officers that, in determining whether the public charge ground of inadmissibility applies to a particular applicant, they should take into account the totality of the applicant's circumstances.

## Litigation

### MICHIGAN DISTRICT COURT PRELIMINARILY ENJOINS CLOSED REMOVAL HEARINGS

– The U.S. District Court for the Eastern District of Michigan has issued a preliminary injunction prohibiting the government from continuing to hold closed removal hearings in the case of Rabih Haddad. Haddad's hearings had been closed to the public and the press as a "special interest" case pursuant to a memorandum issued by Chief Immigration Judge Michael Creppy (see "Chief Immigration Judge Issues Guidelines for Secret Removal Hearings," IMMIGRANTS' RIGHTS UPDATE, Dec. 20, 2001, p. 3). In a separate ruling, the court denied the government's motion to dismiss the cases on jurisdictional grounds. The rulings come in three lawsuits filed by the press, members of the public, and Haddad (see "ACLU Files Suit to Challenge Closed Immigration Hearings," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 14).

The government's motion to dismiss was based on a number of the permanent rules for judicial review enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The court examined each of the provisions relied upon by the government and concluded that none of them apply to this challenge. Thus, the government contended that section 242(d)(1) of the Immigration and Nationality Act, which provides that a court may "review a final order of removal" only where the noncitizen "has exhausted all administrative remedies," prevents challenges to removal proceedings except by judicial review of removal orders. The court rejected this contention because the errors challenged in this case—the closure of hearings by order of the chief immigration judge pursuant to authorization by the attorney general—could not be corrected by the Board of Immigration Appeals. Thus, there is no meaningful administrative remedy to exhaust. The court also noted that several circuits have found that statutory exhaustion requirements do not apply to challenges that are not concerned with the ultimate outcome of the removal case, such as the challenges by the press plaintiffs in this case.

The court also rejected the government's reliance on INA section 242(g), which restricts judicial review of "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." The government characterized the challenge to closed hearings as a challenge to the "adjudication" of the removal case. However, the court noted that the Supreme Court has rejected such a sweeping interpretation of section 242(g), in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (AADC). The court concluded that this provision does not bar this challenge because it is not a challenge to the attorney general's decision to adjudicate this case.

The court relied on the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), to reject the government's claim that INA section 242(b)(9) bars this challenge. In *St. Cyr* the Supreme Court clarified that the purpose of section 242(b)(9) "is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but it applies only with respect to an order of removal." And the court found that INA section

242(b)(2)(B)(ii), which bars judicial review of determinations that are in the discretion of the attorney general, does not apply to procedural (as opposed to substantive) determinations, such as the decision to close removal hearings at issue in this case. For all of these reasons, the court denied the motion to dismiss.

With respect to the newspaper plaintiffs' motion for preliminary injunction, the court found that the plaintiffs were likely to prevail on the claim that the closure of the hearings violates their First Amendment rights of access. The court found that deportation hearings historically and traditionally have been open to the public and the press and that there is a public interest in having such openness. On the other hand, the court found that none of the interests offered by the government for the policy of closing hearings of "special interest detainees" justified closing Haddad's proceedings. Indeed, the only reasons offered by the government concerned possible dangers of disclosing the name, and date and place of arrest, of a special interest detainee, and in Haddad's case all of this information was public from the time of his arrest. Finding also that the plaintiffs would suffer irreparable harm unless an injunction issued, the court granted the plaintiffs' motion for a preliminary injunction.

The government has appealed, and on Apr. 11, 2002, the U.S. Court of Appeals for the Sixth Circuit issued a temporary stay of the district court's order.

*Detroit Free Press, et. al., v. Ashcroft, et al.*, No. 02-70339 (E.D.Mich.Apr. 3, 2002).

### 10TH CIRCUIT HOLDS MANDATORY DETENTION UNCONSTITUTIONAL

– Like the Third and Ninth Circuits before it, the Tenth Circuit Court of Appeals has ruled that section 236(c) of the Immigration and Nationality Act, a mandatory detention provision enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), is unconstitutional as applied. For a discussion of the Third and Ninth Circuit cases, see "3d and 9th Circuits Hold Mandatory Detention Provision Unconstitutional," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2002, p. 11.

In the case decided by the Tenth Circuit, three lawful permanent residents with aggravated felony convictions had challenged the provision in INA section 236(c) which requires that non-U.S. citizens with such criminal convictions be detained by the Immigration and Naturalization Service until they are removed from the United States. The government argued that the immigrants had forfeited any rights to remain in the U.S. and that any liberty interests they may have had were greatly diminished. The petitioners responded that as lawful permanent residents, they are entitled to due process rights. They argued that they have a fundamental liberty interest that may not be infringed upon by the government absent the opportunity for an individualized hearing to address whether they are a flight risk or a danger to the public.

Using the same analysis as that employed by both the Third and Ninth Circuits, the Tenth Circuit held that the detention provision implicates a fundamental liberty interest—i.e., enforcement of the provision may entail denying a person his or her fundamental right to liberty. When a provision of law implicates a fundamental right, the reviewing court must examine the government's application or enforcement of the provision with



heightened scrutiny. It may uphold the government's policy on applying the provision only if, upon balancing the individual's liberty interest and the government's concerns, the court finds the government's policy to be narrowly tailored to meet a compelling need. The Tenth Circuit found that the government's asserted reasons for its policy in applying the mandatory detention provision without regard to individual detainees' particular circumstances—it's concern that all detained noncitizens with past aggravated felony convictions might be flight risks and pose a danger to their communities if they were released—were not tailored narrowly enough. The court therefore struck down the provision as unconstitutional.

*Phu Chan Hoang v. Comfort*, Nos. 01-1136, 01-1180, and 01-1343 (10th Cir., Mar. 5, 2002).

