NATIONAL IMMIGRATION PROJECT of the NATIONAL LAWYERS GUILD, INC.

CENTRAL AMERICAN REFUGEE DEFENSE FUND
VISA DENIAL PROJECT

Seminar Materials

IMMIGRATION RAIDS ON THE WORKPLACE

Table of Contents

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APPENDICES

A. "Know Your Rights" leaflets in English (A-1), Spanish (A-2), and French (A-3).

B. Record of Deportable Alien (Form I-213)

C. Advisement of Rights (Form I-214, Spanish)

D. Application for Order to Show Cause (Form I-265)

E. Order to Show Cause, Notice of Hearing, Warrant for Arrest of Alien

F. Immigration Bond (Form I-352A)

G. Receipt for Payment of Bond (Form I-305)

H. Notice of Bond Cancellation (Form I-391)

I. Order of Release on Recognizance (Form I-320A)

J. Bond Redetermination by Immigration Judge (Form I-342)

K. Notice of Appeal to the Board of Immigration Appeals and Instructions (Form I-290A)

L. Montero v. Ilchert, Findings of Fact and Conclusions of Law (N.D. Calif., Sept. 6, 1984)

M. Motion to Suppress Evidence; Memorandum of Points and Authorities in Support Thereof; Affidavits in Support Thereof

N. Brief - Respondent's Right to Assert the Privilege Against Self-Incrimination at his Deportation Proceedings

SECTION I: INTRODUCTION TO THE SEMINAR

By William R. Tamayo

I. INTRODUCTION

This seminar, Immigration Raids on the Workplace, is long overdue. In the last few years, the Immigration and Naturalization Service, under the guise of creating jobs for U.S. citizens and lawful residents, has undertaken a campaign utilizing "Gestapo-like tactics" (as described by the San Jose City Council members) to stop production in the workplace and round-up Latino and Latino-looking persons without particularized suspicion of illegal alienage.

With the introduction of the Simpson-Mazzoli immigration bill in Spring 1982, the INS conducted "Operation Jobs," a massive nationwide effort in the last week of April 1982 to raid factories across the U.S. Over 5,000 workers were arrested by the INS while INS officials held press conferences every day of that week to announce "their big catch." While this show-and-tell tactic was intended to gain mass support for the legislation, dozens, if not hundreds, of reports were made concerning INS violations of employers' and employees' rights. Several employees were beaten by INS agents, some apprehended were never allowed to see or talk to a lawyer, while others were never even given a chance to show their "green cards" before being handcuffed and taken away to INS detention centers. Mothers and fathers were unexpectedly separated from their children for hours, and sometimes overnight, with no opportunity to make provisions for their children's meals, pick-up, etc.

Above all, the raids epitomized the government's attack on the Latino and other immigrant communities. Latino children were afraid to go to school; Latinos and some Asians were agraid to go to work for fear that they would be rounded-up and be subjects of the 6 o'clock news; others were deported summarily.

Employers suffered damaged property and substantial delays in production resulting in losses of hundreds of dollars. Mass confusion regarding the right of the INS to conduct these raids resulted in employers laying off or firing Latino workers.

In 1984, with the opening of the San Jose sub-office of the San Francisco INS District Office, the INS conducted weekly,

if not daily, raids in the Silicon Valley. In announcing the opening of the office, INS Regional Commissioner Harold Ezell promised "a minimum of two raids" per week and announced that 25% of the Santa Clara County workforce was illegal. No private or government entity knows the number of local or nationwide undocumented immigrants. Yet, not surprisingly, Latinos make-up approximately 20-25% of the population. The violent and discriminatory character of the raids led the San Jose City Council to pass a resolution denouncing the raids and demanding the resignation of the sub-office head. Following that action, the San Jose Chief of Police also denounced the raids and stated that his department would not cooperate with the INS. Community protests against INS activities were commonplace during the San Jose raids.

Just what are the rights and liabilities of workers, unions, and employers during these raids? In some of these raids, INS agents have justified their actions on the notion that employer sanctions will become the law soon or that California has an employer sanctions law which the INS (federal) agents think they can enforce, but which has been enjoined. Still other agents have justified their actions on their grounds that they have some type of "sixth sense" that can tell which individual is undocumented and which workplace has undocumented workers. And, other INS agents (or Border Patrol agents) have testified that they've never seen a search warrant, never applied for a search warrant, don't know what the 4th Amendment to the U.S. Constitution is, and what the rights of aliens are.

With the expected reintroduction of the Simpson-Mazzoli bill in 1985, and the expected raids to coincide with the bill's movement in Congress, it is important that workers, unions, employers and community organizations be aware of all of their rights and liabilities. It is to inform people of their rights so that they can assert them that the National Immigration Project of the National Lawyers Guild and the San Francisco Bay Area NLG Immigration Committee is conducting this seminar. We hope that through the seminar, the violations, the violence, and the general hardship caused by these immigration raids will cease and that challenges to these injustices will be made.

There is indeed an increase in anti-immigrant sentiment -- a sentiment which finds its roots in laws and practices like the Chinese Exclusion Act of 1882, the Gentleman's Agreement of 1907 (limiting Japanese immigration), the "Asiatic Barred Zone" of 1917, the mass deportations of Mexican farmworkers in the 1930's during the Depression, and "Operation Wetback" of the early 1950's. These laws and practices -- the products of periods of economic downturn in the U.S. -- serve as vivid and perhaps painful reminders that the sentiment which blesses them is very much alive. It is the intention of the National

Lawyers Guild that those affected begin to critically examine and denounce the underlying premises given by the INS for its actions and by a public looking for an easy scapegoat to this country's economic woes. This seminar will hopefully play a significant part in that process.

II. IMMIGRATION CATEGORIES

The laws governing immigration are embodied in the Immigration and Nationality Act, amended 1980, 8 U.S.C. 101, et seq. Enacted in 1952 as the McCarran-Walter Act, the INA covers the bases for admission, exclusion, deportation, and naturalization. The governing regulations are contained in 8 C.F.R. 1.1, et seq. The Immigration and Naturalization Service (INS) also has its own Operation Instructions.

There are five general immigration categories. Everyone in the United States falls into one of these:

A. United States Citizens

1. Means of gaining citizenship:
   a. through birth in the U.S., its territories, or certain possessions, i.e., American Samoa and Swain's Island, 8 U.S.C. 1101(a)(29), (38).
   b. through naturalization, 8 U.S.C. 1421-1448.
   c. through parents, 8 U.S.C. 1431-1433.
2. U.S. citizens cannot be deported unless they obtained citizenship by fraud or other illegal means or were otherwise ineligible.
3. U.S. citizens have authorization to work without prior approval by the INS.

B. Lawful Permanent Residents

1. Lawful permanent residents (LPR's) ("greencard holders" or "immigrants") are persons admitted into and allowed to reside permanently in the United States. These persons include but are not limited to:

a. spouses, parents, brothers, sisters, sons, and daughters of U.S. citizens;

b. spouses and unmarried children of lawful permanent residents;

c. persons admitted as professionals, scientists, artists, skilled workers, and unskilled laborers;

d. other people admitted as "special immigrants," e.g., ministers, doctors, etc.

See 8 U.S.C. 1151-1154.

2. LPR's are authorized to work in the U.S. and are protected by all of the labor, EEO laws.

3. However, because LPR's are not citizens, they are still subject to deportation and exclusion no matter how long they have resided in the U.S. 8 U.S.C. 1182, 1251.

C. Nonimmigrants

1. Generally speaking, nonimmigrants are those aliens who are coming to the United States only for a temporary purpose and for a temporary period of time. Nonimmigrants are not subject to any numerical restrictions. Also, under section 212(d), I & N Act, 8 U.S.C. 1182, certain grounds of inadmissibility are not applicable to or may be waived for nonimmigrants. Visitors for business or pleasure, exchange visitors, students, temporary workers, and trainees are required to have a foreign residence which they have no intention of abandoning. Temporary workers, fiances or fiancees, and intra-company transferees must be the beneficiaries of approved petitions filed with the INS.

2. Categories of Nonimmigrants, 8 U.S.C. 1101(a)(15)

A: diplomat

B-1: visitor for business
B-2: visitor for pleasure (tourist)

C: alien in immediate and continuous transit through U.S.

D: alien crewman

E-1: treaty trader
E-2: treaty investor

F-1: student admitted to pursue a full course of study
F-2: spouse of F-1 student

G: representative to International Organization

H-1: temporary worker of distinguished merit and ability, e.g., nurses, engineers
H-2: temporary worker performing services unavailable in U.S., e.g., agricultural workers
H-3: temporary trainee

I: representative of Foreign Information Media

J-1: exchange visitors: includes bona fide student, scholar, trainee, teacher, professor, research assistant, specialist or leader in a field of specialized knowledge coming temporarily to U.S. to participate in a program approved by Secretary of State
J-2: spouse of J-1 exchange visitor

K: fiances or fiancees

L: intra-company transferees (managerial or executive, or have special skill)

M: vocational student

NATO: NATO representatives

3. Authorization to work may depend on the nonimmigrant category and whether the INS has approved such employment. For example:

   a. an F-1 student may work on campus under the terms of a scholarship, fellowship, or assistantship if related to the student's academic program without permission from INS; but the student is not permitted to work off-campus in the U.S. unless the INS gives approval first.

   b. Visitors are barred from working in the U.S.

4. Working without authorization is a violation of one's nonimmigrant status and is a ground for deportation. 8 U.S.C. 1251(a)(2).

5. Since nonimmigrants are noncitizens, they are subject to deportation and exclusion.

D. Refugees/Asylees

1. "The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act (8 U.S.C. 1157)) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(2). (Emphasis added.)

2. Asylees: those aliens who have been granted asylum status because they have established to the satisfaction of the INS that they have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion if they return to their country of nationality. 8 U.S.C. 1101(a)(42); See also 8 U.S.C. 1157, 1158.

3. Refugees and asylees are normally given authorization to work by the INS; they can adjust to lawful permanent resident status after one year. 8 U.S.C. 1159.

4. NOTE: There are hundreds of thousands of Central Americans and Haitians in the United States who are in the political sense refugees, but who are not legally recognized as refugees by the INS (for obvious political reasons). Unless formally

granted asylee or refugee status or other legal status, they are generally considered undocumented. (See below.)

E. Undocumented Aliens

1. Undocumented workers (or "illegal" aliens) are persons who generally are not authorized to be or remain in the U.S. These include:

   a. persons who entered the U.S. without inspection (illegal entry); see 241(a)(2) of I & N Act; 8 U.S.C. 1251(a)(2);

   b. persons who entered the U.S. as nonimmigrants but who violated the conditions of their stay, e.g., worked without authorization by INS, overstayed the allowed period. Sec. 241(a)(2) of I & N Act; 8 U.S.C. 1251(a)(2);

   c. persons who are deportable on the grounds that they should have been excluded, e.g., persons who entered with fraudulent documents or without proper documents, 241(a)(1) of the I & N Act; 8 U.S.C. 1251(a)(1).

2. Undocumented aliens are deportable and are not normally authorized to work unless the INS has given specific work authorization. For example, persons awaiting adjudication of an adjustment of status application (8 U.S.C. 1255), persons awaiting consular appointments for visas, and persons with pending political asylum applications can be granted work authorization by the INS.

3. In general, undocumented aliens are immediately deportable but can be allowed to remain in the U.S. pending the outcome of various applications for relief from deportation or for permanent residency.

4. While undocumented aliens in general are not authorized to work by INS, there is no federal law, at this time, barring their employment. (See section on Employer Sanctions). Eleven states, however, have laws which bar the employment of undocumented aliens.[1]

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[1]See K. Calavita - Employer Sanctions, the Case of Disappearing Law, Center for U.S. - Mexican Studies, UCSD (1982).

(See DeCanas v. Bica (1976), 424 U.S. 351, 96 S. Ct. 933, 47 L. Ed. 2d 43 (California employer sanctions law found to be constitutional, not a regulation of immigration, nor otherwise preempted by federal law); see discussion on Calif. Labor Code, section 2805, below.)

III. EMPLOYER SANCTIONS UNDER SIMPSON-MAZZOLI

The controversial Simpson-Mazzoli bill (S. 529, H.R. 1510), "Immigration Reform and Control Act of 1983," passed the Senate in 1983 and the House in June 1984, but died in the 98th Congressional session just before the Presidential elections. Differences in the joint House/Senate conference committee regarding anti-discrimination measures in the employer sanctions provisions and the reimbursement to state and local governments for costs resulting from the legalization program prevented the committee from producing a final report.

However, the bill is expected to be re-introduced in late January or early February 1985 with the support of the Administration and without the politics of an election affecting its movement in Congress. The debates in the conference committees and the agreed upon provisions provide some insight as to what the 1985 version will be.

The core of the bill has been the employer sanctions provision and the legalization program. Under employer sanctions, employers would be penalized for knowingly hiring undocumented workers. The theory for such a provision is that undocumented workers (especially those from Mexico) come to the U.S. to work at low wages (relative to other U.S. wages but higher than Mexico wages) and therefore displace U.S. citizen and lawful permanent resident workers. By penalizing employers who hire the undocumented (and profit from their labor), there supposedly would be no incentive in hiring undocumented workers. Thus, if there are no jobs for these workers, then presumably they will not enter the United States. (Obviously, this theory dismisses the conditions that propel people to leave their homelands in the first place.)

A. Conference Committee Version of the Bill

1. It would be unlawful for any employer, labor organization or employment agency to knowingly hire or refer an undocumented worker.

2. After enactment, there would be a citation period of 2½ years for both hiring, recruiting, and referring

undocumented aliens and for recordkeeping violations. After the citation period terminates, civil fines will apply immediately to first offenders.

3. Criminal Penalties: A criminal penalty (not exceeding $1,000 and/or 6 months' imprisonment) would be imposed for "pattern or practice" violations of hiring, recruiting or referring undocumented aliens.

4. No Small Employer Exemption: All employers are subject to the employer sanctions provisions.

5. Recordkeeping: Recruiters, referrers, as well as employers with four or more employees, must comply with the verification (recordkeeping) requirements.

6. Civil Penalties and Procedure: After the initial "grace" period, employers, labor organizations, and employment agencies would be fined $1,000 per worker for the first offense and $2,000 per worker for repeated offenses.

   A hearing can be held before an Administrative Law Judge "at the nearest practicable site from the place where the person or entity (employer) resides or the place where the alleged violation occurred." It is the intent of the conferees that the nearest practicable site be found not in excess of 200 miles.

7. National I.D. Card: "Nothing in (Section 1) shall be construed to authorize, directly or indirectly, the issuance of national identification cards or the establishment or administration of a national identification card or system."

8. Timing of Verification: There is a 1-day grace period to comply with the process for verifying employment eligibility.

9. Social Security Validation: The Attorney General, in cooperation with the Secretaries of Labor and Health and Human Services, must conduct a three-year demonstration project on a social security validation system. (As part of the verification process, the government must validate the social security account numbers of individuals applying to be hired, recruited, or referred for employment in the U.S.).

10. Discrimination: The bill bars employers from discriminating on the basis of race, national origin, color and alienage in complying with employer sanctions law. (Only aliens who are lawful permanent residents and who have indicated

an intent to file for U.S. citizenship can claim alienage discrimination.) Frank Amendment. Sets up additional administrative procedure for processing discrimination claims.

11. Federal Preemption: Legislation preempts any state or local law imposing civil and criminal sanctions for hiring, referring or recruiting undocumented aliens. Conferees do not intend it to prevent otherwise lawful state actions with respect to suspension, revocation or refusal to issue or reissue a license to any person who has been found to have violated the sanctions provision in this legislation. Further, the conferees do not intend to preempt state licensing or similar laws, which specifically require such licensee or contractor to refrain from hiring undocumented aliens.

NOTE: Federal employer sanctions for hiring undocumented workers are not the law at this time. The California employer sanctions law (Cal. Labor Code, section 2805) was enjoined, and that injunction has not been lifted. (See discussion below.)

B. Some Arguments Against Employer Sanctions[2]

1. Employer sanctions will not work.

a. Employer sanctions have never worked to deter undocumented immigration anywhere in the world.

1) A study commissioned by Senator Simpson and prepared by the General Accounting Office (GAO) indicated that the 20 countries that have tried employer sanctions to control undocumented immigration found them ineffective. (GAO Report, Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countres, August 31, 1982.)

2) 11 states in the U.S. have some form of employer sanctions, including California and Florida. However, these states still have large numbers of undocumented immigrants. (See K. Calavita, Employer Sanctions, the Case of the Disappearing Law, Center for U.S.-Mexican Studies, U.C.S.D. (1982)).

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[2] Arguments Against the Simpson-Mazzoli Bill, Mexican American Legal Defense and Educational Fund (1983).

b. Undocumented immigration cannot be stopped or controlled by merely cutting off jobs to undocumented aliens. There are other factors for migration:

1) family reunification;

2) to escape social, economic and political upheaval, e.g., those from Central America and Mexico.

2. Employer sanctions will be discriminatory.

a. Recent INS factory raids to identify and remove undocumented aliens from the workplace have resulted in discrimination against immigrants.

1) Latino workers were separated from other workers during some factory raids and asked to produce documentation of legal resident status, resulting in unwarranted apprehensions and detentions of legal U.S. residents and citizens.

2) Raids were disruptive to the workplace and costly to employers so that many employers sought to avoid future problems by reducing their Hispanic workforce.

b. Businesses may respond to the raids (and the discriminatory character) by:

1) not hiring anyone who may even appear to be undocumented, including Hispanics who look like foreign nationals or speak with a foreign accent;

2) reducing the number of workers in a plant who look "foreign," so as not to call the business to the attention of the INS.

c. Anti-discrimination measures, while necessary, will not adequately protect the rights of American workers. (See discussion on employment discrimination law below.)

3. Employer sanctions will fuel the anti-immigrant sentiment in the public that has in turn increased the violent and verbal scapegoating of immigrants and minorities for the economic ills of the U.S.

a. Undocumented aliens do not negatively impact the American economy; instead they are a positive factor. They buy goods and services, and help to create jobs.

NOTE: Temporary worker programs: On the one hand, the Simpson-Mazzoli bill seeks to limit the number of persons entering the U.S.; on the other hand, the bill provides a program to allow between 300 and 500 thousand foreign workers into the U.S.

IV. FEDERAL EMPLOYMENT DISCRIMINATION LAW

A. Title VII, Civil Rights Act of 1964, as Amended 1972, 42 U.S.C. 2000(e), et seq.

1. Under Title VII, it is unlawful for employers, unions, and employment agencies to discriminate against any individual on the basis of race, color, religion, sex or national origin.

2. Definitions, 42 U.S.C. 2000(e):

   a. The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

   b. The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person ...

   c. The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such person.

   d. The term "labor organization" means a labor organization engaged in an industry, affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any

conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

...

f. The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any state or political subdivision of any state by qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a state government, governmental agency or political subdivision.

3. Alienage Discrimination

a. An employer's refusal to hire a person because (s)he was not a United States citizen did not constitute employment discrimination based on "national origin" in violation of Title VII. Espinoza v. Farah Manufacturing Company, Inc., 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973).

(FACTS: Mrs. Espinoza sued Farah for its refusal to hire her because of her Mexican citizenship. She argued that the company's policy violated section 703 of Title VII, which made it unlawful for an employer to fail or refuse to hire any individual because of his (her) race, national origin, etc.).

b. Although Title VII protects aliens against illegal discrimination because of race, color, religion, sex, or national origin, it does not prohibit discrimination on the basis of alienage.

c. But, see 29 CFR 1606.5 (EEOC Guidelines on Discrimination Because of National Origin):

"(a) In those circumstances where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII."

"(b) Some state laws prohibit the employment of non-citizens. Where these laws are in conflict with Title VII, they are superseded under section 708 of the Title." (Emphasis added.)

4. National Origin Discrimination

A developing area of employment discrimination law is the issue of national origin discrimination. The Equal Employment Opportunity Commission (EEOC) defines

> "national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations such as
>
> (a) marriage to or association with persons of a national origin group;
>
> (b) membership in or association with an organization identified with or seeking to promote the interests of national origin groups;
>
> (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and
>
> (d) because an individual's name or spouse's name is associated with a national origin group.
>
> In examining these charges for unlawful national origin discrimination, the Commission will apply general Title VII principles, such as disparate treatment and adverse impact."
>
> 29 CFR 1606.1.

a. Speak-English-Only Rules

> "(a) When Applied at all Times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic.

Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it. (See CD71-446 (1970). CCH EEOC Decisions ¶6173, 2 FEP Cases, 1127; CD 72-0281 (1971), CCH EEOC Decisions ¶6293.)

(b) When Applied Only at Certain Times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity..."

29 CFR 1606.7.

b. Harassment

"(a) The Commission (EEOC) has consistently held that harassment on the basis of national origin is a violation of Title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin. (See CD CL68-12-431 EU (1969), CCH EEOC Decisions ¶6085, 2 FEP Cases 295; CD 72-0721 (1971), CCH EEOC Decisions ¶6311, 4 FEP Cases 312; CD 72-1561 (1972), CCH EEOC Decisions ¶6354, 4 FEP Cases 852.)

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct:

(1) has the purpose or effect of creating an intimidating, hostile or offensive working environment;

(2) has the purpose or effect of unreasonably interfering with an individual's work performance; or

(3) otherwise adversely affects an individual's employment opportunities.

(c) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of national origin regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of such occurrence...."

29 CFR 1606.8.

NOTE: In the context of immigration practices, if an employer only asks Latino employees for their immigration status, this could constitute national origin discrimination.

5. Exceptions to Laws Barring National Origin Discrimination

Discrimination against aliens in the employment situation is lawful under certain circumstances.

a. "Aliens are generally prohibited from federal civil service employment. Executive Order No. 11935, 41 F.R. 37301 (Sept. 2, 1976) by President Ford. (Effectively overturning Hampton v. Wong, 426 U.S. 88 (1976) which held that the exclusion of aliens from all federal positions violated due process and was not authorized by Congress or the President. (See Mow Sun Wong v. Hampton, 435 F.Supp. 87 (N.D. Cal 1977), aff'd sub nom Mow Sun Wong v. Campbell, 526 F.2d 739 (9th Cir. 1980) upholding executive order. But see De Malherbe v. International Union of Elevator Constructors, 476 F.Supp. 649 (N.D. Cal 1979) (requirement of U.S. citizenship to enter federally funded training program unconstitutional in absence of "overriding national interest.")[3]

b. Security Clearance

"The requirements of a security clearance provide another exception to the prohibitions of Title VII under Sec. 703(g). EEOC interpreted this to mean that it is not a violation for an employer to refuse to employ individuals who are unable to obtain clearance from the Central Intelligence Agency

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[3] "Employment Discrimination Based on Alienage -- A Survey of the Law," Memorandum of Mexican American Legal Defense and Educational Fund, October 1, 1984.

because such individuals have relatives behind the Iron Curtain. EEOC General Counsel Opinion Letter, G.C. 124-65 (October 16, 1965, unreported)."[4]

c. Bona Fide Occupational Qualification

"Section 703(e) sets forth a bona fide occupational qualification exception to Title VII for discrimination based on national origin as well as sex and religion ...