### CLASS ACTION CHALLENGES INS DELAY IN ADJUDICATING ASYLEE ADJUSTMENT APPLICATIONS

—Forty-six asylees have filed a class action lawsuit in federal district court in Minnesota to challenge delays and mismanagement on the part of the Immigration and Naturalization Service in the processing and adjudication of applications for adjustment to lawful permanent resident status. Although section 209(b) of the Immigration and Nationality Act authorizes the INS to issue 10,000 immigrant visas per year to asylees, the plaintiffs allege that since 1994 the INS has failed to issue approximately 18,417 asylee immigrant visas that should have been allocated to waiting plaintiffs and class members. They also contend that the INS has violated the regulations by not issuing asylee visas to applicants in the order of their priority dates. The plaintiffs contend that, in part because of mismanagement, there is currently a backlog of more than 60,000 asylee adjustment applicants, which translates into more than a six-year wait for adjustment.

The plaintiffs also challenge the INS's requirement that asylee adjustment applicants pay a fee to renew their employment authorization documents (EADs) every year, since employment authorization is inherent in asylee status. They also challenge other costs resulting from the long delays in asylee adjustment, such as the costs of multiple fingerprinting and medical examinations. The plaintiffs are represented by the American Immigration Law Foundation, the Massachusetts Law Reform Institute, and the law firm of Dorsey & Whitney, LLP.

*Ngwanya v. Ashcroft*, No. 02-CV-502 RHK/JMM (D.Minn., filed Mar. 4, 2002).

### 3D CIRCUIT FINDS DELAWARE FELONY DRUG POSSESSION NOT AN AGGRAVATED FELONY

—The U.S. Court of Appeals for the Third Circuit has ruled, on a petition for review of a removal order, that a Delaware felony drug offense does not constitute a "drug trafficking" aggravated felony because it neither contains a trafficking element nor would be punishable as a felony were the offense to be prosecuted federally. The decision applies the analysis used by the Board of Immigration Appeals in *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990), *Matter of Davis*, 20 I. & N. Dec. 536 (BIA 1992), and *Matter of L-G-*, 21 I. & N. Dec. 89 (BIA 1995). The court rejected the analysis used by a number of circuits that have found such state felonies to constitute aggravated felonies, al-

beit for purposes of sentencing under federal sentencing guidelines rather than for deportation purposes.

The respondent in this case, a Mr. Gerbier, is a Haitian national who became a lawful permanent resident in 1984. In May 1996, he was arrested for possession of marijuana in Wilmington, Delaware, and in February 1997 he pled guilty to the charge of possession of marijuana and was placed on probation for three years. In June 1997 he was again arrested in Wilmington and this time charged with trafficking in crack cocaine. In August 1997 he pled guilty to the lesser included offense of "trafficking in cocaine" under a statute prohibiting not only actions of sale or manufacture but also simple possession, and the factual basis for the plea was possession. Gerbier was sentenced to a boot camp program for six months, followed by supervision for not less than two and a half years.

In 1999, Gerbier was issued a notice to appear for removal proceedings. At his removal hearing, the immigration judge concluded that he was not removable as an aggravated felon and granted his application for cancellation of removal. The Immigration and Naturalization Service appealed, and the BIA sustained the appeal. The BIA concluded that the cocaine offense would have been punishable as a felony under federal law because of Gerbier's prior marijuana conviction. The BIA therefore concluded that the conviction constitutes an "aggravated felony" and issued a removal order. Gerbier filed a habeas petition to review this decision. The district court upheld the BIA's decision, and Gerbier appealed.

Section 101(a)(43)(B) of the Immigration and Nationality Act defines as an aggravated felony "illicit trafficking in a controlled substance (as defined in section 802 of Title 21) including a drug trafficking crime (as defined in section 924(c) of Title 18)."

In its decision on appeal, the Third Circuit contrasted three alternative approaches for deciding whether a state drug offense conviction constitutes an aggravated felony under this provision: the BIA's "*Davis/Barrett*" approach, the approach used by several courts of appeal in cases concerning federal sentencing guidelines, and the approach urged by Gerbier. Under the *Davis/Barrett* approach, a state felony drug offense constitutes an aggravated felony if it either contains a "trafficking element" (i.e., involves the unlawful trading or dealing of a controlled substance) or if it is analogous to a felony offense punishable under the federal statute, 18 U.S.C. section 924(c)(2). The court characterized this analogy to federal law as the "hypothetical federal felony" test.

The second approach to determine whether a state felony conviction is encompassed within INA section 101(a)(43)(B) has been used by other circuits (the First, Second, Fifth, Eighth, Ninth, Tenth, and Eleventh) to decide whether a criminal sentence is subject to enhancement under federal sentencing guidelines. Those guidelines apply an enhancement where the defendant reentered the United States after having been removed based on an aggravated felony conviction. The court termed the analysis used by these courts the "guidelines" approach. Under this approach, any offense punishable under 21 U.S.C. section 802 is considered an aggravated felony if it is a felony under either state or federal law. See *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996). Under this approach, Gerbier's conviction would be considered an aggravated felony.

The third approach, proposed by Gerbier, would limit the reach of INA section 101(a)(43)(B) to offenses that have trafficking as an integral element. The court noted that the Third Circuit has previously observed that this argument has "some intuitive appeal" based on the literal language of the statute. However, the court concluded that the statute's legislative history forecloses this approach.

Comparing the first and second approaches, the court concluded that, at least for purposes of deportation, the *Davis/Barrett* approach is most appropriate. The court found that this approach reflects Congress's intent to establish a uniform immigration law. The court agreed with the BIA that the federal definition of "felony" of 18 U.S.C. section 3559(a)(5) (an offense with a maximum sentence of imprisonment for more than one year) is controlling for this purpose, rather than letting each state define the scope of a felony conviction.

The court also noted that under this approach a misdemeanor conviction constitutes an aggravated felony if it could be prosecuted federally as a felony. The court cautioned that, because of the informality of misdemeanor proceedings, the court must make certain that each and every element of the hypothetical federal felony is met before finding that a conviction constitutes an aggravated felony.

In this case, the BIA found that the state conviction constitutes an aggravated felony based on the finding that the offense could have been prosecuted federally as a felony on account of the prior misdemeanor marijuana conviction. The BIA reached this conclusion because under 21 U.S.C. section 844(a) a federal drug possession charge can be raised to a felony based on a prior misdemeanor conviction. However, in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), the Third Circuit found that a state drug conviction can be treated as a hypothetical federal felony based on a prior drug conviction only if there were equivalent procedural safeguards. Federally, a prior conviction must be charged and proved in the second prosecution in order to elevate it to a felony charge. However, in the state proceedings against Steele and against Gerbier, the prior conviction was never charged or litigated in the second state prosecution. The court therefore concluded that Gerbier's conviction does not constitute a hypothetical federal felony and cannot be considered an aggravated felony. *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002).

**9TH CIRCUIT FINDS LONGER STATUTE OF LIMITATIONS APPLICABLE IN INTERNATIONAL LAW CASE** – In an important case involving international law claims, the Ninth Circuit Court of Appeals has breathed new life into a damage action brought against the government by the family of an immigrant who was murdered while in Immigration and Naturalization Service detention.

The case arose from the tragic death of Mauricio Papa, a Brazilian citizen whom the INS took into custody because he possessed a false visa. After Papa had been in detention for three months, another detainee, a gang member with a criminal record, murdered him while they were in the exercise yard. After Papa's death, his family filed an administrative claim under the Federal Tort Claims Act (FTCA), which allows individuals to file tort claims against government officials. After investigating the claims against it, the INS found that it had not been negligent and it

therefore owed no damages to the family. The INS's denial letter informed the family that they had six months from the date of the denial to file suit if they wished to pursue their claims in court. The Papa family did not file suit within the allotted period.

Five years later, the Papa family filed an action in federal district court, claiming that they are entitled to damages under principles established in the U.S. Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* established that federal courts are authorized to award damages to plaintiffs whose federal constitutional rights have been violated by federal officials. In their action, the family also claimed that their rights under the Federal Tort Claims Act (FTCA), the Alien Tort Claims Act (ATCA), and the Freedom of Information Act (FOIA) had been violated. The district court dismissed all of the family's claims. On appeal, the Ninth Circuit reversed and remanded the *Bivens*, ATCA, and FOIA-related claims.

The district court had held that the *Bivens* claims were untimely and unavailable to the Papa family due to two alternative reasons. It ruled that either the Due Process Clause does not protect immigrants seeking entry into the U.S. or, alternatively, the family had not met the heightened pleading requirements necessary for *Bivens* claims.

Regarding the timeliness of the *Bivens* action, the circuit court looked to the law of the state in which the case arose for determining the applicable statute of limitations. California, where the claim arose, has a one-year statute of limitations. Tolling provisions for *Bivens* claims are also borrowed from the state where the case arises. While agreeing with the district court that dismissal of the claims made by Papa's wife and two older children was appropriate because they failed to meet the statute of limitations, the Ninth Circuit reversed the dismissal of the younger children's claims. The appellate court applied equitable tolling provisions that allow cases to be tolled if persons entitled to bring the suit have not reached the age of majority.

The next issue the circuit court had to examine to determine if the *Bivens* claim was still valid was whether the Due Process Clause of the Fourteenth Amendment offers protection to immigrants such as Papa. The district court had dismissed the claim after holding that immigrants who seek entry into the U.S. are not entitled to due process protection. However, the Ninth Circuit held that detained immigrants are accorded limited due process rights. The court held that "officials may not consciously disregard or act with deliberate indifference toward a detainee's safety by knowingly placing such person in harm's way." The circuit court further held that the Papa family had met the heightened pleading standards required in a *Bivens* claim and had thus preserved the *Bivens* claims of the youngest children in the family. As the FTCA statute contains no tolling provisions, the appellate court agreed with the district court on the dismissal of the FTCA-related claims.

The Papa family had also filed claims under the Alien Tort Claims Act. The ATCA is a 200-year-old law providing federal court jurisdiction to aliens who sue for torts that are committed in violation of the law of nations or a U.S. treaty. As with the *Bivens* claim, the district court had dismissed the ATCA claim due to late filing. A second reason the district court gave for dismissing the claim was that the ATCA creates federal jurisdiction but no cause



of action.

Like the *Bivens* claim, the ATCA itself contains no statute of limitations. In such cases, courts must apply the statute of limitations of the jurisdiction in which the case arises unless another statute is more closely analogous. A 1987 case had held that the ATCA could be likened to 42 U.S.C. section 1983, a civil rights statute. However, the circuit court found a subsequently enacted statute, the Tort Victims Protection Act (TVPA), to be more closely analogous to the ATCA. The TVPA contains a ten-year statute of limitations. Despite the fact that no other court had so ruled, the Ninth Circuit determined that it was appropriate to apply the TVPA's ten-year statute of limitations to claims brought under the ATCA. The court's reasons for doing so were based on the close affinity between the two provisions. Like the ATCA, the court held, the TVPA upholds human rights protections under the United Nations Charter and other international agreements that protect human rights. In addition, sections of the TVPA have been added to the ATCA. The court also recognized that the realities of litigating claims under the ATCA and the federal interest in providing a remedy that the ATCA represents suggest that it would be appropriate to adopt a uniform and generous statute of limitations for claims brought under the act. Citing previous Ninth Circuit precedent, the court summarily disposed of the district court's dismissal of the Papa family's ATCA-based claims, a dismissal that the lower court had based on the argument that the ATCA provides no cause of action. Accordingly, the court preserved the family's claims and remanded the case so they could be litigated.

Finally, the government argued that because it had produced all documents requested, the family's FOIA claims were moot. However, the circuit court found that the government had not certified that it had produced all of the relevant records in existence. Nor had the government detailed the methods used to search for all relevant documents, nor had it stated that all the documents had been produced. Accordingly the court preserved the Papa family's FOIA-based claims as well.

*Papa v. INS*, 281 F.3d 1004  
(9th Cir., Feb. 25, 2002).