Congressman Dent (in House committee discussions) explained that the BFOQ exception would allow a person who ran a French or Italian restaurant to advertise for and hire exclusively French or Italian chefs. 110 Cong. Rec. 2549 (1964).

The BFOQ exception has been narrowly construed in relation to sex discrimination. See, e.g., Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971). The above cited legislative history suggests that the BFOQ exception was to be somewhat less narrowly construed with respect to national origin discrimination."[5]

B. Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. 1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. 1981.

1. "An overwhelming majority of courts do permit individuals of differing ethnic and national backgrounds to proceed under Sec. 1981 of the

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[4] id.

[5] id.

Civil Rights Act of 1866 if they are "nonwhite." See, e.g., Gonzalez v. Stanford Applied Eng'r, Inc., 597 F.2d 1298 (9th Cir. 1979) (Mexican Americans of brown race or color can sue under Sec. 1981); Aponte v. National Steel Serv. Center, 500 F.Supp. 198 (N.D. Ill. 1980) (Section 1981 applies to Hispanics because they are frequently identified as "nonwhites").[6]

2. "When citizenship requirements are challenged under Section 1981 and/or the Fourteenth Amendment, the requirement undergoes 'strict judicial scrutiny' because aliens are a 'suspect classification.' See, Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976); Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2861, 37 L.Ed.2d 853 (1973). It should be noted, however, that when testing the constitutionality of a state statute which excludes aliens from employment in the state's governmental functions, a lesser standard of judicial scrutiny (the "rational basis" test) is utilized. See, Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978) (no violation of Equal Protection in requiring state troopers to be U.S. citizens because state troopers perform a state governmental function)..."[7]

3. "Challenging a citizenship requirement for employment should not hinge upon whether the requirement is 'under color of state law,' i.e., 'state action,' for it has been held that the Civil Rights Act of 1877 applies to private as well as public discrimination. See, Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974)."[8]

See also, De Malherbe v. Union of Elevator Constructors, Local 8, 476 F.Supp. 649 (N.D. Cal. 1979) which held that the plaintiff was unconstitionally excluded from a union minority recruitment program because of his alien status.

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[6] id.

[7] id.

[8] id.

C. Conclusion

While Title VII and Section 1981 provide some protection to minorities and aliens from employment discrimination based on alienage or national origin, they are still inadequate. Proof problems, overburdened administrative agencies, i.e., EEOC, and the lack of administrative remedies for section 1981 violations, indicate that protections against discrimination are limited. Costs alone for filing suits in court could prohibit discriminated employees from taking legal action. In general, the imposition of employer sanctions laws could increase discrimination against Latinos and Asians, and leave the victims without adequate remedies.

V. CALIFORNIA EMPLOYMENT DISCRIMINATION LAW

Aside from being liable for Federal employment discrimination law violations, employers, unions (labor organizations), and employment agencies can also be liable for violating California employment discrimination law. Case law under the state statutes, in particular those cases affecting national origin and alienage discrimination, is extremely limited but may become a significantly developing area of law.

A. California Govt. Code Sec. 12940 states:

"It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the U.S. or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment ...

(b) For a labor organization, because of the race, ... color, national origin, ancestry ... of any person, to exclude, expel or restrict from its membership

such person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, ... color, national origin, ancestry ... of such person ... in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program leading to employment because of the race, ... color, national origin, ancestry ... of the person discriminated against.

(d) For an employer or employment agency ... to print or circulate or cause to be printed or circulated any publication, or make any nonjob-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, color, national origin, ancestry ...

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified or assisted in any proceeding under this part ..."

B. Citizenship Requirements

"Citizenship requirements which have the purpose or effect of discriminating against applicants or employees on the basis of national origin or ancestry are unlawful unless pursuant to a permissible defense."

2 Cal Admin. Code Sec. 7289.5(f)

SECTION II: LEGAL CONSIDERATIONS AFFECTING EMPLOYMENT OF ALIENS

By Matthew D. Ross
Neyhart, Anderson, Nussbaum, Reilly & Freitas
(December, 1984)

I. IS IT UNLAWFUL TO EMPLOY UNDOCUMENTED WORKERS?

No. As of today, no federal law prohibits the employment of undocumented workers. The Simpson-Mazzoli bill, which Congress failed to enact during its last session, and which will probably be reintroduced in the new session, includes a provision, referred to as "employer sanctions," that will prohibit employers from hiring aliens who do not possess work authorization.

Section 2805 of the California Labor Code, which was enacted in 1971 (the Dixon-Arnet bill), imposes criminal penalties on employers who knowingly employ aliens not entitled to lawful U.S. residence if such employment would have an adverse effect on lawful resident workers. However, section 2805 of the Labor Code was declared unconstitutional and the State of California Labor Commissioner was permanently enjoined from enforcing the law (the Dolores Canning case). The enforceability of section 2805 now is somewhat unclear because of another decision of the United States Supreme Court (the De Canas decision), but the better view of the law is that section 2805 is still unenforceable and unconstitutional, for the time being at least.[1]

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[1] In Dolores Canning Co. v. Millas, the Superior Court permanently enjoined the Department of Industrial Relations and the Labor Commissioner from enforcing section 2805, holding that the statute encroached upon the exclusive right of Congress to regulate immigration and naturalization and that the statute failed to provide that degree of certainty required to meet the Constitutional guarantees of due process. The Court of Appeals, in an opinion by Judge Kaus, affirmed, but only on the preemption issue and without attempting to judicially construe the statute or rule on its alleged vagueness. Dolores Canning v. Howard, 40 Cal. App. 3d 673 (1974).

(Footnote 1 continued on next page)

Under the Brown administration, the Labor Commissioner's Office and the Division of Labor Standards Enforcement did not enforce section 2805. The position of the new Deukmejian appointed head of the Division is still unclear. As of now, we know of no prosecutions by the state authorities. The INS, however, seems to be intensifying a policy of threatening employers with prosecution under section 2805. The INS has no legal authority to enforce section 2805. Nevertheless, they have sent letters to employers quoting section 2805 and implying that it is illegal for the employer to hire undocumented workers. In light of the uncertain state of California law, this INS policy is clearly erroneous and should be opposed.

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[1](continued) At about the same time the Dolores Canning case was moving through the state courts, a group of migrant farm workers brought an action pursuant to section 2805 against certain farm contractors alleging that defendants refused the farmworkers continued employment due to a surplus of labor resulting from defendants knowing employment, in violation of section 2805, of aliens not lawfully admitted to residence in the United States. The Superior Court, in an opinion, dismissed the complaint, holding Labor Code section 2805 unconstitutional on federal preemption grounds. The Court of Appeals affirmed on the grounds that Congress had completely barred state action in the field of employment of illegal aliens. 40 Cal. App. 3d 976 (1974). The California Supreme Court denied review but the U.S. Supreme Court granted certiorari and reversed. In DeCanas v. Bica, 424 U.S. 351 (1975), the Supreme Court rejected the specific preemption theory relied upon by the Court of Appeals and therefore reversed, but the Court did not altogether reject a preemption challenge to Labor Code section 2805 or rule the statute unconstitutional. Instead, the Court held that there are questions of construction of section 2805 to be settled by the California courts before a determination is appropriate whether, as construed, section 2805 "can be enforced without impairing the federal superintendence of the field" covered by the I.N.A., 424 U.S. at 363.

After the Supreme Court decision, plaintiffs lost interest in the lawsuit and no California court has yet to judicially construe section 2805, as far as we know. It is therefore an open question whether section 2805 is constitutional on the preemption issue. Moreover, the due process "vagueness" theories advanced in the trial court in Dolores Canning have yet to be reached by any appellate court. What is clear is that the permanent injunction issued in 1974 in Dolores Canning has never been vacated and should still be regarded as a valid, enforceable order of the court.

Employers threatened with section 2805 sanctions by INS officials if they do not terminate undocumented workers should be informed that it is not unlawful to hire illegal aliens. In union shops, union representatives, shop stewards, etc., should inform employers that the fact that a worker is an illegal alien does not provide just cause for their termination. (See question and answer below.)

II. DOES AN EMPLOYER HAVE "JUST CAUSE" UNDER A COLLECTIVE BARGAINING AGREEMENT TO TERMINATE EMPLOYEES BECAUSE OF THEIR UNDOCUMENTED STATUS?

No. One of the basic provisions of a union shop collective bargaining agreement is that the employer has to have "just cause" to terminate non-probationary employees. The requirement of just cause to terminate permanent employees may be implied even where it is not expressly provided for in the labor agreement. The discharge or suspension from employment of an undocumented unionized worker covered by a collective bargaining agreement may be the subject of a union grievance and arbitration.

The decisions of arbitrators on this issue are somewhat contradictory, but a recent case illustrates the prevailing view. Based on an unsolicited "newsletter" from an attorney advising an employer that it could be subject to criminal prosecution under California Labor Code section 2805, an employer required his employees to provide documentation. An employee from Mexico was discharged after twice failing to provide the requested documentation. His attorney wrote to the employer and objected to the employer's demand, arguing that section 2805 of the Labor Code was declared unconstitutional.

The arbitrator in this case ruled that the employer accepted unsolicited legal advice at its own risk and it should have contacted the grievant's attorney inasmuch as the grievant's status was the basis of the discharge. There was not "just cause," the arbitrator held, because the employer knew the grievant's status when he hired him, it failed to discharge another employee who also did not provide documentation, and the employer was not damaged by the grievant's conduct. The first two grounds are narrow and may be limited to the facts of this case, but the third rationale for not finding just cause applies to most other situations involving the termination of undocumented workers. The arbitrator in this case, Bevels Company, Inc., 82 LA 203, also rejected the employer's attempt to rely on section 2805 and the claimed

illegality of hiring undocumented workers. The union argued that section 2805 was ruled unconstitutional. The arbitrator seemed pursuaded by that view, but emphasized that his decision rested solely on the "just cause" provision of the agreement.

Other reported arbitral decisions demonstrate the same reluctance to recognize undocumented status as grounds for employer discipline. For example, another decision rejected a possible raid as justification for terminating undocumented employees. Young's Market Co., 61 LA 1063. However, there are contrary awards in this area. As a practical matter, mitigating or additional facts, such as the length of the undocumented employee's employment or the employer's prior knowledge of, or tolerance of other workers' undocumented status, could be decisive.

III. WHAT STATE BENEFITS ARE UNDOCUMENTED WORKERS ELIGIBLE FOR?

In California, undocumented workers or illegal aliens are eligible for state disability and workers' compensation benefits, but not unemployment insurance benefits. A 1975 decision rejecting unemployment insurance benefits for illegal aliens (Alonso v. State) was based on the grounds that undocumented workers or illegal aliens are not available for work on the same basis as permanent residents and U.S. citizens.[2]

IV. WHAT RIGHTS DO UNDOCUMENTED WORKERS HAVE UNDER NATIONAL LABOR LAWS?

The same rights as other employees: the right to vote in National Labor Relations Board supervised certification elections, the right to file unfair labor practice charges and seek a reinstatement order, and the right to participate in all aspects of union internal affairs.

Several recent cases have addressed the rights of undocumented workers under national labor laws. For years, the National Labor Relations Board has consistently interpreted the definition of "employee" used in the National Labor Relations Act broadly to include illegal aliens. In the Sure-Tan case,

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[2]Certain aliens who are not permanent residents may be able to claim that they are available for work and qualify for unemployment insurance.

an employer challenged this broad interpretation. In Sure-Tan, the Chicago Leather Workers Union sought certification as the bargaining representative of the company's employees. After the union won the election, the company objected that six of the seven voters were illegal aliens. It claimed that certification of the union under such circumstances would conflict with the Immigration and Nationality Act. The Court of Appeals upheld the National Labor Relations Board's (NLRB) rejection of the employer's election challenge, finding no inconsistency between the immigration laws and the Board's order to bargain. The court noted that federal immigration statutes neither prohibit employers from hiring illegal aliens, nor prohibit aliens from working and exercising rights protected by the National Labor Relations Act.

In this same case,[3] the employer called the INS shortly after the union election and asked the Service to check the immigration status of its employees. Five of the workers were eventually deported and unfair labor practice charges were brought with the appropriate regional office of the NLRB. The Board ruled that the employer committed an unfair labor practice by requesting the INS investigation solely because the employees supported the union.

The Court of Appeals and the Supreme Court affirmed the finding of an unfair labor practice, and in so doing, reiterated that undocumented workers are "employees" within the meaning of that term in the National Labor Relations Act and are therefore entitled to all the protections afforded by that Act. The Court noted, however, that it is not a violation of the Act to discharge an illegal alien who was a union activist where the reason for the discharge is not the employee's protected and concerted activities, but the employer's concern that employment of the undocumented worker violated state law. The key issue is whether the employer has acted in retaliation for the employee's exercise of "protected" and "concerted" activity. Keep in mind that those terms encompass activity unrelated to unions or collective bargaining. "Protected activity" includes any activity undertaken for "mutual aid or protection," e.g., protesting job conditions in a non-union shop. However, to succeed with a charge before the NLRB, the activity must also be "concerted activity," or activity undertaken by or on behalf of two or more workers.

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[3]Actually, there are several Sure-Tan decisions. See, Sure-Tan, Inc., 231 NLRB 138 (1977), enforced, 583 F.2d 355 (7th Cir. 1978); Sure-Tan, Inc., 234 NLRB 1187 (1978), enforced, 672 F.2d 592 (7th Cir. 1982). The U.S. Supreme Court decision is Sure-Tan, Inc., et al. v. NLRB, 467 U.S. ____, 81 L.Ed.2d 732, 104 S.Ct. ____. (June 25, 1984).

V. WHAT REMEDIES ARE AVAILABLE UNDER NATIONAL LABOR LAWS AGAINST AN EMPLOYER WHO INITIATES A WORKPLACE RAID?

Under the Sure-Tan case, if an employer initiates a factory raid in retaliation for the exercise by employees of some protected (i.e., mutual aid and protection) and concerted (i.e., collective) activity, the employer has commited an unfair labor practice. Again, protected and concerted activity could include activity unrelated to unionization or collective bargaining. For example, consider the hypothetical of several non-union employees who protest the non-payment of overtime wages and organize other workers to file claims with the Labor Commissioner's Office for unpaid overtime wages. If the employer retaliates by calling in the INS and you have convincing evidence that the employer called in the INS in retaliation for the protest and Labor Commission complaints, you have a good unfair labor practice charge and the NLRB should issue a complaint.

According to the National Labor Relations Act, the NLRB has the authority to petition a federal court for a Temporary Restraining Order to restrain the commission of unfair labor practices after the issuance of a complaint and before trial. In practice, petitions by the NLRB Regional Director for these types of TRO's have to be approved in Washington and the Washington office of the Board is increasingly reluctant to authorize the Regional Directors to petition for such relief. Still, where there is a pattern or practice of using INS raids in a particular industry or workplace to intimidate employees, a Board charge and request for section 10(j) relief should be seriously considered.

In addition to remedies before the NLRB, most state laws which establish mechanisms for workers to bring claims against their employer, also contain provisions making it illegal to retaliate against workers who make such claims. For example, under the Judson Steel case,[4] and section 132 of the Workers' Compensation Act, it is illegal for an employer to retaliate against workers for filing claims for Workers' Compensation Benefits.

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[4] Judson Steel Corporation v. Worker's Compensation Appeals Board, 22 Cal. 3d 658, 150 Cal. Rptr. 250, 586 P. 2d 564 (1978).

VI. CAN UNIONIZED UNDOCUMENTED WORKERS ASK FOR A UNION REPRESENTATIVE DURING FACTORY RAIDS?

Under the Weingarten case,[5] unionized workers have a right to have their shop steward, union representative, or other union member present during an interrogation by their employer if it reasonably appears that the interrogation may result in the discipline of the employee. This so-called Weingarten right does not have to be specifically provided for in the labor agreement. Although Weingarten rights have been somewhat curtailed in recent Board decisions, we think unionized workers should be encouraged to ask for a union representative during INS raids and interrogations at the workplace.

Technically, the Weingarten right is recognized only during interrogation by the employer, and at that, only in certain employer confrontations. However, the rationale for a right to a union representative is that an employee should not be made to answer questions which could result in the loss of his or her job or other lesser discipline without the benefit of assistance from his or her bargaining representative. This rationale applies in a factory raid, especially if an agent of the employer (supervisor, foreman, etc.) accompanies the INS agents during the raid or employee interrogation. A violation of Weingarten rights is an unfair labor practice and is properly raised by an unfair labor practice charge filed with the NLRB. It is important to remember that unfair labor practice charges can be filed by anyone, not just the undocumented employee. Thus, if an employer commits one of the unfair labor practices described in this paper, the union or other workers should proceed with the charge, even if the employee has been deported, if for no other reason than to prevent or discourage this type of illegal activity in the future.

VII. SAMPLE PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS PROTECTING IMMIGRANT WORKERS

A. From an agreement between United Steelworkers and Anaconda Brass Co., Midwest Division:

> "It is the continuing policy of the Company and the Union that the provisions of this agreement shall be applied to all employees without regard to race, color, creed, national origin, citizenship status, age, or sex."

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[5] NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

B. From the I.L.G.W.U. Los Angeles local, agreement with Hollander Home Fashions Co:

The Employer agrees to:

" -- notify the union as soon as an INS agent is seen near company premises;

-- refuse to admit INS agents without warrant, except under 'exigent circumstances;'

-- refuse to reveal names, addresses or immigration status of any employee unless legally compelled to do so;

-- notify the shop steward if the INS agent produces a warrant;

-- reinstate any worker who has missed work because of INS proceedings and has returned to work within seven days."

SECTION III: SCENARIO OF THE WORKPLACE RAID

By Polly A. Webber

I. CHOOSING THE WORKPLACE

A. INS gathers information from many sources, including:

1. anonymous tips;

2. known tipsters and informants, including random calls from disenchanted spouses, family members, recently laid-off employees, and neighbors, and paid informants who infiltrate;

3. intimidation of employees in the parking lot and extraction of names of undocumented inside;

4. DMV, Social Security, and other government agencies;

5. credit bureaus.

B. INS creates portfolios on each workplace rumored to have undocumented employees:

1. when information comes to INS from any source, if INS can determine the suspected undocumented person's workplace, a file is opened in the company's name, and the individual's name entered;

2. each time that workplace is targeted as the employer of a suspected undocumented person, INS places the individual's name in the file;

3. after a certain number of names appears in the file, INS will send agents to question those individuals attempting, first, to obtain the employer's consent;

4. employers who do not consent and who do not appear to be cooperative are routinely threatened with the prospect of a warrant, an administrative subpoena, or an "area control survey."

II. WARRANT

A. INS will name the suspected individuals "and unnamed others" on the face of the warrant and use that broad license to stop and question anyone once they gain access to a work area.

B. Once the INS has discovered a particular wealth of suspects at any one workplace, that company's name will remain in their active file for possible action in the future, such as what happened in "Operation Jobs" in 1982. (See below.)

III. ADMINISTRATIVE SUBPOENA

A. INS claims that many employers beg them for administrative subpoenas so that the employer can release the requested information without becoming liable under EEOC guidelines and potential liability for an unfair labor practice. (See below, Section on Employer Liability for Furnishing Information.)

B. In reality, the administrative subpoena has no force of law and there is no penalty for failing to comply. (Section 235(a) of the INA.)

C. INS uses the subpoena threat to obtain cooperation, but even where an employer either voluntarily submits the information or complies with the subpoena, there is no guarantee that the INS will not raid the company at some date in the future. For example, if an employer turns over several names to INS that INS cannot reconcile as U.S. citizens, legal residents, or persons with permission to work, INS will believe that the employer is lax in interviewing and screening potential employees, and designate the file for potential action, down the road. In other words, there is no guarantee that cooperation will prevent future raids. Quite the contrary has been seen in the recent history of this practice.

IV. THE ACTION

INS has several tactics it will employ:

A. Surrounding the building with officers at each exit, or nearby, while other officers roam the workplace

asking questions of selected employees; OR, occupying a room in the workplace and interviewing each employee, or each employee named in a warrant; OR, doing a combination of the above, and, possibly, interrogating only certain persons who exhibit qualities INS finds to be suspicious;

B. Asking three standard questions of each person encountered. (The Supreme Court interprets this questioning as a "classic consensual encounter"):

1. "What is your name?"

2. "Where were you born?"

3. "Do you have immigration papers?"

C. Detaining suspected undocumented employees for questioning;

D. Arresting those whom INS has "probable cause" to believe are undocumented.

SECTION IV: "OPERATION COOPERATION"

By Polly A. Webber

I. INTRODUCTION

A. Prior to the 1984 Supreme Court decisions in Delgado v. INS, __ U.S. __, 80 L. Ed. 2d 247 (1984), and INS v. Lopez-Mendoza, 468 U.S. __, 82 L. Ed. 2d 778 (1984), the Ninth Circuit Court of Appeals had been extremely critical of the manner in which INS carried out its "area control operations" in workplaces. As a result of pre-Delgado and pre-Lopez-Mendoza decisions, INS sought new methods of carrying out its vision of its mandate to enforce immigration laws.

B. In 1982, INS conducted its last major nationwide offensive, "Operation Jobs," publicizing its thrust of clearing the way for U.S. citizens to take jobs left by undocumented workers unlucky enough to be caught in the dragnet. INS agents raided nearly every place of employment where prior visits had netted substantial numbers of mainly Mexican workers. These raids are said to have disrupted production and as a result, employers have joined immigrants and undocumented persons in a lawsuit against INS pending in the U.S. District Court in San Jose.

C. Employers have an interest in a smooth flowing process in their workplaces. INS has developed this new program, Operation Cooperation, to appeal to this very logical concern of employers. However, it is a thinly disguised threat.

II. SUBSTANCE OF OPERATION COOPERATION

A. The major goal of INS is to have employers stop hiring people who do not have permission to work. This is accomplished in several ways:

1. Convincing the employer to invite INS to the workplace to review the employees' documents;

2. Convincing the employer to obtain a list of all employees' names, birthdates, places of birth and any alien numbers, and to turn the list over to INS;

3. Teaching the employer about what documents are relevant to show employment authorization, so that the employer may police his own workforce.