#### **9TH CIRCUIT OVERTURNS BIA DENIAL OF SECOND MOTION TO REOPEN DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL**

The U.S. Court of Appeals for the Ninth Circuit has overturned a decision of the Board of Immigration Appeals denying a motion to reopen deportation proceedings on the grounds that the motion violated the numerical limitations on such motions. The court found that regulation that generally prohibits more than one motion to reopen did not apply in this case because of the doctrine of equitable tolling. In so concluding, the court found that the respondents established that both their failure to file suspension applications at their deportation hearing and their failure to file an adequate motion to reopen on their first attempt to do so were due to their having been misled by their legal representatives.

The respondents in this case are two Mexican nationals who entered the United States in 1988 and have lived here continuously since then. They are married and have two U.S. citizen children. In an effort to obtain legal status in the United States, they contacted an immigration specialist, Oscar Torres. Torres

advised them to apply for asylum and charged them \$600 to file an asylum application. That application was denied by the Immigration and Naturalization Service, and in July 1996 the INS initiated deportation proceedings against the respondents.

On the day of their hearing, in September 1996, the respondents met Torres and paid him another \$600 to assist them. Torres introduced them to Jorge Cabrera, an attorney who represented them at the hearing. At the hearing Cabrera, on behalf of the respondents, conceded their deportability, withdrew the asylum application, and requested suspension of deportation or, in the alternative, voluntary departure. The immigration judge then adjourned the hearing until Mar. 5, 1997, requiring that the suspension applications be filed by Feb. 15, 1997, and directing that if they were not filed by that date the applications would be considered waived.

According to the respondents, in September 1996 they provided Torres with documents he requested in order to prepare their suspension applications, and he assured them that "everything was fine," that he and the attorney "were handling everything," and that they had "just to wait for the next hearing." In fact, the suspension applications were not filed until Feb. 21, 1997, six days after the deadline that the IJ had set.

At the next hearing on March 5, the respondents met Torres and paid him another \$700. Torres then introduced them to another attorney, Stephen Alexander, who represented them at the hearing. At the hearing, the IJ stated that the suspension applications had not been filed and recessed the hearing to allow Alexander to consult the respondents. Alexander advised them that they should agree to voluntary departure, which they did when the hearing resumed. The IJ found that since the respondents had not timely filed the suspension applications, they waived eligibility for that relief.

After the hearing, the respondents met with Torres and Alexander, who assured the respondents that the applications had been filed and that the IJ had lost them. Torres assured them that "an appeal would resolve all the problems" and charged them \$350 to file an appeal. A notice of appeal, signed by the male respondent, was timely filed, and subsequently Torres charged the respondents an additional \$1,200 to file an appellate brief. The brief contended that the IJ should have considered the suspension applications and the respondents' eligibility for suspension but gave no explanation for the failure to timely file the applications. In November 1998, the BIA dismissed the appeal, noting that the respondents failed to explain, either at the hearing or on appeal, why the suspension applications were not timely filed. The BIA gave the respondents 30 days to voluntarily depart the U.S. The respondents filed a timely motion for reconsideration of this decision, essentially repeating the arguments they had made on appeal. Although the motion was submitted *pro se* (i.e., on their own behalf and without representation of counsel), according to the respondents the motion was prepared by Torres. The BIA denied the motion in June 2000.

The respondents then found other counsel and filed a timely motion to reopen, contending that they were prevented from timely filing their suspension applications by ineffective assistance of counsel and that exceptional circumstances warranted reopening the case. The BIA denied the motion on the grounds that it was barred by 8 C.F.R. section 3.2(c)(2), which generally bars respon-

dents from filing more than one motion to reopen. The BIA rejected the respondents' argument that this provision should be waived under the doctrine of equitable tolling because of ineffective assistance of counsel. In so ruling, the BIA found that equitable tolling or waiver was not applicable because the respondents should reasonably have discovered the ineffective assistance of counsel before the motion to reopen stage of proceedings. The BIA also refused to reopen the case *sua sponte* (i.e., on its own motion), stating that the respondents had failed to demonstrate prima facie eligibility for suspension. The respondents through counsel then filed a petition for review of the BIA's decision.

On appeal, the Ninth Circuit reversed. The court found that the facts asserted by the respondents in their second motion, and not disputed by the INS, established ineffective assistance of counsel. The court also found that fraud on the part of the respondents' representatives prevented the respondents from timely filing their suspension applications and led them to waste their one opportunity under the regulations to file a motion to reopen. The court rejected the INS's argument that the respondents failed to use reasonable diligence to discover the ineffective representation, finding that the lies and misrepresentations of the representatives kept the respondents, who were unfamiliar with immigration proceedings, from discovering the extent of the ineffective assistance. The court concluded that the BIA therefore should have considered the second motion.

On the merits of the motion, the court also found that the respondents were denied due process at their hearing because ineffective assistance of counsel prevented them from seeking suspension of deportation. The court rejected the INS's argument that the BIA's denial of the motion to reopen was not an abuse of discretion, because in refusing to reopen the case *sua sponte* the BIA had stated that the respondents failed to set forth a prima facie case of eligibility for suspension. The court found that this summary conclusion of the BIA was inadequate because the BIA did not "even purport[] to engage in any substantive analysis or articulat[e] any reasons for its decision." The court also found that the BIA had failed to give "careful and individualized consideration to the hardship that respondents' U.S. citizen children would suffer" as a result of deportation. For these reasons, the court reversed and remanded the case for a new hearing on the applications for suspension of deportation.

*Rodriguez-Lariz and Guevara-Martinez v. INS*,  
282 F.3d 1218 (9th Cir. Mar. 13, 2002).

## Employment Issues

**SUPREME COURT BARS UNDOCUMENTED WORKER FROM RECEIVING BACK PAY REMEDY FOR UNLAWFUL FIRING** – The United States Supreme Court has ruled that federal immigration policies prohibit the National Labor Relations Board (NLRB) from awarding undocumented workers back pay under the provisions of the National Labor Relations Act (NLRA). Under the NLRA, back pay is a remedy available to workers who are fired for engaging in union activities. The NLRB awards back pay as a means of compensating workers for the wages they would have earned had the

employer not fired them. The 5 to 4 decision in the case of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* has tremendous ramifications for the rights of low-wage immigrant workers across the country and for the labor movement in general.

**Procedural Background.** In January 1989, Hoffman Plastic Compounds fired José Castro and several of his coworkers after they began a union organizing campaign at Hoffman's plant. The United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL-CIO, filed charges with the NLRB on behalf of four workers. In January 1992, the NLRB found that Hoffman had violated the NLRA when it terminated the workers "in order to rid itself of known union supporters" and ordered Hoffman to (1) cease and desist from future violations, (2) post a notice at the plant for its employees regarding the NLRB's order, and (3) offer reinstatement and back pay to the workers it had retaliated against. As a result, the NLRB held compliance proceedings—i.e., an administrative hearing before an administrative law judge (ALJ)—to determine the amount of back pay Hoffman owed each of the workers. During the hearing, Castro admitted to being undocumented and to having used false documents to get his job at the Hoffman plant.

As a result of this testimony, in June 1993, the ALJ held that Castro was not entitled to back pay because the Immigration Reform and Control Act of 1986 (IRCA) made it unlawful for employers to knowingly hire undocumented workers and for workers to use false documents to obtain work. The ALJ's decision was appealed, and the NLRB ultimately held in September 1998 that Castro was indeed entitled to back pay but that the amount he was owed would be limited to what he would have earned in the period between the date he was discriminatorily fired and the date that the employer discovered that Castro was undocumented. Subsequently, Hoffman appealed that decision to the Court of Appeals for the District of Columbia Circuit and then petitioned the court for a rehearing en banc (i.e., a hearing before all of the justices on the court of appeals, rather than a panel of three judges), but the court affirmed the NLRB's decision to award the limited back pay. Hoffman appealed once again, and the Supreme Court has now reversed the NLRB's decision, finding that no award of back pay may be made to Castro.

**The Court's Reasoning.** In reaching its decision, the Court, in an opinion written by Chief Justice Rhenquist, first relied on previous decisions in holding that the NLRB's authority to award back pay to a worker who had engaged in "serious illegal conduct" is limited, particularly when the NLRB's decision might conflict with federal laws or policies. The Court noted that in enacting IRCA, Congress set up a comprehensive employment eligibility verification system aimed at combating the hiring of undocumented workers in the U.S., which became central to the policy of immigration law.

The Court distinguished *Hoffman* from its pre-IRCA decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), in which it affirmed the NLRB's award of reinstatement and back pay for undocumented workers who had been reported to the INS in retaliation for their union activities. In *Sure-Tan*, the Court had held that undocumented workers were protected by the NLRA and were entitled to remedies, although it limited back pay for those workers who were "unavailable," since some of the workers had already been deported from the U.S. The Court held that the NLRB's

remedies in *Sure-Tan* did not conflict with the immigration laws at the time, whereas now the legal landscape has changed dramatically because of the enactment of IRCA's provisions.

The Court held that the NLRB's decision in the Hoffman case is not entitled to the deference that administrative agencies normally get for their expertise in enforcing the laws under their jurisdiction. The Court found that the NLRB's authority had to yield to the policies set forth by IRCA, which requires that employers verify the employment eligibility of each new employee hired. Under this employment eligibility verification system, it is illegal for an employer to hire a worker who is unable to establish that he or she is eligible to work in the U.S. The Court noted that if an employer hires someone who later turns out to be undocumented or whose work authorization expires, the employer must fire that worker. On the other hand, IRCA provides that an employer who "knowingly" hires an undocumented worker is subject to fines and potential criminal prosecution under IRCA's employer sanctions provisions. Finally, the immigration laws also make it a crime for an employee to use fraudulent documents to try to comply with the employment eligibility verification process. The Court concluded that awarding back pay to undocumented workers runs counter to IRCA, since "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit Congressional policies."

The Court rejected the arguments of Justice Breyer (who wrote the minority decision) and of the NLRB that in awarding back pay to Castro the NLRB had "reasonably accommodated" the federal policies enunciated in both the NLRA and IRCA, because back pay helps deter violations of both labor and immigration laws. In fact, as Justice Breyer noted, "As *all* the relevant agencies (including the Department of Justice) have told us, the National Labor Relations Board's limited backpay order will *not* interfere with the implementation of immigration policy" (emphasis in original). The NLRB further asserted that in tolling Castro's back pay award at the time when the employer discovered his wrongdoing, the award was tailored so as not to conflict with IRCA while still enforcing the remedies available to persons found, under the provisions of the NLRA, to have been discriminated against. As the NLRB noted, while IRCA criminalized the use of false documents, it did not explicitly take back pay or other remedies away from undocumented workers. However, because IRCA makes it a crime for an individual to use false documents to get a job, the Court majority found that there is no reason to believe that Congress would allow that worker to be awarded back pay. The majority concluded that, "[f]ar from 'accommodating' IRCA, the [NLRB]'s position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it. Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones future violations."

The majority dismissed Justice Breyer's argument that awarding back pay to undocumented workers is actually in line with Congress's intent as set forth in IRCA's legislative history. Justice Breyer pointed to a congressional committee report which states that in enacting IRCA Congress did not intend to "undermine or diminish in any way labor protections in existing law, or . . . limit the power of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees." He also contended that denying back pay to un-

documented workers will only serve as an incentive for employers to hire undocumented workers, since the cost of labor violations will be less if a back pay remedy is not available to workers who are wronged. Without responding to this argument, the majority asserted that the NLRB's lack of authority to award back pay to undocumented workers "does not mean that employers get off scott-free." The majority pointed to the fact that in *Hoffman* the NLRB also imposed other "significant sanctions," such as the cease and desist order and the requirement that Hoffman post a notice at its plant. In holding that the NLRB does not have the authority to award back pay to undocumented workers, the Court concluded that, given "the practical workings of the immigration laws, any 'perceived deficienc[y] in the NLRA's existing remedial arsenal' must be 'addressed by congressional action,' not the courts."