B. The methods used to accomplish this goal include:

1. Media campaign publicizing INS activity and likelihood that INS will visit you next;

2. Circulation of California law relating to employer sanctions, without mentioning that the Employment Development Department is enjoined from enforcing that law;

3. Visits to employers to locate one or more named suspected undocumented persons, coupled with discussion about how cooperation would be less disruptive than an "area control survey" or administrative subpoena.

C. Despite the attempts of the Administration and various interest groups to legislate employer sanctions for the hiring of persons without documents, it is still the law that no law prohibits hiring such a person and it is not a crime for someone without papers to work. Operation Cooperation is an attempt to legislate through administrative policy without a Congressional mandate.

III. LIABILITY FOR FURNISHING OR FAILURE TO FURNISH INFORMATION

A. INS puts the employer between the proverbial rock and hard place. The employers believe they must choose between increased harassment from INS and a flurry of lawsuits by employees and their representatives.

B. There is no law against working without papers, and there is no law against hiring someone who has no papers. It is important to examine the employers' responsibility to their employees versus their "responsibility" to turn over information to the government -- information that is not germaine to the employment relationship.

C. Liability for Furnishing Information

1. Employees' Right of Privacy

a. California law recognizes a personal and

fundamental right of privacy for all individuals. (CC section 1798).

1) This definition includes all "natural persons," which should include both documented and undocumented.

b. The specific right potentially invaded is the employees' right to seclusion, solitude and the right to have private affairs kept confidential.

c. In order to assert this right, the employee must show:

1) a reasonable expectation of confidentiality in the employment relationship;

2) the employer should have known the employee would be justified in feeling seriously hurt by the employer's conduct. Gill v. Hearst Co., 40 C. 2d 224, 253 P. 2d 441.

d. It is reasonable for the employee to expect confidentiality in the employment relationship regarding information sought by INS in that:

1) There is no criminal activity on the part of either employer or employee.

2) "The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country ... The INA evinces at best evidence of a peripheral concern with employment of illegal entrants." Sure-Tan, Inc. v. NLRB, 104 S.Ct. 2803 (1976) at 2809, citing from DeCanas v. Bica, 424 U.S. 351, 96 S.Ct. 933, at 938-939.

3) The information sought is not even germaine to the employment relationship and constitutes an attempt by INS to coerce the employer into an enforcement position.

e. The employer's motivation for making the disclosure is not material under this tort claim, but the disclosure must be made intentionally.

f. An employee can waive the right of privacy either directly or implicitly through actions. It would

not be fair, however, to coerce the employee into turning over the information upon threat of dismissal and then to plead that the employee's privacy rights were waived.

g. California Civil Code section 1799 relating to Business Records also provides that records may not be released without the express written consent of the party, except in the case of a subpoena, warrant, criminal investigation, tax issue or a discoverable disclosure.

2. Employees' Civil Rights Protection

a. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, prohibits discrimination on the basis of national origin, among other things. Indirect discrimination and acts of discrimination not specifically mentioned in the Act can be violative of Title VII as well. The plaintiff must make a prima facie showing of discrimination before the burden shifts to the defendant. If the defendant can show some legitimate, nondiscriminatory reason for the action taken, the discrimination may be permitted.

1) In Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), the Supreme Court held that discrimination on the basis of citizenship did not violate Title VII.

b. Section 1981 of Title 42 of the United States Code sets forth the Civil Rights Act of 1866, guaranteeing the "full and equal benefit of all laws" to persons including "aliens and illegal aliens." Standard Fire and Marine Co. v. Galindo, 484 S. W. 2d 635 (1972). However, there is disagreement whether section 1981 protects against national origin discrimination.

c. No court decision squarely decides the issue of whether an INS demand for information extraneous to the employment relationship conflicts with an employer's duty to preserve the employee's civil rights.

d. California's Unruh Civil Rights Act (CC, sections 51, et seq.), guarantees to all persons freedom

and equality regardless of sex, race, color, religion, ancestry or national origin. All persons are entitled to full and equal accommodations, advantages, facilities, privileges, and services in all business establishments. However, some courts have held that the California Act does not encompass discrimination in employment. Van Hoomissen v. Xerox Corp., 368 F.Supp. 829 (D.C. 1973) and Alcorn v. Anbro Engineering, Inc., 86 Cal. Rptr. 88, 3 C.3d 493 (1970).

3. Employees' Rights Under the National Labor Relations Act

a. Section 7 of the NLRA protects employees' rights to organize, and section 8 protects employees from unfair labor practices of employers who interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7.

1) To be liable under section 8, an employer must have an ulterior motive for disclosing information to INS. That motive must be to undermine the employees' section 7 rights.

2) The Supreme Court in Sure-Tan, Inc. v. NLRB, 104 S.Ct. 2803 (1984) found that the employer committed an unfair labor practice by reporting to INS certain employees known to be undocumented, specifically in retaliation for those employees' union activities. However, the Court went on to state, "Absent this specific finding of anti-union animus, it would not be an unfair labor practice to report or discharge an undocumented alien employee" (at page 2811).

3) Motivation is a key issue. In Bloom/Art Textiles, Inc., 225 NLRB 766 (1976), an employer fired an employee because he thought it was a violation of state law to have that person in his employ. The NLRB ruled that the firing was not an unfair labor practice.

b. Section 8 defines a labor organization's duty of fair and equal representation such that certain conduct adverse to the interests of undocumented members as well as nonmembers could be an unfair labor practice. (See sections 8(a)(3), 8(b)(2) and 8(b)(5).)

c. Section 10(c) provides that the NLRB must base its findings on a preponderence of the evidence.

4. Employees' Rights to Organize Under California Labor Code Section 923

a. This section sets forth public policy with respect to freedom of employees to organize in their self-interest. In a situation where an individual is fired, courts prefer to apply a "dominant motive" test. Escamilla v. Marshburn Bros., 121 Cal. Rptr. 891, 48 C.A.3d 472 (1975).

b. Any rights accruing from this section may be pre-empted by federal law.

D. Liability for Failure to Furnish Information

1. Administrative Subpoenas: Section 235(a) of the INA grants authority to INS to issue subpoenas to require testimony of witnesses and the production of documents "relating to the privilege of any person to enter, re-enter, reside in or pass through the United States, or concerning any matter which is material and relevant to the enforcement" of immigration laws. Failure or refusal to cooperate is not punishable by law. However, INS may go into federal court and obtain a subpoena which is actionable as contempt of court if an employer fails or refuses to comply.

2. California Law: Section 2805 of the California Labor Code is an employer sanctions law that has been enjoined since 1974 by the California courts. Although the Employment Development Department is the only agency enjoined from enforcing section 2805, the probability of another agency prosecuting under that section is negligible.

IV. HARBORING IN THE EMPLOYMENT CONTEXT

A. Definition

1. Predecessor to section 274(a)(3):

a. Guilty knowledge is a necessary element of harboring or concealing;

b. To "harbor" is to shelter aliens from the immigration authorities and to shield them from observation to prevent their discovery as aliens. U.S. v. Smith, 112 F.2d 83 (2d Cir. 1940);

c. To "harbor" is to shelter clandestinely; to "conceal" is to shield from observation and prevent discovery. Susnjar v. U.S., 27 F.2d 223 (6th Cir. 1928).

2. Section 274(a)(3):

a. This section relates to the willful or knowing concealing, harboring or shielding of an alien not legally in the U.S. The section is part of a larger statute that reads as follows:

"BRINGING IN AND HARBORING CERTAIN ALIENS

Sec. 274. (8 U.S.C. 1324) (a) Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who --

(1) brings into or lands in the United States, by means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of ---
any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the

> immigration or explusion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: 'Provided, however,' That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

Like all penal statutes, section 274(a) should be strictly construed. U.S. v. Washington, 471 F.2d 402 (5th Cir. 1973).

b. Harboring involves "conduct tending substantially to facilitate an alien's remaining in the U.S. illegally, provided, of course, the person charged has knowledge of the alien's unlawful status."

1) U.S. v. Lopez, 521 F.2d 437 (2d Cir. 1975), was the first important case in federal court to interpret section 274(a). Lopez rented lodgings to persons whom he knew to be undocumented. He assisted them in obtaining employment and transported them to and from work. Despite the fact that Congress did not expressly define "harbor," it was apparent from the legislative history that providing shelter to persons known to be undocumented would violate the Act.

2) In U.S. v. Cantu, 557 F.2d 1173 (5th Cir. 1977), the employer refused entry to INS officials who were attempting to locate undocumented persons working on the premise by demanding a warrant. While the officers waited for the warrant, the employer attempted successfully to remove his undocumented employees from the premises without detection. Cantu's actions substantially facilitated his employees' illegal presence in the U.S.A.

3) In U.S. v. Varkonyi, 645 F.2d 453 (5th Cir. 1981), the employer assaulted the INS officials in order to provide time for his undocumented employees to escape.

4) In U.S. v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982), the employer informed his employees that

the INS officials were present. The court held that within the context of the circumstances this act was meant to facilitate the employees' illegal presence in the U.S.A. Rubio-Gonzalez was himself an immigrant and was aware of the documentation necessary for noncitizens to carry. The suspected undocumented persons included people from Rubio-Gonzalez's home town and his own brother. Knowledge of the undocumented status was thus intrinsically tied to the substantial facilitation doctrine.

B. Knowledge of Undocumented Status is Required

1. Predecessor to section 274(a)(3):

a. U.S. v. Mack, 112 F.2d 290 (2d Cir. 1940) involved an employer who the government could not show allowed an undocumented prostitute to live in the brothel after the employer discovered her undocumented status. The employer was exonerated.

b. In U.S. v. Smith, supra, the employer, again in a house of prostitution, instructed the undocumented employees in methods of shielding their alienage from the authorities.

2. Section 274(a)(3):

a. Courts will impute knowledge of undocumented status where circumstantial evidence supports such a finding.

1) The court in U.S. v. Correa-Negron, 462 F.2d 613 (9th Cir. 1972) noted that the defendant arranged illegal entry and met the undocumented persons in Mexico and later in San Diego, transporting them north, and guided them through the auto checkpoint so as to escape detection.

2) In U.S. v. Rubio-Gonzalez, supra, the defendant denied having knowledge of the employees' undocumented status. However, the court considered that the defendant's brother was among the undocumented arrested, that others arrested were from the defendant's home town in Mexico, and that the defendant himself had resident status and knew the necessary procedures and documentation.

3) The court in U.S. v. Lopez, supra, discussed Congressional intent to punish persons who provide shelter to known undocumented persons. See quote from Lopez, at 1.b.(2), above.

C. Harboring requires an affirmative act which is not a usual and normal employment practice, or something incident to employment.

1. The proviso to section 274(a) states: "(t)hat for purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

a. The proviso protects an employer who unwittingly, unknowingly, or thoughtlessly hires an alien, who the employer does not know is illegal. The proviso does not offer blanket immunity to all employers. The proviso does not prevent the government from indicting an employer who provides hiding places for undocumented employees to use during INS raids. U.S. v. Winnie Mae Manufacturing Co., 451 F.Supp. 642 (D.C. Cal. 1978).

b. In U.S. v. Herrera, 584 F.2d (2d Cir. 1978), at 1144, the court held that:

> "(t)he employment proviso does not exempt employers from the operation of the statute, rather, it is a refinement of what is meant by 'harboring' and only comes into play should a defendant wish to establish that his acts constituted employment or the usual and normal practices incident thereto, and not harboring ... The plain meaning of practices incident to employment refers not to defendant's own practices but those necessary to the kind of employment generally. An employer who goes beyond the 'normal' incidents of employment may violate the statute."

In Herrera, the employer had constructed and provided sophisticated hiding places and surveillance equipment to detect INS presence, and had specific escape plans devised.

c. The employer, a restauranteur, in U.S. v. Mt. Fuji Japanese Steak House, Inc., 435 F.Supp. 1194

(DCNY 1977), induced and imported employees without proper documentation, and provided food, shelter and other services, not normally provided to restaurant workers. Such services might be considered as usual and normal, however, in the case of domestics, resort hotel workers and seasonal farm laborers. See Mailman, Stanley, "Illegal Aliens -- A View of Employers' Rights and Risks," in 176 New York Law Journal, No. 44, p. 1, col. 1.

d. Note, however, that an employer's mere belief that certain activities are usual and normal employment practices will not exempt that employer from liability. See U.S. v. Fierros, 692 F.2d 129 (9th Cir. 1982).

e. And, there is authority holding that the activity engaged in by an employer must be aimed at concealing in order to invoke liability. See U.S. v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976), upholding a conviction for harboring where housing was provided to a known undocumented person. The court found that harboring meant "affording shelter" and that "harboring need not be part of the chain of transactions in smuggling."

D. The employment proviso applies only to the prohibition against harboring in section 274(a)(3) and not to a transportation charge under section 274(a)(2). However, similar standards have been enunciated which provide some minimal protection to an employer.

1. U.S. v. Shaddiz, 693 F.2d 1135 (5th Cir. 1982), and U.S. v. Gonzalez-Hernandez, 534 F.2d 1153 (9th Cir. 1976), require:

a. unlawful transportation of undocumented persons,

b. within the United States,

c. undocumented status and not lawfully entitled to enter the U.S.,

d. defendant's knowledge of undocumented status,

e. defendant knew or should have known undocumented entry was within three years,

f. defendant willfully acted to further the violation of law.

2. In U.S. v. Moreno, 561 F.2d 1321 (9th Cir. 1977), the employer was acquitted, as the transportation of employees was part of ordinary and necessary operations. Transportation was only incidental to the furtherance of the violation of law. The court held that "there must be a direct or substantial relationship between that transportation and its furtherance of the alien's illegal presence in the United States."

3. In U.S. v. Salinas-Calderon, 588 F.Supp. 599 (D. Kan. 1984), the defendant gave rides to six undocumented migrant workers from Colorado to Florida in exchange for their fair share of expenses. The court held that defendant was not guilty of transporting under section 274(a)(2):

> "There must be a distinction between acts performed with the purpose of supporting or promoting an alien's illegal conduct, and acts which are incidental to or which merely permit an individual to maintain his existence, albeit his existence occurs in this country and he is not duly admitted here. Although it is arguable that transporting the aliens to an area where they may be able to find work may further their illegal presence, the test here is whether the defendant's act of transporting was directly or substantially related to the alien's presence. The Court finds that, under the facts of this case, the defendant's act of giving the aliens a ride to Florida was not directly and substantially related to their illegal presence here, but was merely incidental to their existence here, and was too attenuated to constitute a furtherance of their illegal presence."

E. Summary

1. For an employer to escape culpability under section 274(a)(3), the employer must show:

   a. No harboring per se:

      1) No substantial facilitation of alien's continued illegal presence in the U.S.;

      OR

      2) No actual or imputed employer knowledge of employee's undocumented status.

b. Any affirmative act is incidental to employment, a usual and normal employment practice in the industry.

2. The government has the burden of proving acts amounting to harboring. The burden then shifts to show that the acts are incidental to employment.

SECTION V, PART 1:
INS ADMINISTRATIVE SUBPOENA

By Charlotte Fishman

December 1984

I. INTRODUCTION

Since INS subpoenae directed at employment records of suspected aliens are relatively recent phenomena, the issues set out below have not been addressed by the courts in the context of INS enforcement. The pro's and con's of applying the case law set forth below, which was developed in the context of the enforcement activities of other administrative agencies, will be discussed at the seminar.

II. STATUTORY AUTHORITY

A. INS subpoenae are issued pursuant to 8 U.S.C. 1225(a) (I.N.A. section 235(a).

1. Does section 235(a) give INS authority to subpoena documents to investigate deportability of suspected aliens?

2. Section 235 language appears to be geared toward exclusion. Mew v. Jones, 268 F.2d 376 (9th Cir. 1959).

3. Section 235 has been found an inappropriate investigative tool in denaturalization investigations. U.S. v. Minker, 350 U.S. 179 (1956).

4. But some federal courts have held that it is applicable to deportation investigations. See, e.g., Sherman v. Hamilton, 295 F.2d 516 (1st Cir. 1961), cert. denied, 369 U.S. 820.

B. Third Party Subpoenae

1. Are third party subpoenae, i.e., subpoenae directed at employers, where the real target of the investigation is not the company, but employees whose immigration status is in doubt, authorized by the INA?

2. What procedural protection should be afforded to recipients and targets? See, e.g., SEC v. Jerry T. O'Brien, 467 U.S. __, 81 L. Ed. 2d 615 (1984).

C. John Doe Subpoenae

1. There is no explicit statutory authority for "John Doe" subpoenae under the INA, i.e., subpoenae requesting information about unknown individuals.

2. In U.S. v. Bisceglia, 420 U.S. 141 (1975), the Supreme Court sanctioned their use in the context of IRS enforcement.

3. Congress subsequently enacted a statute designed to control and prevent indiscriminate use of John Doe subpoenae. 26 U.S.C. section 7609(f):

   a. Issuance requires a prior court proceeding.

   b. IRS must show:

      1) the summons relates to investigation of a particular person or ascertainable group;

      2) there is a reasonable basis for believing that the person or group has failed to comply with the internal revenue law;

      3) the information sought and the identity of persons to be investigated is not readily available from other sources.

4. In contrast, INS has neither statute nor regulations limiting use of John Doe subpoenae.

5. In the IRS context, John Doe subpoenae continue to be the subject of litigation. See, e.g., Tiffany Fine Arts, Inc. v. U.S., 83-1007 (pending), __ U.S. __; cert. granted re: 718 F.2d 7 (2d Cir. 1983).

III. INS REGULATIONS GOVERNING ISSUANCE

A. Under 8 CFR 287.4:

"A party applying for a subpoena shall be required, as a condition precedent to its

issuance, to state in writing ... what he expects to prove by such ... documentary evidence, and to show affirmatively that he has made diligent effort, without success, to produce the same."

B. Prior to the commencement of proceedings, only the District Director may issue subpoenae.

C. INS subpoenae are not self-enforcing. The District Director must seek the aid of the Federal District Court. 8 CFR 287.4; Fed. R. Civ. Pro. 81(a)(3).

IV. JUDICIAL ENFORCEMENT OF ADMINISTRATIVE SUBPOENAE

A. In order to secure court-ordered enforcement, the agency must show:

1. that the investigation will be conducted pursuant to a legitimate purpose;

2. that the inquiry is relevant to that purpose;

3. that the information sought is not already in the possession of the agency;

4. that the required administrative steps have been followed.

U.S. v. Powell, 379 U.S. 48 (1964) (IRS).

B. In addition, the inquiry must be within the scope of the agency's authority and the subpoenae must be sufficiently definite, not ambiguous or excessively broad.

Oklahoma Publishing Co. v. Walling, 327 U.S. 186 (1946) (ILSA); U.S. v. Morton Salt Co., 338 U.S. 632 (1950) (FTC).

C. Grounds for challenging administrative subpoenae include:

1. failure to comply with Powell standards;

2. harassment and/or improper motive;

a. Lynn v. Biderman, 536 F.2d 820 (9th Cir. 1976), cert. denied sub nom Biderman v. Hills, 97 S.Ct. 316 (1976) (HUD - motive).

b. U.S. v. Church of Scientology, 526 F.2d 818 (9th Cir. 1975) (IRS - harassment).

3. overbreadth;

U.S. v. Morton Salt Co., 338 U.S. 632 (1950) (FTC).

4. improper purpose, e.g., to conduct criminal investigation. Reisman v. Caplin, 475 U.S. 440 (1964) (IRS). See also, Abel v. United States, 362 U.S. 217 (1960) (INS warrants may not be used to gather evidence in a criminal case).

V. JUDICIAL ENFORCEMENT PROCEDURE

A. Enforcement proceedings are governed by the Federal Rules of Civil Procedure, but courts have wide latitude to restrict application of the rules to avoid delay and unnecessary complication. Donaldson v. United States, 400 U.S. 517 (1971) (IRS); Moore's Fed. Prac. ¶81.06.

B. Targets may intervene to challenge a subpoena issued to a third party. Reisman v. Caplin, 475 U.S. 440 (1964) (IRS), but such intervention is permissible not mandatory. Donaldson, supra.

C. A party challenging judicial enforcement of a subpoena is entitled to an adversary hearing prior to enforcement; the party may challenge the subpoena on any appropriate grounds. Reisman, supra; Powell, supra.

D. A party alleging harassment, bad faith, improper purpose, etc. may request discovery and/or an evidentiary hearing. U.S. v. Church of Scientology, 520 F.2d 818 (9th Cir. 1975).

E. Evidence in support of allegations of impropriety must be introduced at the hearing. The court may permit examination of the agent issuing the summons regarding purpose, motive. Church of Scientology, supra; United States v. Salter, 432 F.2d 697 (1st Cir. 1970); United States v. McCarthy, 514 F.2d 368 (3d Cir. 1975).

F. If, at the close of the evidentiary hearing, a "substantial question" remains in the court's mind regarding purpose, it may grant discovery. U.S. v. Salter, supra.

G. Failure to grant an evidentiary hearing may be an abuse of discretion. U.S. v. Samuel Kramers Co., 712 F.2d 1342 (9th Cir. 1983).

H. Failure to obey court-ordered discovery is punishable by contempt. Moore's Fed. Prac. ¶ 81.06.

SECTION V, PART 2:
INS SEARCH WARRANTS

By Charlotte Fishman

December 1984

I. INTRODUCTION

INS search warrants directed at places of employment are relatively recent phenomena. Since this is an area of intense litigation, the case law cited below should be approached with caution. In the Northern District of California, the case of International Molders Union, et al. v. Nelson, C82-4538, should provide additional guidance in the near future. Recent developments will be discussed at the seminar.

II. NECESSITY FOR SEARCH WARRANTS

A. The Fourth Amendment requires search warrants for administrative searches. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

B. However, if premises are considered "open fields," they are outside the scope of Fourth Amendment protection. Hester v. United States, 265 U.S. 57 (1924); Oliver v. U.S., — U.S. —, 80 L. Ed. 2d 214 (1984).

III. STATUTORY AUTHORITY FOR INS "WARRANTS OF INSPECTION"

A. INS currently relies on 8 U.S.C. 1357 (section 287 of the INA) for authority to issue warrants.

B. INS reliance on Fed. Rule Cr. Proc. was rejected in Blackie's House of Beef v. Castillo, 659 F.2d 1121 (D.C. Cir. 1982) and U.S. v. Karanthanos, 531 F.2d 26 (2d Cir. 1976).

C. Warrants of inspection are inappropriate for dwelling searches. Illinois Migrant Council v. Pilliod, 531 F.Supp. 1011 (N.D. Ill. 1982).

D. Warrants of inspection are inappropriate for criminal investigations. Michigan v. Tyler, 436 U.S. 499 (1978).

E. Legislative history of the 1952 Act: H.R. Rep. No. 1365, 82nd Cong., 2d Sess. (1952) deleted proposed section 237(d) authorizing INS entry into workplaces on authority of administrative warrants.

IV. PROBABLE CAUSE STANDARD

A. Administrative warrants may be issued by a federal magistrate under a "relaxed" probable cause standard. Michigan v. Tyler, 436 U.S. 499 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

B. But even the "relaxed" probable cause standard must be met by particularized information sufficient to support the application for a warrant. See, e.g., Marshall v. Horn Seed Co., 647 F.2d 96 (10th Cir. 1981).

C. The level of probable cause required is currently the subject of litigation. See, e.g., Int'l Molders; also see, Kotter Industries v. INS, below.

V. PARTICULARITY

A. The warrant must describe the people to be searched for with sufficient particularity. Lo-Ji Sales v. New York, 442 U.S. 319 (1979); Blackie's House of Beef v. Castillo, supra.

B. It must adequately limit the locations to be searched and the time during which the search is to be conducted. Blackie's, supra.

C. INS use of warrants for named aliens "and others" is currently under litigation, as lacking sufficient particularity. International Molders, supra. But see, Blackie's, supra.

VI. STANDING TO CHALLENGE SEARCHES

A. In order to challenge a search warrant, one must establish a legitimate expectation of privacy in the workplace. Rakas v. Illinois, 439 U.S. 128 (1978).

B. In the Ninth Circuit, it is an open question whether workers have a cognizable expectation of privacy.

See, e.g., ILGWU v. Surreck, 681 F.2d 624 (9th Cir. 1982), rev'd on other grounds sub nom, INS v. Delgado, 80 L. Ed. 2d 247 (1984). The issue is currently the subject of litigation in International Molders Union v. Nelson, C82-4538, supra.

C. For cases which have been decided adversely to workers, see Babula v. INS, 665 F.2d 293 (3d Cir. 1981); Illinois Migrant Council v. Pilliod, supra.

D. A factory owner may challenge an INS search warrant, but may only assert his own privacy interests. Kotler Industries v. INS, 586 F.Supp. 72 (N.D. Ill. 1984).

VII. EXCEPTIONS TO THE WARRANT REQUIREMENT

A. Consent

1. Must be free and voluntary. Schneckloth v. Bustamente, 412 U.S. 218 (1973).

2. The person consenting may place limits on the intensiveness of the search. Whether the scope of consent is exceeded is a question of fact. United States v. Sierra-Hernandez, 581 F.2d 760 (9th Cir. 1978).

B. Exigent Circumstances

1. Officers may not purposefully precipitate a situation that excuses compliance with the warrant requirements. See United States v. Kunkler, 679 F.2d 187, 191 n. 3 (9th Cir. 1982).

2. Flight may only be held to constitute exigent circumstances if it is voluntary and not the intended result of illegal police conduct. See United States v. Garcia, 516 F.2d 318 (9th Cir. 1975).

3. The availability of adequate time to obtain a warrant requires a stronger showing of exigent circumstances to justify it. United States v. Blake, 632 F.2d 731 (9th Cir. 1980).

4. A warrantless search must be strictly circumscribed by the exigencies that justify its initiation. Mincey v. Arizona, 437 U.S. 385 (1978).

SECTION VI: ARREST PROCEDURES DURING A RAID

By Miriam Hayward

I. INITIAL ON-SITE APPROACH, STOP, AND QUESTIONING

A. Common Scenario

INS officers will often secure area by blocking exits. They will usually be in plainclothes, but often with badges, walkie-talkies, handcuffs prominently displayed. Those officers not blocking exits will go through the work-force systematically, usually singling out Asian or Hispanic workers for questioning. They may approach workers and ask innocuous sounding questions in English, to see if the worker speaks English. Or they may approach worker and ask if s/he has "papers," has a "green card," or is a U.S. citizen. Hispanic workers are often questioned in Spanish. If the worker does not make a plausible claim to U.S. citizenship or produce proof of legal residence, s/he will be detained for further questioning and arrest.

B. Statutory Authority for INS Agents to Approach, Stop, and Question

INA section 287(a)(1), 8 USC 1357(a)(1) authorizes INS officers or employees, without warrant, to "interrogate any alien, or person believed to be an alien as to his right to be or remain in the United States."

C. Constitutional Limits on Statutory Authority Under Section 287(a)(1)

The authority to question aliens, or persons believed to be aliens is limited by the 4th Amendment protections against unreasonable search and seizure. THE 4TH AMENDMENT APPLIES TO ALIENS AND CITIZENS ALIKE. Almeida-Sanchez v. INS, 413 U.S. 266 (1973); U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975).

NOTE: 4th Amendment protections in the immigration context have been weakened by INS v. Lopez-Mendoza, 468 U.S. __, 82 L.Ed. 778 (1984). In a 5 - 4 decision, the Supreme Court held that the exclusionary rule does not apply to deportation proceedings, where the evidence

sought to be suppressed is objected to solely on the grounds of 4th Amendment violations, because deportation proceedings are civil rather than criminal in nature. The Supreme Court let stand the rule formerly enunciated by the Board of Immigration Appeals in Matter of Toro, 17 I & N Dec. 340 (BIA 1980): 4th Amendment violations will result in suppression of illegally seized evidence only if the taint of the violation affects the voluntariness of a subsequent incriminating statement, or if the 4th Amendment violations are, in and of themselves, so egregious that admission of the illegally seized evidence would violate due process. Therefore, in a deportation hearing, objections to illegally seized evidence must be framed in terms of the 5th Amendment guarantees of due process and against self-incrimination. See Section VIII, Motions to Suppress in Deportation Proceedings.

1. "Mere Questioning" Versus "Forcible Detention" or "Investigatory Stop."

   a. "Mere Questioning" is a minimal invasion of privacy. The person must be free to depart, or to refuse to answer questions.

      Requirement: The officer must have a reasonable suspicion, based on specific, articulable facts that the person is an alien.

      IMC v. Pilliod, 531 F.Supp. 1011 (N.D. Ill. 1982). See also Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir. 1969); Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971); Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972). But see INS v. Delgado, __ U.S.__, 80 L.Ed.2d 287 (1984), discussed in Section I(C)(2), below.

   b. "Forcible detention" or "investigatory stop" is a brief detention or restraint of liberty falling short of a traditional "arrest." (Analogous to stop described in Terry v. Ohio, 392 U.S. 1 (1968).)

      Requirement: Reasonable suspicion, based on specific, articulable facts, that a person is an alien illegally in the United States. (Lower standard than "probable cause," which is necessary for arrest. See Section II(B), below.

      U.S. v. Brignoni-Ponce, supra;[1] Cuevas-Ortega v. INS, 588 U.S. 1274 (9th Cir. 1979).

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[1]Note: In Brignoni-Ponce, the Supreme Court expressly reserved the question of whether INS may undertake this kind of questioning and stop if the person is reasonably believed to be an alien but there is no reason to believe s/he is in the U.S. illegally.

c. Factors that can be considered in assessing reasonableness of suspicion that person is alien, or that is alien illegally in the U.S.: Cases have cited such factors as appearance, dress, inability to speak English, furtive behavior, attempt to flee, presence in area where other aliens illegally in the U.S. have been apprehended in the past, anonymous tips of presence of aliens illegally in the U.S. See, e.g., Lee v. INS, 590 F.2d 497 (3d Cir. 1979); Au Yi Lau v. INS, supra.

ETHNIC APPEARANCE ALONE DOES NOT JUSTIFY SUSPICION OF EITHER ALIENAGE OR ILLEGAL PRESENCE IN THE UNITED STATES. U.S. v. Brignoni-Ponce, supra; U.S. v. Mallides, 473 F.2d 859 (9th Cir. 1973); IMC v. Pilliod, 540 F.2d 1062 (7th Cir. 1976).

Comment: The distinction between "mere questioning" and "forcible detention" is a difficult and perhaps unworkable one, since nearly all encounters between persons believed to be aliens and INS agents will have an inherent element of coercion. See Marquez v. Kiley, 436 F.Supp. 100, 114 (S.D. NY 1977). The court found the distinction unworkable and entered a declaratory judgment that INS, in "area control" operations, could approach persons to inquire into their citizenship only on reasonable suspicion, based on specific, articulable facts, that the person was an alien illegally in the U.S.

2. Determination of Whether a "Seizure" of the Alien Has Occurred

Many courts have focused on the issue of whether or not a "seizure" of the alien has occurred, reasoning that without a seizure, the 4th Amendment is not implicated. In ILGWU v. Sureck, 681 F.2d 624 (9th Cir. 1982), rev'd sub nom, INS v. Delgado, __ U.S. __, 80 L.Ed. 247 (1984), the Ninth Circuit held that the entire workforce was seized under the following facts: INS agents, with warrants, and in one case with the employer's consent, entered factories and stationed agents at all exits. Other agents moved through the workforce systematically, identifying themselves as INS agents and asking employees one or two questions regarding citizenship or immigration status. Work continued during questioning. Since the entire workforce was seized, the Ninth Circuit ruled that the INS was required to show reasonable suspicion, based on specific, articulable facts that each individual employee questioned was an alien illegally in the U.S.

The Supreme Court reversed, holding that under these facts there was no seizure of the entire workforce, nor of any individual employee, since the workers were free to move about the factory before and during questioning, and could have remained silent.

3. Standard for "Seizure" under the Delgado Decision:

Whether a reasonable worker would have believed that s/he was free to leave or refuse to answer questions. The case cites U.S. v. Mendenhall, 446 U.S. 544 (1980); U.S. v. Anderson, 663 F.2d 934, 939 (9th Cir. 1981). The case also cites the standard for seizure in Terry v. Ohio, supra: a seizure occurs when the officer, by physical force or show of authority has restrained the person's liberty. The opinion notes that an officer may ask basic questions relating to the subject's identity without advising the subject that s/he is free not to answer, Florida v. Royer, 103 S.Ct. 1319 (1983), but if the subject refuses to answer, and the officer takes additional steps to restrain the subject's liberty in order to obtain an answer, a seizure has occurred. Brown v. Texas, 447 U.S. 47 (1979).

A dissenting opinion by Justice Brennan, joined by Justice Marshall, attacks the "studied air of unreality" of the majority decision.

Comment: This analysis seems to conflict with the cases holding that "mere questioning" requires a reasonable suspicion, based on specific, articulable facts that the person questioned is an alien. The Supreme Court in Delgado does not characterize "mere questioning" as a "seizure" implicating the 4th Amendment.

D. Procedures During Initial Questioning

1. Right to Remain Silent

An employee questioned by an INS agent is under NO obligation to respond or to produce identification.

Warning: INS agents are not required to inform employees of their rights to remain silent during the initial questioning phase, and they normally will not do so. Failure to give "Miranda"-type warnings at this stage does not affect the admissibility of incriminating statements at a future deportation hearing. Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975).

2. Right to an Attorney

Every employee has the right to consult with an attorney or other legal representative before deciding whether to answer questions asked by INS agents. However, INS agents do not inform persons they wish to question of this right in the initial phase of questioning. The person's attorney is not required to be notified prior to questioning. Matter of Chen, 15 I & N Dec. 480 (BIA 1975).

3. INA section 287(a)(1) does not authorize questioning regarding criminal matters unrelated to immigration violations. Yam Sang Kwai v. INS, supra.

E. Legal Consequences to Alien Employee of Answering Initial Questions

1. Admissions of Alienage and Illegal Presence in the United States

a. Will provide probable cause for arrest under INA section 287(a)(2), 8 USC 1357(a)(2), if it appears likely that the alien will escape before a warrant can be issued. (See Section II(B), below.)

b. Can be used to establish jurisdiction of the Immigration Court in deportation proceedings, and can be used to establish deportability. Matter of Au, Yim, and Lam, 13 I & N Dec. 294 (BIA 1969).

2. Admissions of Alienage Only

a. May provide probable cause for arrest, depending on other circumstances.

b. Will establish jurisdiction of the Immigration Court in deportation proceedings under INA section 242(b), 8 USC 1252(b). (The government carries the burden of proving alienage in a deportation hearing. Jolley v. INS, 441 F.2d 1245 (5th Cir. 1971), cert. denied, 404 U.S. 946 (1971). Once alienage is established, the burden of proof shifts to the alien to show time, place, and manner of entry. INA section 291, 8 USC 1361.

F. Strategies to Prevent Employees From Making Incriminating Statements During the Initial Questioning Phase of a Factory Raid

1. Alien employees should seek legal counsel regarding their immigration status before a raid occurs.

2. ALL EMPLOYEES MUST UNDERSTAND THEIR RIGHT TO REMAIN SILENT, REGARDLESS OF CITIZENSHIP OR IMMIGRATION STATUS.

3. Insist on the presence of an attorney or legal representative before answering any question.

4. Make it clear to the questioning officer that you are aware of your legal rights. Be polite, but firm. Stand your ground. Do not allow yourself to be intimidated by threats or fooled by promises of "help" from the INS officers.

5. Encourage other employees to exercise their right to remain silent. In the situation of a factory raid, like in many other situations in life, there is strength in numbers.

6. Be alert and observant. Pay attention to the details of what is happening around you. If you are approached and questioned by an INS officer, get the officer's name and try to remember exactly what words are spoken, what actions are taken, etc. Be alert to what is happening to your neighbors. Details that seem unimportant to you may turn out to be crucial later. If possible, it may be advantageous to photograph or record the actions of the INS officers.

7. At all times during a factory raid it is important to stay calm. An atmosphere of panic and confusion only helps the INS.

8. Avoid touching any INS officer and do not make any motions or gestures that could be interpreted as threatening.

9. If any violence occurs, keep your head and pay attention to every detail of what happens.

10. Do not consent to search of your personal possessions by INS officers. If the officers conduct a search anyway, make it clear that you do not consent to the search. Say this in a voice loud enough for others to hear.

11. Do not produce counterfeit documents or make false claim to U.S. citizenship. It is far better to simply refuse to answer questions.

G. What Happens if an Employee Refuses to Answer Questions?

In most cases, the INS agents will not have enough evidence that an employee is an alien illegally in the U.S. to arrest the employee, unless the employee admits this information. If the employee is arrested anyway, and continues to refuse to answer questions, the Immigration Judge will have no choice but to terminate deportation proceedings. (See following sections on arrest and right to a deportation hearing.)

II. ARREST AND DETENTION FOLLOWING INITIAL ON-SITE QUESTIONING

A. Common Scenario:

An employee picked up by INS at a factory raid will be taken to the local INS office or Border Station for further interrogation and "processing." S/he will be questioned in detail regarding the date, place, and manner of entry into the U.S., employment information, relatives in the U.S., and possible immigration "equities." S/he will generally be asked to sign a "voluntary departure" form (I-274) which waives all rights to a deporation hearing and authorizes immediate removal from the U.S. If the employee refuses to sign, INS will issue and serve the Order to Show Cause re: Deportation, which contains a warrant of arrest, determination of custody status, and conditions for release from INS custody. The employee will be asked to sign a statement that explains her/his legal rights, and states that s/he understands these rights.

B. Legal Authority to Arrest and Detain Aliens Without Warrant

INA section 287(a)(2), 8 USC 1357(a)(2) authorizes INS officers and employees to "arrest any alien ... if he has reason to believe that the alien ... is in the United States in violation of any ... law or regulation and is likely to escape before a warrant can be obtained for his arrest ..."

1. "Reason to Believe"

   The statutory language "reason to believe" is the functional equivalent of "probable cause." Au Yi Lau v. INS, supra, Yam Sang Kwai v. INS, supra.

   Whether or not an INS officer has probable cause to arrest will usually depend on whether the person has made incriminating statements.

2. "Likely to Escape"

   This is a factual determination. For cases dealing with this issue, see U.S. ex. Rel. Martinez-Agnosto v. Mason, 344 F.2d 673 (2d Cir. 1975); Valerio v. Mulle, 148 F.Supp. 546 (E.D. Pa. 1956); Taylor v. Fine, 115 F.Supp. 68 (S.D. Cal. 1953).

C. Determination of When "Arrest" Has Occurred

A person is "arrested" when a combination of factors, objective and subjective, indicate that s/he is in custody and freedom is so severely restricted that s/he must be considered to be under arrest. This is generally well before s/he is served with the warrant of arrest contained in the Order to Show Cause. (See 8 CFR 242.1.)

D. Procedures for Questioning During Detention

1. Following arrest, the person may be taken "without unnecessary delay" for questioning by an INS officer regarding her/his right to remain in the U.S. INA section 287(a)(2), 8 USC 1357(a)(2).

2. The person must be examined by an officer other than the arresting officer, unless none is available. 8 CFR 287.3.

3. If the examining officer determines that there is a prima facie case that the person is an alien illegally in the U.S., and the person refuses to sign for "voluntary departure," formal deportation proceedings are commenced by issuance and service of the Order to Show Cause. Id.

4. The Order to Show Cause must be issued within 24 hours. Id.

5. As in the initial, on-site questioning during a

factory raid, a person questioned while in INS detention has the right to remain silent and the right to request the presence of an attorney during questioning.

E. Strategies for Dealing with Arrest

If you are arrested by the INS during a factory raid:

1. Try to make sure that your employer or co-workers know what happened, and know how to contact a friend or relative who can help you, or how to contact your attorney directly. If necessary, shout out the telephone number of your friend, relative or attorney. It may be a long time before you are allowed to use a telephone.

2. Do not resist arrest or try to escape.

3. As soon as you are taken to an office with a telephone, insist on your right to contact your attorney. If a secretary answers the telephone, explain that this is an emergency and that you are being detained by INS.

4. If you are not allowed to use the telephone, keep insisting. As in all your dealings with the INS, be polite, but firm.

5. Even if you have already given the INS incriminating information, refuse to answer any questions without the presence of your attorney. Insist on your right to remain silent.

6. Stand your ground. Remember that you are dealing with professionals who make their living by obtaining the kind of information that you are withholding. The officers will try various strategies to get you to talk. Do not let yourself fall into a trap.

7. Be patient. Remember that the INS cannot hold you indefinitely. They must let you go or commence deportation proceedings within 24 hours.

8. If you are asked to sign any paper, take the time to read it. If the paper is in English and you do not read English, ask to have it explained in your language. DO NOT SIGN ANYTHING WITHOUT FIRST CONSULTING YOUR ATTORNEY.

9. If you are arrested with a group of co-workers, do your best to help keep up morale. Encourage your co-workers to insist on their legal rights.

10. Do not discuss your nationality or immigration status with anyone. This is personal information that is no-one's business but your own. Avoid giving information to the INS officers about your co-workers' nationality or immigration status.

11. Be alert and try to remember every detail of what the INS officers say or do in your presence. Be aware of what is happening to your co-workers.

12. If you speak to your attorney, either by telephone or in person, make sure that you are not overheard discussing your nationality or immigration status. If you speak Spanish, remember that the INS investigators, and many INS employees, understand Spanish.

13. When you speak to your attorney, answer all her/his questions fully. Your attorney has an obligation to keep all information you give him/her confidential, and to act in your best interest.

14. After hearing all the details of your case, your attorney may advise you to continue to remain silent, or s/he may advise you to answer the INS officers' questions, depending on the details of your case. Make sure that you understand your attorney's advice, and the reasons for this advice. Your case may be very simple or very complicated. Either way, you have a right to understand the legal aspects of your case. You will probably be asked to make some very important decisions. You cannot make the right decision without having all the information.

15. Remember that your attorney cannot "guarantee" the outcome of your case. S/he can only give you her/his opinion on what the likely outcome will be.

16. Make sure you understand what services your attorney will provide and what you will be charged for these services.

17. If you are not able to speak to an attorney, demand a deportation hearing. Insist on your right to present your case to an Immigration Judge.

<u>If your employee or co-worker is arrested by the INS during a factory raid:</u>

1. Try to find out how to contact the person's friend, relative, or attorney before the person is taken away.

2. Do not try to interfere physically with the arrest.

3. Ask the arresting officer's name, and her/his business address and telephone number.

4. Pay attention to every detail of what happens. If possible, photograph and/or record the INS officers' actions.

5. As quickly as possible, get in contact with the person's friend, relative, or attorney. If you call the person's attorney, explain that this is an emergency, and that the person has been arrested by the INS. Answer the attorney's questions as thoroughly as you can.

6. If the person does not have an attorney, do what you can to help arrange for her/his legal representation.

7. The person arrested may not be released from INS custody unless s/he pays a bond. Do what you can to assist in making arrangements to pay the bond.

8. Do not discuss the person's nationality or immigration status with anyone except the person's attorney.

<u>If you are an attorney and your client is arrested in a factory raid</u>:

1. Find out where your client is being detained.

2. Call and explain to the INS officer that you represent the client. Request that your client not be questioned in your absence.

3. Ask to speak to your client. Find out whether s/he has given any information about her/his nationality or immigration status. Advise your client that you are on your way, and not to answer any questions until you arrive.

4. If your client has not given any incriminating information, it is important that you get to where your client is being detained as quickly as possible. The INS will probably not honor your request to cease questioning until you arrive. Unless you are present, it will be extremely difficult for your client to avoid giving incriminating information.

5. If your client has already given incriminating information before you are able to speak to her/him, it is important that you speak to her/him as quickly as possible in detail to determine what defenses may still be available in deportation proceedings.

6. Regardless of what defenses are available to your client in deportation proceedings, you should file form G-28 immediately to prevent your client from being removed to a remote detention facility.

7. When you interview your client in detention, make sure that the circumstances guarantee confidentiality. Remember that INS investigators and many INS employees speak Spanish.

8. Get all the facts regarding your client's arrest. Be alert to any possible Constitutional violations.

9. Even if your client has not given any incriminating information, or may have good grounds for a motion to suppress, do not fail to get information regarding all possible defenses or remedies available in deportation proceedings, e.g., suspension of deportation, political asylum, adjustment of status, voluntary departure, etc.

10. Insist that an Order to Show Cause be issued without delay, or that your client be released.

III. RIGHTS AND PROCEDURES IN DEPORTATION PROCEEDINGS

A. Procedures for Commencing Deportation Proceedings

1. Advisement of Rights

After the examining INS officer makes the determination that deportation proceedings are to be instituted, the INS officer must explain the reason for the arrest and advise the person arrested of the following rights:

a. The right to remain silent;

b. The right to counsel, at no expense to the government;

c. The right to have a decision within 24 hours as to whether s/he will remain in INS custody;

d. Rights on appeal from an unfavorable decision in a deportation hearing;

e. A list of organizations in the area providing free legal services.

8 CFR 287.3; 8 CFR 242.1(b)

The person will be asked to sign a statement that s/he has been advised of these rights.