**Legal Ramifications of Hoffman.** The Supreme Court's holding in *Hoffman* that undocumented workers are no longer entitled to back pay under the NLRA has a direct impact on all employees—not just those who are undocumented—trying to organize a union or to collectively improve their workplace conditions. Implicit in the Court's decision is that undocumented workers continue to be "employees" under the NLRA, which provides workers with the right to form a union. However, if an undocumented worker is fired for organizing a union, then that worker is not entitled to back pay. Because the NLRA protects not only workers engaged in union organizing but also those who engage in "concerted activity" to improve conditions at their workplace, the decision will have a chilling effect on workers who seek to complain about violations such as failure to pay minimum wage or overtime, or about health and safety hazards.

Part of the Court's reasoning in denying back pay to undocumented workers is that under the NLRA the back pay award is "remedial" in nature and the NLRB is prohibited from imposing punitive remedies against employers. In other words, back pay under the NLRA is to compensate the worker who has been discriminated against for the harm he or she has suffered. The Court's position is that an undocumented worker who is in the U.S. unlawfully and cannot obtain work without violating the immigration laws cannot technically be "harmed." The Court's reasoning may have repercussions for back pay as a remedy provided under other statutes such as Title VII of the Civil Rights Act of 1964 (Title VII), which protects workers from discrimination based on race, religion, national origin, or gender (which includes sexual harassment). Because courts have traditionally looked to similar statutory schemes in analyzing an employment statute such as Title VII, future courts will look to the Supreme Court's holding in *Hoffman* to analyze back pay-related provisions in employment and labor statutes other than the NLRA. In October 1998, the Equal Employment Opportunity Commission (EEOC) issued a guidance on remedies available to undocumented workers under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, specifically relying on the NLRB's position prior to *Hoffman*. However, because these statutes do have additional remedies such as compensatory and punitive damages that can be assessed against employers, only the back pay remedy should be affected by this *Hoffman* decision. Administrative agencies such as the EEOC may also be reviewing their positions based on the *Hoffman* decision.



Despite the Court's decision in *Hoffman* with respect to an undocumented worker's right to back pay under the NLRA, this decision does not affect the many other basic employment rights undocumented workers have, such as protection from national origin (including language-related) or racial discrimination and sexual harassment, and the right to worker's compensation benefits and safe work environments. As stated above, however, *Hoffman* potentially limits the remedies available to undocumented workers under the laws providing for these rights. Moreover, it should be noted that the Supreme Court's decision does not affect the authority of courts or administrative agencies to order employers that have violated state or federal minimum wage and overtime laws to pay undocumented workers for unpaid wages for work already performed.

*Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. \_\_\_, No. 00-1595 (Mar. 27, 2002).

**NORTH CAROLINA AFFIRMS UNDOCUMENTED WORKER'S RIGHT TO WORKER'S COMPENSATION** – The Court of Appeals of North Carolina has affirmed the right of undocumented workers to receive worker's compensation benefits regardless of their immigration status, rejecting an employer's arguments that an undocumented worker cannot legally be considered an "employee."

The worker whose case the court decided, a Mr. Ruiz, was critically injured on the job in October 1997 after falling approximately seventy feet from a forklift. He suffered traumatic brain injuries and several fractures, for which he was hospitalized for about one month. He was then transferred to a rehabilitation center for another month and was later placed in an outpatient program under his brother's care. In February 1998, the treating physician found Ruiz to be "permanently and totally disabled," and the North Carolina Industrial Commission awarded him worker's compensation benefits and benefits for the attendant care provided by his brother.

The employer appealed the commission's award, first arguing that Ruiz was not entitled to benefits because he was undocumented. The court of appeals rejected that argument based on the relevant state statute (*see* N.C. Gen. Stat. § 97-2(2) (1999)), which defines "employee" for worker's compensation purposes as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed." The court agreed with the commission's position that the employer "received the benefits of plaintiff's labor up to the time of his injury, and it would be repugnant to now deny plaintiff a benefit of the same agreement." Moreover, the court relied on a prior decision, *Rivera v. Trapp*, 519 S.E.2d 777 (N.C. App. 1999), which addressed a similar issue, and held that an undocumented worker "can, despite his or her status, demonstrate an earning capacity in" North Carolina.

In its appeal, the employer also argued that the federal Immigration Reform and Control Act of 1986 (IRCA) preempts the North Carolina statute by making it unlawful for employers to knowingly hire undocumented workers. Because of this, argued the employer, an undocumented worker can never be considered an "employee" under a federal or state labor statute. The court relied on Congress's intent as set forth in IRCA's legislative his-

tory, as well as the reasoning of other courts, in holding that IRCA does not preempt the North Carolina worker's compensation statute's definition of "employee," nor does it prevent undocumented workers from receiving worker's compensation benefits solely because of their immigration status.

*Ruiz v. Belk Masonry Co., et al.*, 559 S.E.2d 249, 2002 N.C. App. LEXIS 50, (N.C. App. 2002).

**MASSACHUSETTS LAW LIMITS TRANSPORTATION FEES CHARGED TO TEMPORARY WORKERS** – A law that limits the amount of fees that temporary employees may be charged for transportation to and from the places where they are temporarily employed was enacted recently in Massachusetts.

The new law states that a "staffing agency" or employer that offers temporary workers transportation to the work site for a certain fee can charge only the actual transportation cost or three percent of that worker's daily wages, whichever is less. Moreover, such a fee may not reduce the worker's daily wages below the minimum wage. Most importantly, if the agency, work site employer, or anyone working for either the agency or work site employer *require* a worker to use the transportation services, the new law prohibits them from charging any fee. Finally, the law requires a staffing agency or work site employer or anyone acting on their behalf to obtain written authorization from a worker before deducting any transportation fees from his or her wages. The worker must be provided a copy of the signed authorization, which must be in a language the worker understands. Any person who violates the new law is subject to civil fines.