2. Issuance and Service of the Order to Show Cause

This commences formal deportation proceedings. The OSC must be issued by the District Director, the Acting District Director, the Deputy District Director for Investigations, or the Officer in Charge. It must be signed and properly served.

8 CFR 242.1(a).

B. The Deportation Hearing

1. Notice

The OSC contains a notice of hearing. Notice must be given not less than seven days before the hearing date. More notice may be given, but generally will not if the person is in INS custody. The person can waive notice and request a prompt hearing. Setting a prompt hearing is within the discretion of the issuing officer.

8 CFR 242.1(b).

2. Bond Redetermination

After the OSC has been issued, the respondent (person under deportation proceedings) has a right to an immediate bond redetermination by an Immigration Judge. 8 CFR 242.2(b). This is technically not part of the deportation hearing. No record is made of the proceedings, and evidence presented in a bond redetermination hearing is not made part of the record of deportation proceedings.

3. Right to an Attorney

The respondent has a right to be represented by counsel in the deportation hearing. 8 CFR 242.10. The INS does not provide attorneys. (There is no Public Defender for immigration cases.) However, for the first Immigration Court appearance, the respondent will

usually be represented free of charge by a volunteer attorney, if s/he does not have an attorney. UNDER NO CIRCUMSTANCES SHOULD ANYONE TRY TO REPRESENT HIM OR HERSELF AT A DEPORTATION HEARING. If you do not have an attorney, and there is no volunteer attorney available, ask for a continuance so that you can get an attorney.

4. "Summary Calendar" Hearings

The first court appearance in deportation proceedings is the summary calendar appearance. Cases in which there are no basic issues in dispute that call for a lengthy hearing are disposed of on the summary calendar. If an evidentiary hearing is called for, a new date will be set on the regular calendar.

SECTION VII: POST ARREST PROCEDURES (BOND)

By David Berry

I. DELIVERY BONDS

A. Used to guarantee that the alien will appear for his/her deportation hearing, or at other times as INS instructs. "Bond" and "bail" in the immigration context are essentially the same thing.

B. Set by District Director or designated agent. Bond amount is typically set by the Deputy District Director for Investigations Branch.

C. Bond amount indicated on the back of Order to Show Cause (OSC), Form I-221S.[1] Delay in issuance of OSC often necessitates an evening in jail before bond amount is set.

D. While INS has authority to release on personal recognizance, this would be uncommon for an alien arrested in a workplace raid.

E. The minimum bond is five hundred dollars. (Section 242(a) of INA.) Refusal to set any bond is usually limited to severe flight risks or for national security risks. There is no upper limit on bond.

II. POSTING BOND

A. Immigration bonds require full cash payment. It is <u>not</u> sufficient to get 10% of bond. Bail bondpersons are sometimes available, but often require the deed to a home as security.

B. Pay in cashiers check only. Personal checks and cash are not accepted in some INS offices.

C. Receipt for payment of bond is on Form I-305. Bond itself is indicated on Form I-352. Cancellation of bond via Form I-391 requires submission of bond receipt, Form I-305.

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[1]Copies of all identified forms are contained in the Appendices.

D. In San Francisco, bond is posted in Room 1135 of INS.

E. Release on personal recognizance often leads to requirement to regularly report to the Travel Control branch of INS. See Form I-220A. Some aliens prefer posting minimal bond ($500) in lieu of making monthly visits to INS.

F. By posting bond set by INS, alien does not waive right to bond redetermination by an Immigration Judge. See Part III, below.

III. BOND REDETERMINATION

A. Bond set by INS may be "redetermined" by an Immigration Judge, as described below. 8 CRF 242.2(b).

B. Note that "redetermination" may lead to the bond being raised, lowered, or kept the same.

C. If bond not yet posted, redetermination accomplished simply by indicating such a desire on the back of the OSC.

D. If bond is posted, application for redetermination must be made in writing to Immigration Judge within seven days of release from custody. Thereafter, modification of bond may be made only by the District Director of INS.

E. If no local judge is available, redetermination may be heard by another judge in the region. Telephonic hearings are permissible. Bond hearings are not recorded and are to be held separate from deportation hearings.

F. Immigration Judge has no authority to redetermine bond after a deportation order becomes final. In such a case, the bond set by a District Director may be appealed to Board of Immigration Appeals, except that no appeal lies if alien is in custody for purpose of executing a deportation order and so notifies alien of that purpose. Matter of Kwun, 13 I & N Dec. 457 (BIA 1979); Matter of Vea, 18 I & N Dec. 171 (BIA 1981); Matter of Chew, 18 I & N Dec. 262 (BIA 1982).

G. Immigration Judge makes redetermination using Form I-342. Either alien or INS may appeal Judge's decision to the

Board of Immigration Appeals. Appeal notice, Form I-290A, must be filed within five days of notification of decision. No fee for appeal.

H. In general, the criteria for denying release on bond are "threat to national security" or "flight risk." In the absence of these conditions, release should be ordered without a bond. Matter of Patel, 15 I & N Dec. 666 (BIA 1976).

I. Other factors to consider in a bond decision include: 1) alien's employment history; 2) length of residence in the community; 3) existence of family ties; 4) any record of nonappearance at court proceedings; and 5) previous criminal or immigration violations. Matter of Spilipoulos, 16 I & N Dec. 561 (BIA 1978).

J. In theory, can always apply to District Director for bond redetermination. Absent a change in circumstances, rarely worthwhile.

IV. CANCELLATION AND BREACH OF BONDS

A. Bonds may be cancelled (returned) if all conditions of the bond have been complied with, and there is no longer a need for the bond. 8 CFR 103.6(c)(2). Cancellation most typically occurs when the alien departs the U.S. within the prescribed time, when the alien becomes a lawful permanent resident, or when the alien dies.

B. Alien usually proves timely departure from the U.S. through presenting self to American Consulate abroad. INS often provides a letter for this purpose.

C. Bond is breached when there has been a substantial violation of the stipulated conditions. 8 CFR 103.6(c)(3). Failure to appear or depart as ordered is most common reason for breach. See, e.g., Matter of S, 3 I & N Dec. 813 (C.O. 1949); Matter of L, 3 I & N Dec. 862 (C.O. 1950); Matter of Donald Donaldson's Key Bail Service, 13 I & N Dec. 563 (Acting Reg. Comm. 1969).

V. NO WORK "RIDERS"

A. Pursuant to the Attorney General's ruling in Matter of

Toscano-Rivas, et al., 14 I & N Dec. 523 (BIA 1972), recon'd 14 I & N Dec. 538 (BIA 1973), certified 14 I & N Dec. 550 (A.G. 1974), the rider attached to delivery bonds against unauthorized employment was improper in the absence of regulatory authorization. See also, Matter of Leon-Perez, 15 I & N Dec. 239 (BIA 1975); Matter of Chew, 18 I & N Dec. 262 (BIA 1982).

B. In response to Toscano-Rivas, a provision barring employment pursuant to a delivery bond (a no work "rider") was permitted under 8 CFR 103.6(a)(2). However, use of the rider was carefully proscribed.

C. On November 7, 1983, INS published a final rule making the rider against employment mandatory in all delivery bonds unless the District Director determined that employment was appropriate. Federal Register, Vol. 48, No. 216, Nov. 7, 1983, pp. 51142-51144. 8 CFR 103.6(a)(2)(ii).

D. The mandatory no work rider found in the Nov. 7, 1983, regulation was preliminarily enjoined from enforcement on December 16, 1983. National Center for Immigrants Rights, Inc. v. INS, __ F.Supp. __ (C.D. Cal., Nov. Cv. 83-7927 Kn (JRx)).

E. The preliminary injunction restraining enforcement of the amended regulations was upheld by the Ninth Circuit on September 20, 1984, __ F.2d __, (No. 8405504).

F. It has now been held by the BIA that the old regulations authorizing no work riders were not revived by the injunction of enforcement of the new regulations. Therefore, there are no presently effective regulations authorizing issuance of no work riders to delivery bonds and the riders are not permissible pursuant to the Toscano-Rivas decision. Matter of Shuen, I.D. #2977 (BIA September 7, 1984).

SECTION VIII: MOTIONS TO SUPPRESS IN DEPORTATION PROCEEDINGS

By Marc Van Der Hout

I. EFFECT OF INS v. LOPEZ-MENDOZA

A. Fourth Amendment exclusionary rule no longer applicable in immigration proceedings. INS v. Lopez-Mendoza, 468 U.S. ___, 82 L.Ed.2d 778 (July 5, 1984).

B. Motion to suppress practice reverts back to post Matter of Sandoval, 17 I & N 70 (BIA 1979) era.

C. Motions to suppress must be couched in Fifth Amendment terms. For example:

1. Egregious violations of Fourth Amendment violate Fifth Amendment notions of due process and fundamental fairness. Matter of Toro, 17 I & N 340, 343 (BIA 1980); see also, INS v. Lopez-Mendoza, supra, 82 L.Ed at 793 N.5.

2. Coerced confessions inadmissible under Fifth Amendment. Matter of Garcia, 17 I & N 319 (BIA 1980); Choy v. Barber, 279 F.2d 642, 646 (9th Cir. 1960).

3. Evidence obtained in violation of INS regulations inadmissible. Matter of Garcia-Flores, 17 I & N 325 (BIA 1980); Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); see also U.S. v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979).

II. THEORY OF THE MOTION TO SUPPRESS

A. INS has jurisdiction only over aliens for purposes of deportation proceedings.

B. INS must establish deportability by "clear, convincing and unequivocal" evidence. Woodby v. INS, 385 U.S. 276, 286 (1966).

C. INS must establish alienage by clear, convincing and unequivocal evidence. Ramon-Sepulveda v. INS, 743 F.2d 1307 (9th Cir. 1984); see also, Corona-Palomera, 661 F.2d 814, 817 (9th Cir. 1981).

D. Once alienage is established, burden shifts to respondent to show time, place and manner of legal entry into the United States. INA section 291, 8 USC 1361 (in 9th Circuit §291 only applicable in §241(a)(2) cases) (unlawful entry); see Iran v. INS, 656 F.2d 469 (9th Cir. 1981), but rejected by BIA outside 9th Circuit. See Matter of Benitez, I.D. 2979 (BIA, 1984).

E. Therefore, key to motion to suppress is preventing government from establishing alienage by competent evidence.

F. Generally, evidence sought to be suppressed is I-231, oral statements of respondent, any other evidence of alienage.

III. PRESENTING THE MOTION TO SUPPRESS

A. Presenting a Written Motion

1. At initial hearing present prima facie evidence of illegality on part of INS. Must submit written affidavits. Matter of Tang, 13 I & N 691 (BIA 1971).

2. Submit facts supporting illegality for each instance in which "confession" made. Best practice is to submit written motion to suppress with points and authorities.

B. Tactics at Initial Hearing

1. Present written motion to suppress supported by affidavits establishing prima facie case.

2. If insufficient time to prepare a written motion, request continuance.

3. If continuance denied, do not concede deportability. Deny allegations, deny deportability, object to I-213 on authentication grounds. See Iran v. INS, 656 F.2d 469 (9th Cir. 1981).

4. If prima facie case established, government must present its witnesses to overcome illegality. Respondent may not be called to stand by government until some evidence of alienage is presented. Matter of Tang, 13 I & N 691, 692 (BIA 1981).

5. Demand a separate suppression hearing arguing due process mandates it. But see, Matter of Benitez, supra, saying neither Act nor regulations require separate suppression hearing.

C. Claiming the Fifth Amendment Privilege Against Self-Incrimination

1. Prior illegality and, hence, inadmissibility of evidence irrelevant if respondent admits alienage at deportation hearing. Medina-Sandoval v. INS, 524 F.2d 658 (9th Cir. 1975).

2. Can avoid admitting alienage by proper invocation of Fifth Amendment privilege against self-incrimination. Respondent must be prepared to take the Fifth him/herself. Prepare client thoroughly.

3. Fifth Amendment protection extends to civil proceedings (Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)) and to immigration proceedings. Matter of Carrillo, 17 I & N 30 (BIA 1979); Tashnizi v. INS, 585 F.2d 781 (5th Cir. 1978); Chavez-Raya v. INS, 519 F.2d 39 (7th Cir. 1975).

4. Respondent may claim Fifth as to any question which could reasonably tend to incriminate him. Wehling v. CBS, 608 F.2d 1084, 1087 (5th Cir. 1979) (even if risk of prosecution remote).

5. Privilege extends beyond directly incriminating evidence to information forming link in chain of evidence. Blau v. U.S., 340 U.S. 159 (1950); U.S. v. Mata-Abundiz, 717 F.2d 1277 (9th Cir. 1983).

6. No requirement of explaining actual crimes. Hoffman v. U.S., 341 U.S. 479, 486 (1951).

7. Respondent in deportation proceedings faces many possible criminal penalties. See, for example: INA section 275, 8 USC 1325 (illegal entry); INA section 262(a), 8 USC 1302(a); INA, 266(a), 8 USC 1306(a) (registration requirements); see also, INA section 265, 8 USC 1305; INA section 264(e), 8 USC 1305(e); INA section 265(a), 8 USC 1305(a); INA section 266(b), 8 USC 1306(b); INA section 276, 8 USC 1326. (Supreme Court has held, in dicta, the violation of the registration requirements to be a continuing offense.) No statute of limitation problem. See INS v. Lopez-Mendoza, supra, 82 L.Ed.2d at 791.

D. Drawing An Adverse Inference From Assertion of Fifth Amendment Privilege

1. If Fifth Amendment privilege against self-incrimination is properly invoked, improper to draw adverse inference. See Ocon v. DelGuercio, 237 F.2d 177 (9th Cir. 1956); HRC v. Civiletti, 503 F.Supp. 442 (S.D. Fla. 1980); Matter of Tsang, 14 I & N 294 (1973); Matter of Jay, 8 I & N 568, 572 (BIA 1960).

2. Reference in INS v. Lopez-Mendoza, supra, to Bilokumski v. Tod, 263 U.S. 149 (1923) involves silence without proper invocation of Fifth Amendment, therefore distinguishable.

3. However, in discretionary relief phase, incumbent upon respondent to testify to establish eligibility for such relief. Kim v. Rosenberg, 363 U.S. 405 (1960); Matter of Marquez, 15 I & N 200 (BIA 1975).

4. No evidence given during discretionary relief phase can be used to establish deportability. 8 CFR 242 (17)(d).

E. Right Not to Admit Name

1. Important where pre-existing file present.

2. Courts have refused to extend fruit of poisonous tree doctrine to evidence from pre-existing file. Hoonsilapa v. INS, 575 F.2d 735, modified 586 F.2d 755 (9th Cir. 1978); Lopez-Mendoza v. INS, 705 F.2d 1059 at 1017 note 13 (9th Cir. 1983), reversed on other grounds 468 U.S. ___ (1984).

3. Important to keep clear that assertion of right to refuse to admit name stems from possibility of self-incrimination rather than fruit of poisonous tree doctrine.

4. Also important to burden of proof if prior alienage is established. Compare Sint v. INS, 500 F.2d 120, 122 (1st Cir. 1974) (proof of prior alienage not sufficient to meet government burden of proving present alienage) with Corona-Palomera v. INS, 661 S.2d 814, 818 (9th Cir. 1981) (evidence of foreign birth gives rise to presumption of present alienage, invoking section 291 burden on respondent).

KNOW YOUR RIGHTS!

Whether or not you have documents:

1. You don't have to answer any questions asked by Immigration. Talk to a lawyer first.

2. Don't let officials into your house without a warrant.

3. Don't sign anything, especially a document for "voluntary departure." Talk to a lawyer first.

You have a right to:

* A locally-held hearing before deportation.
* Release from jail with or without bail.
* Help getting your papers.

WHAT DOES THE MIGRA DO TO VIOLATE YOUR RIGHTS?

In conducting raids, the migra's goal is to deport people as quickly and easily as possible. To accomplish this, they do not inform people of their rights, threaten them with criminal prosecution if they don't waive their rights, deny phone calls to those arrested, and illegally search houses. These are all violations of your legal rights.

PROTECT YOUR RIGHTS AGAINST THESE VIOLATIONS!

1. If you are arrested, try to notify others around you, and have them call the Project immediately. This way, the Project can advise or free you even if the migra denies you a phone call.

2. Do not give in to the migra's threats and promises: demand to speak with a lawyer, or the Project first.

3. Don't confess your citizenship or immigration status until you speak with a lawyer. Involuntary statements and illegally seized evidence cannot be used against you.

CONOZCAN SUS DERECHOS!

Aunque Ud. tenga o no tenga documentos:

1. No tiene que contestar ninguna pregunta de la migra. Hable primero con un abogado o con el Proyecto.

2. Los oficiales no tienen el derecho de entrar a su casa sin orden de un juez. No los deje entrar sin este documento.

3. No ponga su firma en ningún documento de la migra antes de hablar con un abogado. Especialmente no firme ningún documento para "salida voluntaria del pais."

Ud. tiene el derecho a:

* Corte aquí en Oregón antes de deportación.
* Salir de cárcel con o sin fianza de dinero.
* Ayuda arreglando sus documentos.

QUE HACE LA MIGRA PARA VIOLAR A SUS DERECHOS?

Cuando conducen redadas, el objecto de la migra es deportar personas lo mas rápido y fácil posible. Para cumplir esto, la migra no informa a la gente de sus derechos, amenazan a esas personas con cargos penales si no abandonan sus derechos, niegan el derecho a una llamada después de ser arrestadas y entran a casas ilegalmente. Todas estas tácticas son ilegales y violaciones de sus derechos.

PROTEJA SUS DERECHOS A CONTRA ESAS VIOLACIONES!

1. Si Ud. es arrestado, trate a notificar a otras personas que estan cercas de Ud., y pida que llamen al Proyecto inmediatemente. De esta manera, el Proyecto puede aconsejarlo o librarlo si la migra lo niega a Ud. una llamada.
2. No escuche las amenazas y promesas de la migra. Hable primero con un abogado o el Proyecto sobre sus derechos.
3. No confiese su ciudadanía y clasificación inmigratoria antes de hablar con un abogado. Declaraciones involuntarias y evidencias agarradas ilegalmente no podrán ser usadas en contra de Ud.

Vos Droits concernant les lois sur l'Immigration

Meme quand vous êtes dans le Pays sans aucune Pièce Légale, vous êtes un ayant-droit et ne peut être renvoyé chez vous (Votre Pays d'Origine) si vous êtes arreté par un agent de l'Immigration.

Voici Quelques uns de vos Droits

Vous avez droit à un Avocat.

Vous avez droit d'être relaché en cautionnement si vous êtes appréhendé.

Vous avez droit à un jugement par devant un Juge du service d'Immigration pour decider de votre situation.

Au cas ou vous devez quand même quitter le Pays, vous avez droit de solliciter du Juge un départ volontaire, cela vous permetrra de partir à une date ultérieure.

Si vous êtes qualifié, selon votre situation, vous pouvez appliquer pour une suspension d'expulsion afin d'ajuster votre condition et avoir votre Allien Carte ou bien votre statut d'exilé politique.

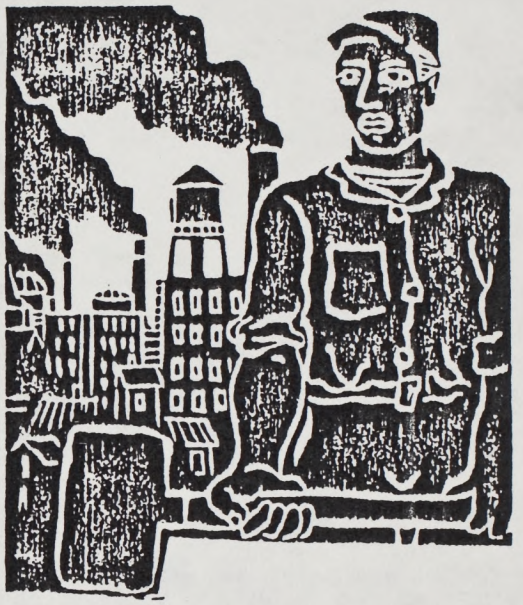
Vous avez droit d'aller en appel à votre cas si la décision du juge n'est pas en votre faveur et vous pouvez rester aux U.S.A. en attendant le jugement de l'appel.

Aucun Officier d'Immigration ne Peut Vous Forcer de Parler. Quelquesoit l'Information Que Vous Donnez, Elle Peut Etre Employee a Votre Deportation.

Ce Qu'il Faut Faire si un agent de l'Immigration Vous Retient, Vous Questionne ou Vous Arrete

1. **Ne repondez pas a aucune question.**
   Vous avez le droit de garder le silence et refuser de parler.
2. **Ne lui donner aucune piece ou identification.**
   Vous n'etes pas obligé de lui dite ou de lui donner aucune information.
3. **Ne lui donner accès dans votre maison ou le droit de vous fouiller.**
   Vous avez le droit de refuser que l'on vous fouille, excepte si l'agent est détenteur d'un mandat de perquisition.
4. **S'il vous detient et vous pose des questions, ou vous conduit au bureau de l'immigrarion, reclamez votre droit de contacter un avocat sans retard..**
   Vous avez le droit d'être accompagné d'un avocat. Si vous ne pouvez payer un avocat, sonnez "Legal Services" et quelqu'un essaiera de vous aider.
5. **Ne signer rien.**
   Vous avez le droit de parler à un avocat avant d'accepter de signer ou de faire aucune déclaration à un agent de l'Immigration.

Ne dites pas ou vous êtes né (e); ne dites par quel Port (New York, Miami, etc.) que vous etes entré aux U.S.A.; ne dites pas si vous avez des pièces ou non; ne dites pas votre nom. **Ne dites rien, ne signez rien.**



Droits de Travailleurs

Tous les travailleurs qui ont ou non pas des pièces légales justificatives ont le droit de s'organiser et d'être membres d'un Syndicat d'Ouvriers là ou ils or elles travaillent.

Il n'est pas légale pour un Patron ou Superviseur de suspendre des grèves ou des mouvements organisés par le syndicat des ouvriers.

Il n'est pas légal pour le Service d'Immigration de faire la descente dans les factories pendant que le Syndicat des ouvriers est en pleine organisation ou en conflit de travail, parceque c'est une violation des droits de tous les travailleurs.

APPENDIX B

CORD OF DEPORTABLE ALIEN (See A.M. - 2790.31)

PLEASE TYPEWRITE OR PRINT IN BLOCK CAPITAL LETTERS

Given Name | Middle Name | Family Name (Capital Letters)

Mexico (Residence) | Passport Number and Country of Issue | File Number

(Number) (Street) (City) (State) (Zip Code)

Santa Rosa Ca.