It is common practice to require temporary workers, many of whom are immigrants who work for low wages, to pay a transportation fee as high as \$15 per day. Massachusetts' Acting Governor Jane Swift signed the new law, which amends section 27C of chapter 149 of the Massachusetts General Laws, on Feb. 13, 2002.

## Immigrants & Welfare Update

**HOUSE HUMAN RESOURCES SUBCOMMITTEE TO MARK UP TANF BILL; OTHER TANF REAUTHORIZATION PROPOSALS INTRODUCED**– A number of competing proposals to reauthorize the Temporary Assistance for Needy Families (TANF) program awaited consideration by Congress when it returned from its spring recess on Apr. 8, 2002.

On April 9, House Ways and Means Subcommittee on Human Resources Chairman Wally Herger (R-CA) introduced HR 4090, the Personal Responsibility, Work, and Family Promotion Act of 2002. Rep. Herger's bill is very similar to President George W. Bush's TANF proposal, and will be the starting point for further action in the Ways and Means Committee. The subcommittee had scheduled a hearing for April 11, and the bill will be revised during the week of April 17. House members hope that the bill will make it out of the full Ways and Means Committee toward the end of April, with a vote in the House expected by early May. In the Senate, Sens. Thomas Carper (D-DE) and Evan Bayh (D-IN) have released an outline of their TANF proposal, which adopts many of President Bush's provisions. Sen. John D. Rockefeller (D-WV) has also introduced a TANF reauthorization bill, which

includes some of the National Governor's Association's (NGA's) recommendations on benefit restorations for immigrants.

**President Bush's Proposal.** On Jan. 26, 2002, President Bush released an outline of his administration's TANF proposal, which is titled "Working Toward Independence." President Bush would maintain the five-year ban on welfare benefits for "qualified" immigrants entering the country on or after 1996, to "ensure that welfare policy neither attracts noncitizens to the U.S. to take advantage of welfare nor induces welfare dependency among noncitizens who do receive welfare benefits." The Bush proposal resuscitates the myth that immigrants come to the U.S. to seek benefits, despite overwhelming evidence demonstrating that immigrants come to reunite with family and seek employment. Immigrant rights advocates were disappointed with the president's proposal, which seems inconsistent with his own budget. In the budget he submitted for the coming fiscal year, the president proposed to restore food stamps to qualified immigrants who have been in the country for five years.

The Bush TANF proposal also increases work requirements for recipients. Under current law, states are required to enroll 50 percent of their TANF recipients in a defined set of work activities for at least 30 hours a week. The Bush plan augments the required hours per week from 30 to 40 and raises the percentage of recipients who must be working to 70 percent by 2007. At the same time, the administration's proposal phases out the "caseload reduction credit" under which a state's work activity participation rate requirement is reduced if the state's TANF caseload has declined since 1995 for reasons other than changes in eligibility rules. The credit has greatly reduced or eliminated work participation rate requirements in many states.

The combination of these two proposals would significantly increase the number of persons who would be required to work, even as unemployment remains high. Many individuals who remain in TANF programs have multiple barriers to employment. Meeting the administration's proposed work rates would require states to make substantial additional investments, but the administration's proposal includes no additional funding. Efforts to meet these high participation rates would likely force states to reduce their current investment in child care and other programs that help working families with low incomes.

The administration's proposal removes much of the flexibility currently available to states in designing programs that meet the unique needs of each recipient. The plan would let states count 16 hours of education or other job preparation toward the 40 hours of required "work." Unlike current law, the president's proposal *would not* allow job search and vocational education to count toward satisfying the recipient's first 24 hours of the work requirement. Under Bush's proposal, participants in substance abuse treatment programs, job training, or rehabilitative services could receive an exemption from the work requirement for up to 3 months every 2 years.

Finally, the Bush proposal eliminates the separate rate for two-parent families. Under current law, the federal government imposes a 90 percent work participation rate on two-parent families and a 50 percent rate for single-parent families. In effect this allows states to discriminate against two-parent families in establishing eligibility for benefits and services under TANF. Rules that limit participation by two-parent families disproportionately

affect low-income immigrant families, which are twice as likely as low-income U.S.-born families to be headed by two parents.

**Carper/Bayh Proposal.** Sens. Carper and Bayh also released the outline of their TANF proposal, called the Work and Family Act, at a press conference on Feb. 27, 2002. The proposal mirrors the Bush proposals in a number of ways, including its lack of benefit restorations for immigrants. Like the Bush proposal, the Carper/Bayh proposal increases work requirements for all families and work participation rates for states.

**Sen. Rockefeller's TANF Bill (S. 2052).** Unlike the other two proposals, Sen. Rockefeller's bill, released on Mar. 21, 2002, includes many positive proposals for low-income immigrants. The bill is titled The Personal Responsibility and Work Opportunity Reconciliation Act Amendments of 2002.

The following provisions in the Rockefeller bill assist low-income immigrants.

**Elimination of Five-Year Bar in TANF and Reduced Deeming in Cash Assistance.** Currently, most qualified immigrants who entered the U.S. on or after Aug. 22, 1996, are subject to a five-year bar on receiving TANF assistance. After the five-year bar, the income of many immigrants' sponsors may be "deemed" to be available to them until they become citizens or work for approximately ten years. This "sponsor deeming" rule renders most immigrants ineligible for services, including cash assistance, English as a second language (ESL) classes, and job training. Even if immigrants are eligible for assistance because their sponsor's income is very low, sponsors may be required to reimburse the government for TANF benefits that the immigrant receives. Sen. Rockefeller's bill limits deeming to three years and imposes this restriction only on cash assistance. As under current law, sponsors would be liable and could be sued by the TANF agency if the sponsored immigrant manages to obtain cash assistance during the deeming period.