Place, Time, Manner of Last Entry: 4-74 Refused to answer further

Passenger Boarded At

Number, Street, City, Province (State) and Country of Permanent Residence: ,Mexico

Date of Birth: 9-17-51

Date of Action: 7-26-83

Location Code: SFR

City, Province (State) and Country of Birth: Navarit,Mexico

AR 3 | Form: (Type & No.) | ☐ Listed ☐ Not Listed

Visa Issued At – NIV No.: NA

Social Security Account Name

Social Security No.

Send C.O. Rec Check To.

Date Visa Issued: NA

Criminal Record: Claims only traffic

Number & Nationality of Minor Children: NA

Immigration Record: claims none

Name, Address, and Nationality of Spouse (Maiden Name, if appropriate): NA

Mother's Present and Maiden Names, Nationality, and Address, if Known: ,Maria Mexico,Mexico

Father's Name, and Nationality and Address, if Known: ,Mexico,Mexico

Lookout Book Checked: ☐ Not Listed ☐ Listed, Code

Deportation Charge(s) (Code Words): RAZEZ

Monies Due/Property in U.S. Not in Immediate Possession: ☒ None Claimed ☐ See Form I-43

Fingerprinted: ☐ Yes ☐ No

Type of Employment

Salary: $0.00 hr

From: 12-76 To: Present

Name and Address of (Last) (Current) U.S. Employer: ,Santa Rosa Garbageman

Narrative (Outline particulars under which alien located/apprehended. Include details, not shown above, re time, place, manner of last entry, and elements which establish administrative and/or criminal violation, indicate means and route of travel to interior.) Alien has been advised of communication privileges pursuant to 8 CFR 242.2(e).

Initial _____ Date 7-26-83

Subject came to the attention of the service while operating a garbage truck for the above mentioned place of employment.
Subject claims to be a native and citizen of Mexico who states that there are no petitions pending in his behalf.
Subject refuses to disclose the manner in which he entered the U.S. but states it was in 4-74.
Subject was arrested in the company of .
Subject claims equities or equities in the U.S. but requests a hearing before an Immigration Judge.

I-210 served and list of free legal services provided

L. Cobbins C.SW
(Signature and Title)

(If space insufficient, show "continued" and continue on reverse, from bottom up)

DISTRIBUTION
1-file
1-log

Received (subject and documents) (results of interview) from

Officer: Robbins 19 83 at 2:00 (P.) M.
7-26

Disposition OSC/BI

(Receiving Officer)

Form I-213 (Rev. 4-16-79)Y UNITED STATES DEPARTMENT OF JUSTICE Immigration and Naturalization Service

m | blk | brn | Med

Height: 69 | Weight: 145 | Occupation: Laborer

Scars or Marks: None visible.

F.B.I. No. | Marital Status: ☒ Single ☐ Married ☐ Widowed ☐ Separated ☐ Divorced

Method of Location/Apprehension: STBC-1

(At/Near) Santa Rosa | Date & Hour: 7-26-83 09:30

By: Crebbs/Robbins

Status at Entry | Status When Found: working

Length of Time Illegally in U.S.: over one year

APPENDIX C

* U.S. GOVERNMENT PRINTING OFFICE:

Form 1-214
(Rev. 8-1-73) N (Spanish)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

AVISO DE DERECHOS

File No. A. _____

Antes de que le hagamos cualquier pregunta, usted debe de comprender sus derechos:
Usted tiene el derecho de guardar silencio..
Cualquier cosa que usted diga puede ser usada en su contra en un juzgado de leyes, o en cualquier procedimiento administrativo o de inmigración.
Usted tiene el derecho de hablar con un abogado para que el lo aconseje antes de que le hagamos alguna pregunta, y de tenerlo presente con usted durante las preguntas.
Si usted no tiene el dinero para emplear a un abogado, se le puede proporcionar uno antes de que le hagamos alguna pregunta, si usted lo desea.
Si usted decide contestar nuestras preguntas ahora, sin tener a un abogado presente, siempre tendrá usted el derecho de dejar de contestar cuando guste. Usted también tiene el derecho de dejar de contestar cuando guste, hasta que pueda hablar con un abogado.

RENUNCIA

He leido esta declaracion de mis derechos y comprendo lo que son mis derechos. Estoy dispuesto a dar una declaración y a contestar preguntas. Por ahora no deseo un abogado. Comprendo y sé lo que estoy haciendo. No me han hecho promezas ni me han amenazado, ni han usado presión o fuerza en mi contra.

MM

X - refuses to sign - has talked with ... (lawyer)
Firma

Fecha y hora: 3/31/83 1:45 P Lugar: Livermore, Cal.

CERTIFICATION

I HEREBY CERTIFY that the foregoing Warning and Waiver were read by me to the above signatory, that he also read it and has affixed his signature hereto in my presence.

Immigration Officer Signature

Witness' Signature

Interpreter's Signature Language

Interpreter's Address

INTERVIEW LOG

1. Person interviewed _____ 2. Officer(s) _____
3. Place (exact address and identity of room) _____
4. Date _____
5. Exact Time place of encounter or arrest _____
6. If transported from place of encounter to interrogation point, show exact time involved. _____
Note whether interrogation continued during transporting _____
7. Officers making arrest and/or transporting subject _____
8. Time interview began _____ 9. Time subject or suspect advised of right to remain silent and fact any statement could be used against him in court and name of officer furnishing advice _____
10. Time subject advised of right to presence of counsel, retained or appointed and name of officer furnishing advice _____
11. Time questioning concluded _____ 12. Time written statement commenced _____
13. Person preparing statement _____ 14. Time statement completed _____
15. Time statement reviewed by person interviewed _____ 16. Time statement signed _____
17. Record of requests and complaints of subject and actions taken thereon _____

(If additional space required, continue on an attachment.)

U.S. Department of Justice
Immigration and Naturalization Service

Application fo and Bond/Custody Processing Sheet (must be attached)

APPENDIX D

A. Name	Office	File
[redacted]	LIV	26 365 908
Address [redacted] IN SERV CUST.		Date 3-31

FACTUAL ALLEGATIONS M 5/14/54

1. You are not a citizen or national of the United States
2. You are a native of MEXICO and a citizen of MEX;
3. You entered the United States at NEAR SAS on 3/15/81 (Date);
4. You were not then inspected by an immigration officer.
5. ☑ Attorney of Record

Supporting evidence (briefly itemize)

B. ADDITIONAL FACTORS TO BE CONSIDERED FOR BOND CUSTODY DETERMINATION

1. Is a petition, application pending for this alien or family member? (explain)
   No
2. Total times apprehended C/N
   Bonded before? _____ How many times? _____ Released o/r before _____
   Bond breached? _____ How many times? _____ Complied with o/r _____
3. Present state of health of subject, of spouse, children (if other than good, explain)
   GOOD
4. Total time in U.S., dates and location; residing with (family members or others)
   SINCE '77 off & on
5. Personal property in U.S. (liquid and non-liquid assets)
   ~~CAR~~ NONE
6. Family members in U.S. (Wife, children, immediate relatives) address if different than subject:
   wife - GWL - 5 MOS. PREGNANT; 1 YR OLD child
7. Employment history: (Other than current)
   -
8. Other factors i.e. false claim, attempted flight, unsupervised children at home, etc.
   - refuses I-274 wants hrg.;

C. The undersigned recommends: ☐ V/D without OSC ☐ OSC Charge(s) (Code) Roten (Page No.) _____
☐ Trial Attorney ☐ Interpreter: _____ (Language) ☐ Prosecution Violation
☐ W/A for the following reasons:

Signature MERCHANT Title _____

Supervisory Approval Signature _____ Title _____

D. Approved as to legal sufficiency:

_____ (Date) _____ (Signature) _____ (Title) SEP (Office)

E. based on the above information I have set the following bond: $ 3,000

☐ DD ☐ Acting DD ☐ DDD ☑ ADDI ☐ OIC ☐

4/4/85 (Date) _____ (Signature) 10A (Office)

Form I-265 (Rev. 4-15-81)Y

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File No. [redacted]

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA

In the Matter of

USINS Custody
Livermore, California
Address (number, street, city, state, and ZIP code)

Respondent.

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You entered the United States at near San Isidro, California on or about March 15, 1981;
   (date)
4. You were not then inspected by an Immigration Officer;

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that you entered the United States without inspection;

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at
Room 431, 630 Sansome Street, San Francisco, California
on April 7, 1983 at 10:00 A m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: March 31, 1983 - 2P.M.

(signature and title of issuing officer)
Robert N. Kaschenak
~~Assistant District Director for Investigation~~
(City and State)
San Francisco, California

Form I-221S (Rev. 8-1-77) Y

(over)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

☐ Detained in the custody of this Service. ☐ Released on recognizance.

☑ Released under bond in the amount of $ 5,000.00.

You may request the Immigration Judge to redetermine this decision.

☒ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

_____ _____
(signature of respondent) (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

_____ _____
(signature of respondent) (date)

CERTIFICATE OF SERVICE

Served by me at San Francisco on Oct. 21 19__ at ___ m.

_____
(signature and title of employee or officer)

43

DEPARTMENT OF JUSTICE
...ION AND NATURALIZATION SERVICE

IMMIGRATION BOND

APPENDIX F

...and address of obligor: P[redacted] St., San Francisco

...this bond is executed by a surety company complete the following: Rate of premium: _____ Amount of premium _____ The name and address of the person who executed a written instrument with the surety company requesting it to post ...e bond is:

Name of alien for whom this bond is furnished: *(If there is more than one alien, separate schedule showing name of each alien, date and country of ...s birth and arrival data, signed and sealed by the obligor and made part hereof, is attached.)*

...ame: [redacted] C

Date and country of birth of alien: PHILIPPINES 7- -51

...ate, port, and means of arrival in United States: 7- -83 LOS TV

Nationality of alien: PHILIPPINES

In consideration of the facts recited in paragraph or paragraphs herein numbered TWO ...d captioned BOND CONDITIONED FOR THE DELIVERY OF AN ALIEN

...nd in any rider or riders lettered _____ and captioned _____ ...tached hereto and made part hereof) the obligor above named, by subscribing hereto, hereby declares that he is firmly bound unto the ...ited States in the sum of Five Thousand _____ dollars ($5,000.00) (except that inso- ...as the bond is that the alien shall not become a public charge the obligor declares himself bound in such amount or successive amounts as are ...escribed in paragraph (3) herein) as liquidated damages and not as a penalty, which sum is to be paid to the United States immediately upon ...ilure to comply with the terms set forth in any such paragraph or rider. The obligor further agrees that any notice to him in connection with this ...ond may be accomplished by mail directed to him at the above address. If bond is furnished for more than one alien, the obligor agrees that any ...ferences herein to alien in the singular sense shall be construed in the plural sense. The obligor acknowledges receipt of a copy of this executed ...nd and any attached rider or riders specified above. The burden of establishing compliance with the terms of the bond rests on the obligor. If ...s bond has been executed in consideration of the facts recited in paragraph (1) captioned "Bond for Maintenance of Status and Departure of ...n-immigrant Alien" and has been furnished for more than one alien, the amount due for each alien who fails to comply with the terms thereof ...all be _____ dollars ($_____), not to exceed the total sum of _____ _____ dollars ($_____).

Signed and sealed in the presence of —

...me [redacted]

...dress San Francisco, California (Witness)

X [redacted] (Obligor)

Date: 14 October 1983

Name _____

Address San Francisco, California (Witness)

(SEAL)

PLEDGE AND POWER OF ATTORNEY FOR USE WHEN UNITED STATES BONDS OR NOTES ARE DEPOSITED AS SECURITY

...he United States Bonds/Notes described in the following schedule are hereby pledged as security for the performance and fulfillment of the ...egoing undertaking in accordance with 6 U.S.C. 15, 31 CFR Part 225, and Treasury Department Circular 154 (Revised), dated October 31, 1969, ...I the obligor named in this bond do hereby appoint the Attorney General of the United States as my attorney for me and in my name to col- ...t or to sell, assign and transfer said United States bond or notes and I agree that in case of any default in the performance of any of the con- ...ons herein to which I have subscribed, my said attorney shall have the power to collect said bonds/notes or any part hereof or to sell, assign, ...d transfer said bonds/notes or any part thereof, without notice, at public or private sale, free from equity of redemption and without appraise- ...nt or valuation, notice and right to redeem being waived, and to apply the proceeds in whole or in part to the satisfaction of any damages, de- ...nds, or deficiencies arising by reason of such default, as my said attorney may deem best.

TITLE OF BONDS/NOTES	COUPONS ATTACHED	FACE VALUE	INTEREST RATE	SERIAL NO.	INTEREST DATES

PLEDGE AND POWER OF ATTORNEY FOR USE WHEN CASH IS DEPOSITED AS SECURITY

...he amount of Five Thousand _____ ($5,000.00), cash money of the United States, is hereby pledged as ...urity for the performance and fulfillment of the foregoing undertaking, and I, the obligor named in this bond, hereby appoint the Attorney ...eral of the United States as my attorney for me and in my name to collect or to assign and transfer the said sum of money, and I agree that, ...case of any default in the performance of any of the conditions herein to which I have subscribed, my said attorney shall have full power ...collect said sum of money or any part thereof or to assign and transfer said sum or any part thereof, without notice and to apply said sum or ...part thereof to the satisfaction of any damages, demands, or deficiencies arising by reason of such default, as my said attorney may deem best. ...ther empower my said attorney, in the event all the conditions herein to which I have subscribed have been complied with and the bond is ...celed, to deliver the said sum of money plus any interest accrued thereon, to me at my risk and expense by such means as he shall select.

...VITNESS WHEREOF, I have hereunto set my hand and seal this 14th day of October 19 83

X [redacted] (SEAL)

...efore me, within the county of San Francisco in the State of California (or the District of ...umbia), personally appeared the above named Pilar Cuevarra and acknowledged the execu- ... of the foregoing power of attorney.

...itness my hand this 14th day of October 19 83

[redacted] (Signature)

Deportation Officer (Title)

...ond approved and accepted San Francisco, California (City) (State) 14 October 1983 19

David N. Ilchert (District Director)

...(Rev. 10-14-76)N

THIS COPY AND FORM I-352A TO BE RETAINED BY OBLIGATOR

(Rev. 5-1-78)

APPENDIX G

RECEIPT OF IMMIGRATION OFFICER – UNITED STATES BONDS OR NOTES, OR CASH, ACCEPTED AS SECURITY ON IMMIGRATION BOND

OBLIGOR		
1. Name: P G		2. Receipt Number: SFR 11
Number and Street: St.,		3. City and State: San Francisco, Californi
City, State and ZIP Code: San Francisco, California 94134		4. Date: 14 Oct 83
5. Name of alien: G , F	6. A-File: A26-379-	7. Immigration bond: Date above; Type delivery

8. UNITED STATES BONDS OR NOTES

(State form of assignment, if registered)

Said United States bonds/notes are assigned

Title of Bonds/Notes	Coupon or Registered	Total Face Amount	Denomination	Serial No.	Interest Dates

(If this space is insufficient for enumeration of bonds/notes, use separate sheet and securely affix same hereto)

9. CASH (Postal Money Order, Certified Check)

The sum of FIVE THOUSAND AND no.100---------- dollars ($ 5,000.00).
in the form of *cashier check B of A 0295 56090

*Description: U.S. Postal Money Order and number; bank and check number; or number and denomination of coin and currency.

10. NOTICE TO OBLIGOR

The Immigration and Naturalization Service will deposit accepted United States bonds or notes in a Federal depository for safekeeping; accepted cash will be deposited in the United States Treasury. When all of its conditions have been met, the immigration bond will be cancelled, you will be so notified, and you may then recover the accepted security. United States bonds or notes will be returned to you when you surrender this receipt and give your own receipt on Form I-306. If it is impossible for you to call in person for these securities, you may authorize their delivery to you at your risk and expense. Arrangement will be made for the return to you of the cash accepted as security when you surrender this receipt. YOU MUST SURRENDER THE ORIGINAL OF THIS RECEIPT BEFORE THE SECURITY WILL BE RETURNED TO YOU. This receipt is not assignable.

11. ACCEPTANCE OF SECURITY

The undersigned hereby acknowledges receipt from above-named obligor of the above-described security, deposited as security on above-named immigration bond filed with the undersigned on behalf of the above-named alien.

Signature of immigration officer	Title of immigration officer
Garay Alcantar	Deportation Officer

Form I-305
(Rev. 5-1-76)

To: Obligor. When surrendered by Obligor, to: Finance, Regional Office

APPENDIX H

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
630 Sansome Street
San Francisco, CA 94111

File Number A26 379

Date February 27, 1984

SUBJECT:
IMMIGRATION BOND
Receipt Number SFR-11
Date October 1983
Amount $5,000.00
Alien's Name
G , C

NOTICE—IMMIGRATION BOND CANCELLED

P G

San Francisco, CA 94134

The conditions of the above-described immigration bond have been fulfilled as to the above-named alien and you are no longer liable under such bond for this alien. The nature of the security accepted on the bond is checked below. If the security was in the form of U.S. Bonds or Notes or cash please comply with the pertinent instructions for the return of the security.

☐ SURETY BOND.

☐ UNITED STATES BONDS OR NOTES ACCEPTED AS SECURITY.
The United States Bonds or Notes accepted on the above-described immigration bond, and a check for any undistributed interest paid thereon, will be made available for return to you when the office shown below is informed of your preference for its delivery. Accordingly, would you please check the appropriate items below, sign, and return this form. IT WILL NOT BE NECESSARY FOR YOU TO APPEAR AT THIS OFFICE AT THIS TIME. YOU MAY MAIL THIS FORM TO THE BELOW ADDRESS.

☐ I prefer to receive my securities at the office shown below on a regular business day between the hours of 9 a.m. and 4 p.m. I understand that these securities will not be available in that office until after ten days from the date on which I mail this form. I understand also that it is necessary for me to surrender my "Receipt of Immigration Officer—United States Bonds or Notes, or Cash, Accepted as Security on Immigration Bond" (Form I-300 or Form I-305) before my securities may be released.

☐ It would be more convenient for me to receive my securities at the Immigration and Naturalization Service office located at:

(Street Address) (City or Town, State) (Zip Code)

☐ I prefer to receive my securities by express (collect), and hereby authorize delivery in that manner. I understand that it is necessary for me to surrender my "Receipt of Immigration Officer—United States Bonds or Notes, or Cash, Accepted as Security on Immigration Bond" (Form I-300 or Form I-305) before my securities may be released and accordingly this receipt is enclosed herewith.

☐ My address shown above is incorrect. The address to which the express company should deliver my securities is:

(Street Address) (City or Town, State) (Zip Code)

Signature of Obligor	Date

☐ UNITED STATES BONDS OR NOTES ACCEPTED AS SECURITY, REDEEMED.
The United States Bonds or Notes accepted on the above-described immigration bond were redeemed at maturity, or upon call, and converted to cash. Arrangement will be made for the return to you of the cash, plus any undistributed interest paid thereon, when the office shown below receives your "Receipt of Immigration Officer—United States Bonds or Notes, or Cash, Accepted as Security on Immigration Bond" (Form I-300 or Form I-305). Accordingly, please mail (Certified or Registered Mail is suggested) the above-mentioned receipt or bring it to that office on a regular business day between the hours of 9:00A.M. and 4:00P.M. Your security will be returned by a check which will be mailed to you as soon as possible after your receipt arrives. This notice will serve as your temporary receipt pending delivery of your check.

☒ CASH ACCEPTED AS SECURITY.
Arrangement will be made for the return to you of the cash accepted on the above-described immigration bond, when the office shown below receives your "Receipt of Immigration Officer—United States Bonds or Notes, or Cash, Accepted as Security on Immigration Bond" (Form I-300 or Form I-305). Accordingly, please mail (Certified or Registered Mail is suggested) the above-mentioned receipt or bring it to that office on a regular business day between the hours of 9:00A.M. and 4:00P.M. Your security will be returned by a check which will be mailed to you as soon as possible after your receipt arrives. This notice will serve as your temporary receipt pending delivery of your check.

IMMIGRATION AND NATURALIZATION SERVICE
630 SANSOME STREET Room 1135
SAN FRANCISCO, CALIFORNIA 94111

Signature [signature]
Title David N. Ilchert, District Director

Form I-191 (Rev. 3-14-77)N

UNITED STATES OF AMERICA:

[redacted]

APPENDIX J

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES IMMIGRATION COURT

In the Matter of

Respondent

DETERMINATION OF THE IMMIGRATION JUDGE WITH RESPECT TO CUSTODY

Request having been made for a change in the custody status of the respondent pursuant to 8 CFR 242.2 (b), and (c), and full consideration having been given by me to the representations of the Service and of the respondent in the premises, it is hereby

☐ ORDERED that the request for a change in the custody status of the respondent be denied.

☒ ORDERED that the request be granted and that respondent be:

☒ released from custody on his own recognizance.

☐ released from custody under bond of $_____.

It is further ordered that the conditions of the bond

☐ remain unchanged

☐ be changed as follows: _____

Alien is on conviction to mailed to a USC; 212(c) relief is available to him + (he is). has a

Copy of this decision has been served on the respondent and the Service.

Appeal: Waived—~~reserved~~ He is also the father of a U.S.C. child. His father Very strong verbal claim to asylum.

Date: April 10, 1984 is in the U.S. as is sister all are asylum applicants. His bond was

Place: SFR, Ca increased by the judge in Criminal case in amount of 1/2 million dollars despite fact alien is on probation. — He has no reason to

(Immigration Judge) abscond.

FORM I-342
(Rev. 4-25-79) Y

ALIEN'S COPY

APPENDIX K

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO:

IMMIGRATION AND NATURALIZATION SERVICE

_____

_____

Fee Stamp

In the Matter of:

File No.

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated _____ in the above entitled case.

2. Briefly, state reasons for this appeal.

3. I _____ desire oral argument before the Board of Immigration Appeals in
(do) (do not)
Washington, D. C.

4. I _____ filing a separate written brief or statement.
(am) (am not)

_____
Signature of Appellant (or attorney or representative)

_____
(Print or type name)

_____
Date

_____
Address (Number, Street, City, State, Zip Code)

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev.4-1-76)N

GPO 953-062

INSTRUCTIONS

1. **Fees.** A fee of fifty dollars ($50) must be paid for filing this appeal. It cannot be refunded regardless of the action taken on the appeal. (Only a single fee need be paid if two or more persons are covered by a single decision.) DO NOT MAIL CASH. Payment by check or money order must be drawn on a bank or other institution located in the United States and be payable in United States currency. If appellant resides in the Virgin Islands, check or money order must be payable to the "Commissioner of Finance of the Virgin Islands." If appellant resides in Guam, check or money order must be payable to the "Treasurer, Guam." All other appellant must make the check or money order payable to the "Immigration and Naturalization Service." When check is drawn on an account of a person other than the appellant, the name of the appellant must be entered on the face of the check. Personal checks are accepted subject to collectibility. An uncollectible check will render the appeal form and any documents issued pursuant thereto invalid. A charge of $5.00 will be imposed if a check in payment of a fee is not honored by the bank on which it is drawn. If payment is made by the type of international money order that cannot be mailed, the money order must be drawn on the postmaster of the city in the United States to which the appeal will be mailed, and that city, the money order number, and the date must be shown clearly on the top margin of this appeal form. The fee is required for filing the appeal and is not returnable regardless of the action taken thereon.

2. Counsel. In presenting and prosecuting this appeal the appellant may, if he desires, be represented at no expense to the Government by counsel or other duly authorized representatives. No interpreters are furnished by the Government for the argument before the Board.

3. Briefs. A brief in support of or in opposition to an appeal is not required, but if a brief is filed it shall be in triplicate and submitted *to the officer of the Immigration and Naturalization Service having administrative jurisdiction over the case* within the time fixed for the appeal or within any other additional period designated by the special inquiry officer or other Service officer who made the decision. Such officer, or the Board for good cause, may extend the time for filing a brief or reply brief. The Board in its discretion may authorize the filing of briefs directly with it, in which event the opposing party shall be allowed a specified time to respond.

4. Oral argument. *Oral argument shall not be heard on appeal from an order of a special inquiry officer denying a motion to reopen or reconsider or stay deportation, unless specifically directed by the Board.* Oral argument is optional; no personal appearance by the appellant or counsel is required. The Board will consider every case on the record submitted, whether or not oral representations are made. Oral argument in any one case should not extend beyond fifteen (15) minutes, unless arrangements for additional time are made with the Board in advance of the hearing.

   An appellant will not be released from detention or permitted to enter the United States to present oral argument to the Board but may make arrangements to have someone represent him before the Board, and unless such arrangements are made at the time the appeal is taken, the Board will not calendar the case for argument.

5. No appeal. *There is no appeal from an order of a special inquiry officer granting voluntary departure within a period of at least thirty days if the sole ground of appeal is that a greater period of departure time should have been fixed.*

6. Summary dismissal of appeals. The Board may deny oral argument and summarily dismiss any appeal in any deportation proceeding in which (i) the party concerned fails to specify the reason for his appeal on the reverse side of this form, (ii) the only reason specified by the party concerned for his Appeal involves a finding of fact or conclusion of law which was conceded by him at the hearing, (iii) the appeal is from an order that grants the party concerned the relief which he requested, *or (iv) if the Board is satisfied, from a review of the record, that the appeal is frivolous and filed solely for purposes of delay.*

7. FILING OF NOTICE OF APPEAL. THE NOTICE OF APPEAL, IN TRIPLICATE, WITH THE REQUIRED FEE, *MUST* BE SUBMITTED TO THE IMMIGRATION AND NATURALIZATION SERVICE OFFICE WHERE THE CASE IS PENDING. THE NOTICE OF APPEAL IS *NOT* TO BE FORWARDED DIRECTLY TO THE BOARD OF IMMIGRATION APPEALS.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARISOL MONTERO, et al.,

Petitioners,

v.

DAVID ILCHERT, District Director of the United States Immigration and Naturalization Service,

Respondent.

NO. C 84-0470 TEH

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioners filed a petition for writ of habeas corpus in which they sought review by this Court of the failure of the District Director of the Immigration and Naturalization Service, the Immigration Judge, and the Board of Immigration Appeals to grant their requests for stay of deportation.

The Petition was the subject of a hearing held on February 16, 1984. After having considered all the papers submitted and the entire record on file, and after having heard argument from counsel, this Court found that the District Director, Immigration Judge and Board of Immigration Appeals had abused their discretion by not granting the stay requests of petitioners. The Court granted the petition for writ of habeas corpus and issued an "Order Enjoining Deportation" in which respondent was

restrained and enjoined from deporting the petitioners pending a determination of their motions to reopen by the Immigration Judge and the Board of Immigration Appeals. The decision is based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The petitioners are the subjects of deportation proceedings instituted by the San Francisco Office of the Immigration and Naturalization Service (hereinafter INS) based on their alleged Mexican citizenship and nationality and their alleged entry into the United States without inspection between the dates of May 1977 to March 1983. (Specifically, 5/77, 6/78, 11/78, 11/78, 11/78, 12/79, 3/83).

2. Respondent David N. Ilchert is the duly appointed District Director of the San Francisco District Office of the United States Immigration and Naturalization Service.

3. On May 11, 1983, petitioners were arrested by INS agents at their place of work, the Levi Strauss factory in San Jose. That same day, May 11, 1983, deportation proceedings were instituted by the INS to deport petitioners from the United States on the ground that they were natives and citizens of Mexico and had entered the United States without inspection.

4. Prior to their deportation hearings, petitioners posted bond and were released from the custody of the INS.

5. On July 18, 1983, petitioners appeared at their deportation hearings, represented by their former attorney and were found deportable as charged by the Immigration Judge on the basis of pleas made on their behalf by their former attorney

conceding deportability. The conduct of the attorney at the hearings is a subject of petitioners' motions to reopen.

6. The Immigration Judge granted petitioners until December 31, 1983 to depart voluntarily in lieu of deportation.

7. The orders made by the Immigration Judge at petitioners' hearings were not appealed by either side and have not been the subject of any prior judicial proceeding.

8. On December 16, 1983, petitioners filed a complaint with the Bar Association of San Francisco against their former attorney, based on the way he handled their cases. Petitioners requested arbitration.

9. On December 21, 1983, the District Director extended petitioners' period of voluntary departure to Friday, January 20, 1984 in order to permit petitioners to pursue the above-mentioned complaint filed against their former attorney with the Bar Association of San Francisco.

10. On January 23, 1984, petitioners filed motions to reopen their deportation proceedings and requests for stay of deportation pending a ruling on the motions to reopen. The motions alleged that petitioners were denied procedural due process at their deportation hearings due to the ineffectiveness of their attorney when he failed to move to suppress evidence unconstitutionally obtained from them. The motions asked that the pleas entered by their attorney be stricken and the proceedings reopened in order to allow petitioners a full and fair hearing that meets constitutional due process requirements.

11. Each of the petitioners' motions to reopen and motions for stay included his or her affidavit regarding the

circumstances claimed to constitute the ineffective assistance of counsel and illegal INS conduct in his or her arrest and interrogation. Each of the petitioners' motions was also accompanied by the affidavits of attorneys Byron Park and Donald Ungar, who concluded that under the circumstances alleged in petitioners' affidavits, a motion to suppress should have been filed and that a reasonably competent attorney would have done so.

12. The respondent offered no evidence in opposition to the motions to reopen and motions for stay to controvert any of the factual allegations in the affidavits submitted by petitioners although INS did submit a "Memorandum in Opposition to Respondents' Request for Stay of Deportation."

13. The affidavits of petitioners allege numerous details regarding their arrests and interrogation by agents of INS and the nature of the representation by their former attorney, including the following:

a. On the morning of May 11, 1983, several vehicles filled with INS agents arrived at the premises of the Levi Strauss factory in San Jose, California. The agents proceeded to surround the factory exits and entrances both with vehicles and through stationing themselves in the doorways of the building. The agents were armed and carried handcuffs.

b. Each petitioner was taken by the supervisor to the office for questioning. Upon entering the office, each petitioner was confronted by an INS agent and was asked questions. Each petitioner indicated that he or she had an attorney and showed the agent a letter from him. The INS agent stated that

the letter was meaningless. Petitioners were told they would not be permitted access to an attorney until after answering some questions or until arrival in San Francisco. Each petitioner then answered the INS agent's questions. Each petitioner was then transported to an INS office in San Francisco.

c. Neither at the factory during their interrogation nor in San Francisco were petitioners advised that any statement they made could be used against them or of their right to counsel.

d. While at INS in San Francisco, the interrogation of petitioners continued even after they again indicated they had attorneys and wished to speak with them.

e. After release on bond, all of the petitioners retained an attorney to represent them, as did approximately 17 other workers arrested at the Levi Strauss factory. This attorney met with the workers for the first time on approximately May 20, 1983. At that first brief meeting, he did not talk to any of the workers individually. He circulated a piece of paper and had all the workers, including each of the petitioners, list their names, addresses, phone numbers and hearing dates. He did not elicit any particulars regarding what had occurred during their interrogations and arrests. The attorney, however, informed the workers that he would challenge the arrests.

f. The attorney also told the workers that, if for some reasons he should lose the challenge to the illegalities, that he would appeal the judge's decision.

g. The attorney made representations at that first meeting that he was good friends with the judge and that this

fact would work in the workers' favor. The petitioners were assured by him that at their July 18, 1983 hearing they would not have to answer any questions. He stated that he would do all the talking. A second hearing, to be held five to six months after their summary hearing, would be the occasion for the petitioners to give their testimony.

h. A few weeks after their first meeting with their attorney, the group met with him again. Approximately 15 workers attended this second meeting, including petitioners. The meeting lasted less than an hour. Again, no individual interviews of his clients were conducted by the attorney. He reiterated that he would challenge the arrests and appeal if he lost. Once again he spoke of his friendship with the judge.

i. The next and last time petitioners saw their attorney was on the day of the deportation hearing, July 18, 1983. All the workers from Levi Strauss represented by the attorney who were scheduled for hearing on that day gathered outside the courtroom before their hearings. The attorney told them again that everything would be fine. He then went into chambers to discuss the case with the Immigration Judge. When he emerged he informed petitioners that the case was much more difficult than he had thought. He stated that the judge was willing to give them five and one-half (5-1/2) months to stay here and if they did not accept that they could risk being deported immediately and/or losing their jobs. A few workers voiced a desire to continue with their cases, but the attorney said he would not continue unless all the workers did so. Petitioners then accepted the offer of 5-1/2 months voluntary depar-

ture, believing they had no alternative or would risk being deported or losing their jobs if they didn't.

14. At no time during or prior to petitioners' deportation hearings did their former attorney attempt to introduce into evidence either a written motion to suppress or any affidavits by any of the petitioners attempting to establish a prima facie case of illegal conduct by INS agents in carrying out the arrests and interrogations of petitioners.

15. On or about January 24, 1984, the INS mailed a notice to petitioner Montero to surrender for deportation on January 31, 1984 at 10:00 a.m.

16. On or about January 30, 1984, after having received Montero's notice, petitioners' current counsel applied to the District Director for a Stay to permit petitioner to continue with her Motion to Reopen.

17. The Stay was denied on January 30, 1984 and a written denial subsequently was issued.

18. The reasons for the District Director's denial of the stay request were set forth in the written denial. The reasons included the following:

> It is my view that your motion is likely to fail on its merits. . . . At no time did you or your counsel of record make any allegation that you, in fact, have any right to be or remain in the United States. Nor do you allege that you have any substantive relief from deportation under the Immigration and Nationality Act.

In denying petitioner Montero's request for stay, the District Director also stated that "[t]he motion has been carefully discussed in the Government's Memorandum in Opposition to the Respondent's Request for Stay of Deportation [hereinafter the

"Government's Memorandum"] before the Immigration Court dated this date, a copy of which was served on counsel of record, and need not be repeated here."

19. The Government's Memorandum makes the following arguments for denial of the stay:

> a. The decision made by prior counsel to secure voluntary departure rather than raise an arguable defense was a "tactical decision that does not constitute ineffective assistance of counsel." Rodriquez-Gonzalez v. INS, 640 F.2d 1139, 1142 (9th Cir. 1981). See also Thorsteinsson v. INS, 724 F.2d 1365 (9th Cir. 1984).
>
> b. Because the name and alienage of the petitioner (Montero) was admitted at the former hearing, "there is nothing to suppress."
>
> c. Petitioner has not "demonstrated any constitutional right to remain in the United States without lawful status."
>
> d. Petitioner has not demonstrated "any right to conceal her alien status from the immigration court."
>
> e. Since petitioner received approximately six months voluntary departure, a challenge to her prior hearing "after having enjoyed the benefit of extended voluntary departure is particularly repugnant."

20. At approximately 1:00 p.m. on January 31, 1984, the day petitioner Montero surrendered for deportation, the Immigration Judge denied the motion for stay, but did not rule on the motion to reopen. The motions to reopen and for stay were filed on January 23, 1984. The Immigration Judge had indicated to petitioner's counsel that no ruling on the stay would issue until petitioner surrendered for deportation on the scheduled day of her deportation. See Affidavits of Marc Van Der Hout and Teresa Bright dated February 10, 1984.

21. The four page written Decision of the Immigration Judge denying the Motion for Stay sets out his reasons for denial of the stay. It includes the following:

> There has been no valid showing nor authority cited for the proposition that other competent counsel would not have done precisely what counsel did in this case, at the deportation hearing. (at p. 2 of the decision, p. 5A of C.A.R.).

22. Shortly after the Immigration Judge denied the stay request on January 31, 1984 counsel for petitioner, Marc Van Der Hout, then called the Board of Immigration Appeals to request an emergency stay. He had previously sent supporting papers to the Board. The Board subsequently informed petitioner's co-counsel, Teresa Bright, that it would not rule on the request until the following day.

23. On January 31, 1984, petitioner Montero filed a Petition for Writ of Habeas Corpus with this Court as well as an application for a Temporary Restraining Order.

24. On January 31, 1984 after having reviewed the papers submitted and having heard arguments by counsel for both sides, this Court issued an order restraining respondent from deporting petitioner Montero pending a hearing on February 16, 1984. That hearing was to address the question of whether a writ of habeas corpus should issue restraining respondent from deporting petitioner during the pendency of her Motion to Reopen before the Immigration Judge and Board of Immigration Appeals.

25. On February 10, 1984, petitioners filed a Motion for Joinder of Parties to Petition for Writ of Habeas Corpus and an Application for Temporary Restraining Order. The motion alleged that joinder was appropriate due to the existence of

common questions of law and fact between petitioner Montero's case and the cases of the other six petitioners. It was set for hearing on February 13, 1984.

26. On February 13, 1984, the Court was informed by petitioner's counsel that just minutes prior to the commencement of the hearing, the District Director had denied the six petitioners' application for stay.

27. At the February 13, 1984 hearing this Court, after having considered the moving papers and having heard arguments of counsel, ordered that all seven petitioners be joined in one action and that the seven be allowed to file their "First Amended Petition for Writ of Habeas Corpus." This Court also issued an order restraining Respondent from deporting all seven petitioners pending a ruling at the February 16, 1984 hearing.

28. On February 13, 1984, petitioners filed their First Amended Petition for Writ of Habeas Corpus.

29. On February 16, 1984, the Court held a hearing on the First Amended Petition for Writ of Habeas Corpus.

To the extent that any of the following Conclusions of Law are deemed to be Findings of Fact, they are incorporated herein by reference.

CONCLUSIONS OF LAW

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated herein by reference.

1. Pursuant to § 106(a)(9) of the Immigration and Nationality Act (hereinafter INA), 8 U.S.C. 1105(a)(9); any

alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

2. A District Court has habeas corpus jurisdiction when an order of deportation has become administratively final, even though the subject of the deportation order is not yet physically in custody. Flores v. INS, 524 F.2d 627, 629 (9th Cir. 1975).

3. Petitioner Montero was in INS custody at the time she filed her Petition for Writ of Habeas Corpus and Application for Temporary Restraining Order with this Court on January 31, 1984. The order of deportation against her and the remaining six petitioners became administratively final on July 18, 1983 when their former attorney waived their right to appeal to the Board of Immigration Appeals. Although the six remaining petitioners were not in INS custody when they filed their First Amended Petition for Writ of Habeas Corpus on February 13, 1984, notices to surrender for deportation on February 14, 1984 had been issued. Under the above circumstances this court has jurisdiction to consider petitioners' habeas corpus petition.

4. The District Director is empowered pursuant to 8 C.F.R. § 243.4 to grant a stay of deportation in the exercise of discretion. Denial of a stay request to the District Director is not appealable. Id.

5. An Immigration Judge may reopen any case in which he or she has made a decision and may stay deportation pending his or her determination of a motion to reopen, the filing of which does not automatically serve to stay the execution of an outstanding order of deportation. 8 C.F.R. § 242.22.

6. The Board of Immigration Appeals has the power to review all decisions of the Immigration Judge, including a denial of a motion for stay, made in conjunction with a motion to reopen. 8 C.F.R. § 3.1(b)(2).

7. Stay denials may be reviewed by a district court for abuse of discretion. Sotelo Mondragon v. Ilchert, 653 F.2d 1254, 1256 (9th Cir. 1980).

8. Petitioners had exhausted their administrative remedies, as required by 28 U.S.C. § 2254, prior to filing their petitions for writ of habeas corpus by filing applications for stays with the District Director which in the case of Montero was denied on January 30, 1984 and in the cases of the six other petitioners were denied on February 13, 1984.

9. A denial of a request to stay deportation by a district director or an immigration judge must be noticed to the applicant in writing and must include "specific reasons" for the denial. 8 C.F.R. Sections 103.3(a), 243.4 (1982).

10. Denial of discretionary relief by the INS is an abuse of discretion if the decision does not include a rational explanation, Wong Wing Hang v. INS, 360 F.2d 715, 719 (2nd Cir. 1966), or does not rest on a reasonable foundation. 2 Gordon and Rosenfield, Immigration Law & Procedure, at p. 8-132 (1984).

11. There is also an abuse of discretion if the entity exercising its discretion fails to fully consider the relevant facts. See Mejia-Carrillo v. United States INS, 656 F.2d 520, 522 (9th Cir. 1981). Reasons must be given which show that the entity has properly considered the facts which bear on its decision. Id.

12. For the purposes of determining whether the District Director, Immigration Judge or Board of Immigration Appeals abused their discretion in ruling on a request for stay filed in conjunction with a motion to reopen, the facts as stated in the affidavits included as part of the motion to reopen are to be accepted as true. Reyes v. INS, 673 F.2d 1087, 1090 (9th Cir. 1982). The court explained:

> "Since motions to reopen are decided without benefit of a hearing, common notions of fair play and substantial justice generally require that the Board accepts as true the facts stated in an alien's affidavits in ruling on his or her motion." Id.

13. Constitutional due process requirements in the deportation context are satisfied by a full and fair deportation hearing. Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977). Incompetent and ineffective assistance of counsel can preclude a fair hearing and thus constitute a denial of due process. See Paul v. INS, 521 F.2d 194 (5th Cir. 1975).

14. The affidavits submitted with petitioners' motions to reopen, including the affidavits of legal experts, taken as true, made a strong showing of denial of due process due to ineffective assistance of counsel. The alleged misrepresentations by petitioners' former attorney, his lack of adequate preparation, his failure to bring the expected motion to suppress, and the other alleged defects in his representation would, if true, constitute evidence of ineffectiveness of counsel that may have affected the outcome of the deportation hearing to the prejudice of petitioners. As a result, the affidavits provided a proper basis for the Immigration Judge to consider the motions to

reopen. See 8 C.F.R. §§ 103.5; 242.22; Villena v. INS, 622 F.2d 1352, 1358-59 (9th Cir. 1980).

15. However, since a departure from this country by an alien during the pendency of his or her motion to reopen may constitute a withdrawal of such a motion, see 8 C.F.R. 3.2, the right to reopen would be essentially meaningless unless petitioners were granted a stay of deportation pending a ruling on their motions to reopen.

16. The reasons given by the District Director and the Immigration Judge for denying the stay do not sufficiently address the affidavits of petitioners and their legal experts submitted with the motions to reopen. The reasons do not constitute adequate grounds for denying the stays while substantive motions were pending and deportation was imminent.

17. Accordingly, the District Director, the Immigration Judge and the Board of Immigration Appeals, abused their discretion by precluding meaningful consideration of the motions to reopen by failing to grant the requested stays of deportation.

18. As the Court ordered on February 16, 1984, the First Amended Petition for Writ of Habeas Corpus is granted and the deportation of petitioners is enjoined pending determination of their motions to reopen by the Immigration Judge and the Board of Immigration Appeals.

IT IS SO ORDERED.

DATED: September 6, 1984

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

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Attorneys for Respondents

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

OFFICE OF THE IMMIGRATION JUDGE

SAN FRANCISCO, CALIFORNIA

In the Matter of:	
	FILE NO.
	FILE NO.
Respondents.	FILE NO.
	MOTION TO SUPPRESS AND EXCLUDE EVIDENCE; MEMORANDUM OF POINTS AND AUTHORITIES; AFFIDAVITS IN SUPPORT THEREOF.

The Respondents in the above matter move for the suppression and exclusion of all evidence, physical and testimonial, obtained or derived from or through or as a result of an unlawful detention, arrest, interrogation, search and seizure which occurred on or about January 4, 1984 at their home and at the INS District Office , 630 Sansome Street, San Francisco, California.

Specifically, Respondents move for the suppression and exclusion of the following:

A. INS forms I-213, I-214 or any other statements or forms completed from information that may have been given by the Respondents or forms signed by the Respondents on or about January 4, 1984.

B. Any and all other property, papers, information or testimony obtained or taken from or pertaining to Respondents on or about January 4, 1984 by agents of INS, or obtained from INS files, or any other source as a fruit of the unlawful search and seizure and subsequent arrest and interrogation of Respondents that occurred on January 4, 1984.

In support of this Motion, Respondents say:

1. The warrantless detention and arrest of Respondents at their home and the warrantless seizure of evidence thereby obtained violated their Fourth Amendment rights to be free from unreasonable searches and seizures.

a. The protections of the Fourth Amendment apply to all persons within the United States and limit the powers of INS agents and officers to act under 8 U.S.C. § 1357. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). The Fourth Amendment specifically protects the rights of people to be secure in their "persons, houses, papers and effects" against unreasonable searches and seizures. (4th Amend., U.S. Constitution, emphasis added). The Courts have insisted

on strict adherence to the requirement of a judicially approved warrant for searches of the home, absent exigent circumstances. Payton v. New York, 445 U.S. 573, 585 (1980), Steagald v. United States, 101 S.Ct. 1642, 1647 (1981); Vale v. Louisiana, 399 U.S. 30, 33-44 (1970).

b. There are only two exceptions to the requirement of obtaining a search warrant to enter a home. The first occurs when consent is given. Schneckloth v. Bustamonte, 412 U.S. 218(1973). No such consent was given in the instant case. The second exception arises when exigent circumstances make it impossible for the officers to obtain prior approval of a magistrate. Vale v. Louisiana, 399 U.S. 30 (1970), Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), modified 548 F.2d 715 (7th Cir. 1977). There is no evidence that Respondents were about to move from their home or otherwise flee, nor that INS officers could not have applied for a warrant before entering the Respondents' home.

c. The Supreme Court recently held that the Fourth Amendement exclusionary rule does not apply in deportation cases. INS v. Lopez-Mendoza, __U.S.__, 82 L Ed.2d 778,(1984). However, the Court did not upset the rule that "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness" were still subject to suppression motions. INS v. Lopez-Mendoza, supra.; Matter of Toro, 17 I & N, Dec. 340 (BIA 1980). See also Ex parte Jackson, 263 F.110 (D.Mont.1920); Matter of Cordova, (A21 095 659, BIA 1980). The uninvited entry into Respondents' home and bedroom early in the morning and the ransacking

of her home constitute a most egregious violation. Matter of Cordova, supra.