**State Option to Provide Medicaid and SCHIP to Pregnant Women and Children.** Under current law, qualified immigrants—including pregnant women and children—who arrived on or after Aug. 22, 1996, are also barred for five years from receiving health benefits under Medicaid or the State Children's Health Insurance Program (SCHIP). After the five-year bar, the income of many immigrants' sponsors may be deemed to be available to them until they become citizens or work for approximately ten years. As with TANF, this sponsor deeming rule renders most immigrants ineligible for services. Sen. Rockefeller's bill gives states the option of providing federal health care to lawfully present immigrant children and pregnant women during the five-year bar. The bill also eliminates deeming and sponsor liability for these women and children in the states that choose this option.

**GAO Study to Analyze the Impact of the Immigrant Restrictions in SSI.** Currently, most immigrants who entered the U.S. on or after Aug. 22, 1996, are ineligible for Supplemental Security Income (SSI). SSI provides a cash safety net for seniors and persons with disabilities who have little or no income or resources. The Rockefeller bill would require the Government Accounting Office (GAO) to study the impact of the immigrant restrictions.

**Inclusion of ESL as a Work Activity.** The 1996 welfare law established work "participation rates" for families receiving TANF assistance. To count toward the work participation rates, individuals must participate in one of a set of work-related activities listed

in the statute. Currently, ESL classes are not explicitly listed as a work activity. Several states allow ESL as "education related to employment" or "job readiness," both of which are federal work activities. But, depending on the activity, there are limits on the period of time that recipients can participate or on the percentage of the caseload that can participate. Under Sen. Rockefeller's bill, ESL classes would be considered a countable work activity, which would give states greater flexibility in choosing how best to serve their limited English-proficient (LEP) population.

***Elimination of Separate Eligibility Requirements and Work Participation Rates for Two-Parent Families.*** Like the Bush and Carper/Bayh proposals, the Rockefeller bill eliminates the separate work participation rate for two-parent families. The bill also prevents states from imposing stricter eligibility criteria for two-parent families.

The Rockefeller bill includes a number of other provisions that would assist low-income individuals, including increased funding for the TANF block grant. The bill would also increase funding for child care, allowing more recipients to participate in post-secondary education. Sen. Rockefeller's proposal would also extend the period of time that recipients can participate in vocational education from 12 to 24 months and provide states grants to assist recipients facing barriers to work (including limited English proficiency). In addition, states would be given the option to replace the caseload reduction credit with an employment credit.

***National Governor's Association's Winter Policy Statement.*** As noted above, the Rockefeller bill adopted some of the recommendations issued by the NGA in its Winter Policy Statement. The NGA proposes to do the following:

- Restore food stamps for qualified immigrants.
- Grant states the option to use federal funds for TANF during the federal five-year bar. The NGA asks Congress to allow states to provide federal TANF to post-Aug. 22, 1996, entrants during the five-year bar.
- Restore federal Medicaid and SCHIP to pregnant women and children. The NGA priorities endorse the Immigrant Children's Health Improvement Act of 2001 (S. 582, H.R. 1143), which gives states the option of providing federally funded health care to lawfully present immigrant children and pregnant women regardless of their date of entry.
- Eliminate the separate two-parent family participation rates. As noted previously, under current law the federal government imposes a 90 percent work participation rate on two-parent families and a 50 percent rate for single-parent families. Like the Bush and Carper/Bayh proposals, the NGA asks Congress to eliminate the separate rate for two-parent families.
- Grants greater flexibility to states to define work activities. Current law defines a set of work activities in which recipients must be engaged to fulfill the first 20 hours of their work requirement. The NGA asks Congress to give states greater flexibility to

define what counts as a work activity. States would then be better able to assist recipients facing multiple barriers to employment, including low literacy levels, mental illness, substance abuse, learning disabilities, limited English proficiency, and domestic violence.

**"NONWORK" SSNs NO LONGER AVAILABLE FOR DRIVER'S LICENSE APPLICANTS** – The Social Security Administration (SSA) has announced that, effective Mar. 1, 2002, the agency will no longer assign "nonwork" Social Security numbers (SSNs) to persons who need them solely to secure a state driver's license. The SSA will continue to issue nonwork SSNs to persons

- required by a federal statute or regulation to provide an SSN to secure a benefit or service, or
- required by a state or local law to provide an SSN to secure general assistance benefits to which they have established an entitlement.

To obtain a nonwork SSN, applicants must provide evidence of age, identity, and immigration status, as well as a letter from the benefit agency explaining the need for the SSN (see SSA's Program Operations Manual System (POMS) RM 00203.510). Immigrants who need an SSN in order to secure a state or local benefit must submit evidence of lawful status. POMS RM 00203.510.D.2. By contrast, all immigrants regardless of status may obtain a nonwork SSN where a federal statute or regulation requires one in order to secure a federal benefit. POMS RM 00203.560.

Although the SSA published an advance notice of proposed rulemaking in October 1999 announcing potential restrictions on nonwork SSNs, it never published a final rule (see "SSA to Restrict Issuance of SSNs for Nonwork Purposes," IMMIGRANTS' RIGHTS UPDATE, Nov. 17, 1999, p. 9). Numerous states currently require applicants for driver's licenses to provide SSNs. The SSA's new policy has already prevented some otherwise eligible immigrants from securing driver's licenses.

The SSA's restriction comes at a time when states are debating at least 35 proposals to expand or restrict access to driver's licenses for immigrants. For example, some states are debating whether to accept individual taxpayer identification numbers (ITINs) as an alternative to the SSN.

The National Immigration Law Center is working with other national groups to track current state policies and the proposals that are moving through state legislatures and administrative agencies. To provide information about driver's license policies and proposals in your state, please contact Tyler Moran at [tylertmoran@yahoo.com](mailto:tylertmoran@yahoo.com). The SSA's POMS are available on the agency's web site, at [policy.ssa.gov/poms.nsf/poms?OpenView](http://policy.ssa.gov/poms.nsf/poms?OpenView). The driver's license policy is also explained in the SSA's "frequently asked questions" site, at [www.ssa.gov](http://www.ssa.gov).





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