Respondents complain that any and all statements allegedly made by them to any and all agents of INS on or about January 4, 1984, and any and all questions allegedly answered or responded to, or information allegedly offered or given by them on those dates, whether written or oral, and all property seized or taken, or physical or docmentary evidence given, discovered or obtained from them or from any other source, whether in the possession of Respondents or INS or any other source, is tainted by the above violations of law. As such, all such unlawfully obtained evidence must be suppressed and excluded. Wong Sun v. United States, 371 U.S. 471 (1963).

2. The detention, arrest and interrogation of Respondents at their home and later at the INS office was conducted in violation of 8 U.S.C. § 1357(a)(2) and (4) and 8 C.F.R. § 287.3, as amended effective March 16, 1979 (Federal Register Vol. 44, No. 16, 3/16/79) and 8 C.F.R. § 292.5 and § 242.2 in that:

a. No warrant was obtained for the arrest of Respondents pursuant to 8 U.S.C. § 1357(a)(2) and (4), although there was no reason to believe that Respondents would escape if a warrant were applied for. 8 U.S.C. § 1357 (a)(2) and (4).

b. Having made the determination to arrest Respondents and institute deporation proceedings, INS agents did not properly inform Respondents of the reasons for their arrest, nor advise them of their right to counsel, to remain silent, that statements they made would be used against them, and that a decision as to the amount of bond required for their release would be made within 24 hours, pursuant to 8 C.F.R. § 287.3 and

§ 242.2.

Respondents in deportation proceedings have the right to due process of law. Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950). Compliance with the very statutes promulgated to safeguard these rights to due process is essential. These statutes and regulations secure the minimum requirements of due process to be afforded an alien, and constitute the minimum standard to which Congress and INS holds its officers in the conduct of their duties. An agency cannot fail to abide by its own regulations and governing statutes and where such failure tends to prejudice the rights of a respondent in a proceeding before that agency, evidence so obtained cannot be used. Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Pacific Molasses v. F.T.C., 256 F.2d 387 (5th Cir. 1966); U.S. ex. rel. Accardi v. Schaughnessy, 347 U.S. 260, 267 (1954); U.S. v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979).

3. The interrogation of Respondents at the INS office in San Francisco was tainted by the manner in which Respondents' detention and arrest was carried out, and any statements, documents or other evidence produced as a result thereof must be suppressed as involuntarily made and as "fruit of the poisonous tree." Wong Sun v. U.S., supra.:

a. Any statements taken subsequent to an illegal search or seizure are considered products of that unlawful act and are therefore suppressible unless the circumstances surrounding the taking of the statements are such as to "purge the primary taint" of the illegal search and seizure. Wong Sun v. United States, supra. Factors to be taken into account in determining whether the primary taint has been purged include "the temporal proximity of arrest and the confession, the presence of intervening circumstances and the purpose of the flagrancy

of the official misconduct." Brown v. Illinois, 422 U.S. 599 (1975). The detention of Respondents at their home and their subsequent interrogation at INS offices constituted part of a single action, contiguous in time, where the "flagrancy of official misconduct" (Brown, supra.) by INS agents at the home had direct bearing on the Respondents' state of mind at the subsequent interrogation. Thus any statements given were not sufficiently voluntary to purge the initial taint. Wong Sun, supra.; Brown, supra.

4. All statements allegedly made by Respondents during their interrogation and any and all physical evidence acquired regarding Respondents was obtained in a manner inconsistent with the right against self-incrimination and the right to due process guaranteed by the Fifth Amendment, in that:

a. Any evidence that may have been given was given to appease Respondents' accusers, and to avoid being incarcerated, thus was given involuntarily.

b. Any evidence that may have been given was not given pursuant to proper explanation or implementation of Respondents' rights under 8 C.F.R. 287.3, the section designed specifically to assure that any statements made will be voluntarily given, or 8 C.F.R. Section 292.5 and C.F.R. 242.2, and if given, was given following deprivation of Respondents' right to remain silent.

c. INS agents violated 8 C.F.R. § 287.3 when the arresting officers examined Respondents in preparing for the I-213.

d. Any evidence given was obtained as a result of the coercive atmosphere created by INS agents during the search and

and seizure at their house and interrogation of Respondents at INS. One of the Respondents had been frightened and intimidated by the presence of INS agents in her bedroom as she awoke, and the other two Respondents had been frightened by the sight of strange men ransacking their house without any known cause. They had been summarily accused of committing a crime, with no explanation, and had been packed into a car and driven off to a custodial interrogation. One of the Respondents is a minor, another the mother of this and another minor child who was also detained. None had ever had any contact with the law. This combination of circumstances was more than sufficient to create a coercive situation, where any statement given was involuntary.

It is well established that an alien may not be deported on the basis of evidence coerced from him. The Fifth Amendment requires that any statement must be voluntarily given. Bong Youn Choy v. Barber, 279 F.2d 642, 646 (9th Cir. 1960); Valeros v. INS, 387 F.2d 921 (7th Cir. 1967); Navia-Duran v. INS, 568 F.2d 863 (1st Cir. 1977); Matter of R- 4 I & N Dec. 720 (BIA 1952). Tushnizi v. INS 585 F.2d 781 (5th Cir. 1978), Matter of Carrillo, 17 I & N Dec. 30 (BIA 1979). Further, if a waiver of due process rights is alleged, "whether in a criminal or civil context, there must be a voluntary, intelligent waiver of a known right." Brewer v. Williams, 430 U.S. 387 (1977). Moreover, evidence obtained in violation of due process standards of fundamental fairness can lead to suppression of that evidence. Matter of Garcia, 17 I & N 319 (BIA 1980); Matter of Garcia-Flores, 17 I & N 325 (BIA 1980); Matter of Toro, supra. Furthermore, evidence obtained in violation of INS regulations 8 C.F.R. 287.3 may also be suppressed. Matter of Garcia-Flores, supra.

5. When arrest of a respondent has been made by an INS officer without a warrant for the purpose of instituting deportation proceedings, he/she must be given Miranda-style warnings of the rights and guarantees accorded in INS' own regulations. 8 C.F.R. § 242(a), 8 C.F.R. 287.3. Further, according to INS regulations, once a respondent has requested an attorney, questioning must cease until the attorney is present. 8 C.F.R. § 292.5. Statements made in response to questions posed after an attorney has been requested must be suppressed. Matter of Garcia, supra.

When an individual indicates in any matter that she or he wishes to speak with an attorney, questioning must cease. Miranda v. Arizona, 384 U.S. 436 (1966). See also Maglio v. Jago, 580 F.2d 282 (6th Cir. 1978). Even an indirect indication that an individual wants an attorney present compels an immediate cessation of the interrogation until an attorney is in fact present. See People v. Ireland, 70 Cal. 2d 522, 535-536 (1969); People v. Enriquez, 19 Cal. 3d 221 (1977). In the instant case, Respondent indicated that she wished to speak to an attorney and first called to seek assistance upon first hearing that INS agents were in her home. She again made phone calls to obtain an attorney upon arrival at the INS office, and was told that an attorney had been obtained on her behalf and would arrive soon. However, the INS agents did not await the presence of her attorney and continued questioning. Any statement given after this point must be suppressed. Matter of Garcia, supra.; Miranda v. Arizona, supra.

6. Judicial interpretation of the Fifth Amendment protections require Miranda warnings when custodial interrogation is likely to elicit an incriminating response. United States v. Mata-Abundiz, 717 F.2d 1277 (9th Cir. 1983). The custodial interrogation need not be in the context of a criminal investigation for this requirement to attach. Mathis v. United States, 391 U.S. 1 (1968). In Mathis, the court held that

incriminating statements given by a jailed defendant to an Internal Revenue Service agent during a routine tax investigation were inadmissable because Miranda warnings were not administered. Ibid. The Ninth Circuit Court of Appeals found in Mata-Abundiz that the INS also must comply with Miranda warnings when an incriminating response is likely. U.S. v. Mata-Abundiz, supra. The court determined that the ease of evading constitutional requirements by using civil labels was too facile. The court in Mata-Abundiz held that the questioning by INS investigators had to be preceded by Miranda warnings because the response being elicited -- admission of alienage -- constituted an element of a crime.

In this case, Respondents were repeatedly accused of possessing fraudulent visas. Fraud and misuse of entry documents is a felony under 18 U.S.C. 1546.

Since the questioning of the Respondents had potential criminal repercussions and was likely to elicit an incriminatory response, Miranda warnings were in order. Mata-Abundiz, supra; Miranda v. Arizona 384 U.S. 436 (1966).

WHEREFORE, Respondents say that all of the aforementioned evidence, testimonial, tangible, or produced from any other source, having been obtained in violation of their rights, is tainted and inadmissible, and moves this Immigration Court to suppress all such illegally obtained evidence and to terminate this proceeding.

Dated: November 14, 1984

Respectfully submitted,

JEFF T. APPLEMAN, Attorney for Respondents

MARC VAN DER HOUT, Attorney for Respondents

County of San Mateo)
) ss. AFFIDAVIT OF
State of California)

I, Diana Verano, being duly sworn, do hereby depose and say:

This affidavit is being submitted in support of the motion to suppress evidence filed in my immigration case.

I was in bed on the morning of January 4, 1984, at about 7:45. My son burst in the door and said two Immigration agents were there and wanted to see our passports. I saw one of the agents upstairs behind my son. I told my son to tell them to wait while I got dressed. I called my husband in Los Angeles and told him what was h appening, and he said he would get someone to help. Before I could get dressed one of the agents knocked and said "[illegible]". I answered that he should wait a minute, but he came right into my room without waiting. My daughter and I were still in bed and very frightened at the presence of a strange man in our room. He began searching the closets, under the bed, out the window and all around the room. I got out of bed, put a robe and asked him what he was looking for. At first he ignored me and searched my children's rooms. I asked him again, and he said it was just standard procedure.

I came downstairs, and the short agent said he needed our passports and told me to get them. I went back upstairs and got them. Since I was terribly shaken and frightened from the ransacking of our house, I followed his orders. The short one looked at them and immediately said our visas were fake. The tall agent made a phone call on our phone. He then said he would

have to take us all downtown. I asked if my little girl could eat breakfast, but he said there was no time, so she just had a glass of milk. We were all jammed into the back seat of their car.

When we got to INS we talked to a Mr. [illegible]. He glanced at our passports and said the visas were fake. Then the agents started asking us questions. The first thing I did was to ask to make a phone call to try to get help. I called my office, but my boss wasn't in yet. Then I called my husband's friend who was going to send us a lawyer. I told them a lawyer would be coming. The lawyer didn't get there until noon, but the agents kept on interrogating us without waitif for her. They asked us personal questions and took away our social security cards. We were all very upset about our house having been invaded like that so early in the morning, and about having to go with the agents. I was not sure what was going to happen to us, or what we should do. I was terribly freightened and answered their questions.

At about noon the attorney came and we were again interrogated. We were given some sandwiches for lunch and told we would have to stay there until bail was posted. Then a little later, they told us we would have to stay in jail, that my son would have to go to one jail, I to another and the two girls to another. I thought I was going to faint at that point. The girls were hysterical and my son had tears in his eyes. Finally, bail was posted and we were able to leave. -

Subscribed and sworn to
before me this 12th day
of November 1984 at
Redwood City, California.

Notary Public

Marc Van Der Hout
915 Middlefield Road, Suite 2
Redwood City, CA 94063

Attorney for Respondent

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

SAN FRANCISCO, CALIFORNIA

In The Matter Of:	FILE NO.
In Deportation Proceedings.	RESPONDENT'S RIGHT TO ASSERT THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION AT HIS DEPORTATION PROCEEDING

I.

THE FIFTH AMENDMENT PRIVILEGE EXTENDS TO CIVIL PROCEEDINGS

It is well established that the 5th Amendment protection against self incrimination applies to civil proceedgins. Matter of Carrillo, 17 I&N 30 (BIA 1979); Tashini v. INS, 585 F.2d 781 (5th Cir., 1978); Chavez-Raya v. INS, 519 F.2d 39 (7th Cir., 1975). The 5th Amendment "not only protects the individual against being voluntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in a future criminal proceeding." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). It is no less intolerable to force a Respondent in a deportation hearing to surrender his constitutional right against self incrimination than it is to place a criminal defendant in the same irresolvable dilemma. Any construction of the 5th Amendment which limits its use to only criminal cases would reduce the privilege to an empty formality.

The refusal to testify in reliance on the 5th Amendment privilege may not be construed against the Respondent. When the prosecution has introduced no prima facie showing of proof, the witness' silence cannot supply the missing proof. Ocon v. Del Guercio, 237 F.2d 177 (9th Cir., 1956). It is impermissable to draw inferences from the silence of an alien on a question to which he has asserted a valid 5th Amendment claim. Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Flor., 1980).

The Respondents in the instant case may invoke the 5th Amendment in their deportation proceeding. They may refuse to testify in response to allegations regarding name, alienage, or time, place and manner of entry to the United States, if any. Furthermore, their refusal to testify may not be used against them.

II.
THE RESPONDENTS NEED NOT EXPLAIN THE BASIS OF THE FIFTH AMENDMENT CLAIM AGAINST SELF INCRIMINATION

A witness may properly invoke the privilege against self incrimination when he "reasonably apprehends a risk of self incrimination, though no criminal charges are pending against him..." Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1087 (5th Cir., 1979). This is true even if the risk of prosecution is remote. Wehling, supra. In order for the privilege to be sustained, it need only be understood "from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it can't be answered might be dangerous because an injurious disclosure would result." Hoffman v. United States., 341 U.S. 479, 486 (1951). The 5th Amendment privilege would be completely undermined if the Respondent were to be compelled to state facts which were self incriminating. The privilege extends beyond directly incriminating evidence to information forming a link in a chain of evidence. Blau v. United States, 340 U.S. 159 (1950). When a witness can show any possibility of prosecution which is more than fanciful, he has demonstrated a reasonable fear of prosecution sufficient to meet the constitutional muster. In Re Corrugated Container Anti Trust Litigation, 620 F.2d 1086 (5th Cir., 1980) cert. den. 449 U.S. 1102. The 5th Amendment standards established in Hoffman, supra, and in current criminal litigation apply with equal force and effect in deportation proceedings. Valeros v. INS, 387 F.2d 921 (7th Cir., 1967). Cabral-Avila v. INS, 582 F.2d 957 (9th Cir., 1968).

The Respondent in the instant case need not explain the basis of his decision to invoke his privilege against self incrimination. It is clear from the facts of his cases and the charges against him that he faces the possibility of criminal liability. Furthermore, the Respondent need not explain the basis of his 5th Amendment claims.

III.

THE RESPONDENTS IN A DEPORTATION PROCEEDING MAY FACE CRIMINAL PENALTIES UNDER TITLE 8 OF U.S.C.

Section 275 of the Act, 8 U.S.C. 1325 states that an alien who enters the United States without inspection has committed a federal criminal offense. Criminal prosecution may be initiated and penalties imposed under this statute. Arizona v. Manypenny, 451 U.S. 232 (1981); Garcia-Trigo v. United States, 671 F.2d 147 (5th Cir. 1982).

An alien may be criminally prosecuted for failure to comply with the registration requirements of Chapter 7 of the Immigration and Nationality Act. Section 262 of the Act, 8 U.S.C. 1302 provides that every alien 14 years or older who has not been previously registered or fingerprinted and who remains in the United States 30 days or longer shall register. Section 265 of the Act, 8 U.S.C. 1305, as amended by Section 11 P.L. 97-116, 95 Stat. 1161., mandates that each alien is required to be registered within the United States, must notify the Attorney General in writing of each change of address within 10 days of the change. Prior to the 1981 amendment, this section required every alien to annually notify the Attorney General of his current address. However, in the interest of efficiency, Congress eliminated the annual notification requirement. Section 262 of the Act, 8 U.S.C. § 1302 and Section 265, 8 U.S.C. § 1305 specify quite clearly that every alien must comply with the terms of the statutes. The language of the statutes, on its face, is inclusive of all aliens within the territorial boundaries of the United States. Aliens who entered the United States illegally are not exempted from the terms of the statutes. Although Section 263 of the Act, 8 U.S.C. § 1303 states provisions governing the registration of five groups of aliens, those aliens who entered the United States illegally do not fall within the five groups specifically described in Section 263. Thus, both legal and illegal aliens are subject to criminal prosecution under

8 U.S.C. § 1302 and § 1305.

Section 266 of the Act, 8 U.S.C. § 1306 enumerates the criminal penalties which may be leveled against an alien who fails to comply with the above mentioned statutes. A fine of up to $1,000.00 and/or 6 months imprisonment may be imposed.

Title 19 U.S.C. § 3282 prohibits the institution of federal criminal proceeding 5 years after the commission of the offense "except as otherwise expressly provided by law". Criminal actions are to be liberally construed in favor of repose. Toussie v. U.S., 397 U.S. 112 (1970). However, the failure to register under the INA is a continuing offense and it has been held that prosecution is not barred by the statute of limitations as provided in 19 U.S.C. § 3282. In U.S. v. Franklin, 188 F.2d 182 (7th Cir., 1951), the court held that the violation of 8 U.S.C. § 1302 as a "continuing willful violation of the Act" and the defendant's plea invoking the statute of limitations had no merit. Ibid at 187. The court in U.S. v. Ginn, 222 F.2d 289 (3rd Cir. 1955), found the statute of limitations imposed by 19 U.S.C. § 3282 inapplicable to 8 U.S.C. § 1302 and 8 U.S.C. § 1305. The court found that the purpose of the registration provisions of the statute is to protect the national security interest of the United States in time of peace as well as time of war. Ibid at 290. The purpose of the statute is effectuated only if the failure to register is construed as a continuing offense. Thus, the violation continues as long as the alien fails to register and/or fails to provide the INS notification of an address change.

IV.
THE CRIMINAL PENALTIES WHICH ATTACH TO ENTRY INTO THE UNITED STATES WITHOUT INSPECTION UNDER TITLE 19 OF THE USC APPLY WITH EQUAL FORCE TO ALIENS AND UNITED STATES CITIZENS

Any person who arrives in the United States from a contingous country must report his arrival to a customs officer at the port of his arrival

or port of entry. In Title 19 Section 1459, the Code states that upon entry to the United States, the person in charge of a vehicle shall report to the customs officer and present the merchandise within the vehicle for inspection. The failure to report to a customs officer as specified by Title Section 1459 carries penalties of $100.00 for each offense. Furthermore, 19 U.S.C. Section 1460 states that if any vehicle not so reported carries any passenger, the person in charge of the vehicle shall be fined $500.00 for each passenger so carried.

Section 1461 of Title 19 requires that all merchandise and baggage brought in from any continguous country shall be unladen in the presence of and be inspected by a customs officer at the first port of arrival. The failure to comply with the mandates of 19 U.S.C. Section 1461 may result in the forfeiture of the merchandise or baggage (19 U.S.C. Section 1462) or a fine of up to $1,000.00 and/or imprisonment for not more than five years (19 U.S.C. Section 1464).

Sections 1459 and Section 1461 of Title 19 provide that all individuals seeking entry into the United states whether they arrive in a vehicle or on foot, must submit to inspection by a United States customs officer.

V.

THE INVOCATION OF THE 5TH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION CANNOT RESULT IN A DENIAL OF DISCRETIONARY RELIEF

The 5th Amendment claim of privilege and the refusal to answer questions cannot in itself be a basis for the denial of discretionary relief. (Gordon/Rosenfield Section 71b). When the 5th Amendment privilege is invoked, official annoyance at the invocation of the constitutional claim cannot justify a resulting adverse inference. Matter of Tsang, 14 I&N 294 (1973). In Matter of Tsang, the immigration judge denied voluntary departure as a matter of discretion. The BIA held that an alien's refusal to testify

regarding his deportability on a claim of self incrimination is not a factor which should weigh against the exercise of discretion. Ibid.

Once deportability is established, the court may find that the refusal to testify makes it impossible for the alien to establish his eligibility for discretionary relief. In Kim v. Rosenberg, 363 U.S. 405 (1960), the alien applied for suspension of deportation or voluntary departure. When the alien was questioned about Communist Party membership, he claimed the 5th Amendment privilege and refused to answer. The court found that he failed to meet his burden to prove his eligiblity for the discretionary relief. Kim v. Rosenberg, supra, at p. 406. The alien must establish the qualifications necessary to obtain discretionary relief. Jimenez v. Barber, 235 F.2d 922 (9th Cir., 1956). In Matter of Marques, 15 I&N 200 (1975), the Respondent claimed the 5th Amendment privilege regarding his alleged possession of $54,000.00.

The Respondent's suspension case required evidence of extreme hardship. Since the Respondent's 5th Amendment claim foreclosed proving an element of his suspension eligibility, the BIA held he failed to meet his burden and denied the appeal.

The Respondent in the instant case invoked the 5th Amendment privilege in reasonable apprehension of the risk of self incrimination and criminal prosecution. The Respondent's refusal to answer questions is integral to the maintenance of their prima facie case of INS illegalities in search, seizure and confession procedure. In Matter of Marques, supra, the subject of the Respondent's 5th Amendment claim was directly related to establishing eligibility for discretionary relief. However, in the instant case, the Respondent's 5th Amendment claim is in no way related to evincing eligibility for discretionary relief. The Respondent's 5th Amendment claim merely furthers his constitutional right to suppress illegally obtained evidence in the

suppression phase of a deportation hearing. In the instant case, an adverse inference resulting in the denial of discretionary relief would be an arbitrary and unlawful use of the discretionary powers of the immigration judge.

The regulations governing INS procedure, Code of Federal Regulations Volume 8, provide for the alien's need for full protection and the government's need for full disclosure during a hearing for discretionary relief. The evidence presented in an effort to obtain discretionary relief may not be used to establish deportability. 8 C.F.R. Section 242.17(d) states that an application made for discretionary relief "shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability". 8 C.F.R. Section 242.17(d).

Dated: July 18, 1983

Respectfully submitted,

MARC VAN DER HOUT
Attorney for Respondent