IMMIGRATION LAW BULLETIN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS
1550 WEST EIGHTH STREET LOS ANGELES, CALIFORNIA 90017 (213) 487-2531

DEVELOPMENTS ON O'BRIEN AMENDMENT

The Appropriations Bill for the Legal Services Corporation passed the Senate on September 10, 1979, containing the following language:

> [N]one of the funds appropriated in this title may be used to carry out any activities for or on behalf of any individual who is known to be an alien in the United States in violation of the Immigration and Nationality Act or any other law, convention, or treaty of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens...

During floor debate on the Appropriations Bill, Senator Alan Cranston engaged in a colloquy with the bill's floor manager, Senator Ernest Hollings, which in part went as follows:

> SENATOR CRANSTON: It certainly cannot be the intent of Congress to substitute the subjective judgment of an individual legal services attorney as to whether a potential client is "legally" within the country for the full due process proceedings that the individual is entitled to receive under our immigration laws.

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PURPOSE OF THE NATIONAL CENTER FOR IMMIGRANTS' RIGHTS

The National Center for Immigrants Rights (NCIR) is organized to provide assistance to local field programs, eligible clients and community organizations on issues concerning immigration matters and the rights of noncitizens. Our primary emphasis is in the areas of litigation and advocacy. We assist local programs and client organizations with the identification of issues for litigation and with the implementation of litigation. We also respond to written inquiries concerning immigration law matters. In order to fully respond to such inquiries in an orderly process we urge that all questions be sent by way of letter. Emergency problems are dealt with telephonically.

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O'Brien Amendment.....

> I should like to ask the floor manager if it is his understanding as it is mine, that this provision which forbids legal assistance to individuals "known" to be in the United States in violation of immigration laws means that the individual legal services attorney must be aware that a final judicial determination as to the client's residency status has been reached and that such a final determination has actually been reached.
>
> MR. HOLLINGS: That is my understanding as well. [Emphasis added.]

The Legal Services Corporation has indicated that their interpretation of the O'Brien amendment is consistent with that expressed by Senators Cranston and Hollings.

Community organizations from throughout the United States have denounced the O'Brien amendment as an unwarranted attack on the immigrant community. The National Immigration Coalition, headed by Bert Corona, has charged that "the amendment could result in massive discrimination against Hispanic, Asian and Black persons in need of legal assistance." Various Immigration Judges have also written to Congress expressing opposition to the amendment.

The amendment will not become a permanent feature of the Legal Services Corporation Act, but instead must be voted on each year by the Appropriations Subcommittee. It should be noted that substantive amendments to an agency's authorizing act usually do not come up in an appropriations committee. These are generally initiated in an "authorizing committee." The House Subcommittee on Courts, Civil Liberties, and the Administration of Justice (of the House Judiciary Committee), chaired by Rep. Robert W. Kastenmeier (D-Wis.), will hear testimony on the O'Brien amendment on September 20 and 27, 1979, during LSC's authorizing hearings. This Subcommittee has the authority to propose an amendment to the Legal Services Corporation Act which would eliminate the O'Brien amendment.

Rep. Kastenmeier has expressed interest in taking oral and written testimony on the issue, but does not appear to be interested in pushing an amendment. If such an amendment does not come out of the House authorizing committee, it may be developed in the Senate Subcommittee on Employment, Poverty and Migratory Labor, chaired by Senator Gaylord Nelson (this is the Senate's authorizing committee for LSC).

If you have clients affected by the O'Brien amendment, you may wish to send written testimony to: Hon. Robert Kastenmeier, Chairman, House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Room 2232, Rayburn House Office Building, Washington, D.C. 20515.

For further information contact Peter Schey or Tim Barker (NCIR) (213) 487-2531 or Mark Schacht (MLAP) (800) 424-9425.

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INJUNCTION ISSUES IN HAITIAN CASE

HAITIAN REFUGEE CENTER v. CIVILETTI, (S.D. Fla. No. 79-2086-JLK): Class action complaint filed by NCIR with Legal Services of Greater Miami and Florida Rural Legal Assistance in the Southern District of Florida on May 9, 1979 for Declaratory and Injunctive Relief.

The case arises out of the accelerated mass processing of approximately 5,000 Haitian political asylum applicants by I.N.S. District Office #6 in Miami, Florida. These Haitians have been arriving in the U.S. since 1972, having fled the extremely repressive regime of "Baby Doc" Douviler. They have been arriving in small boats much like the Vietnamese boatpeople in Southeast Asia. The I.N.S. allowed these cases to accumulate over the years and then in July 1978 decided to move on them utilizing mass processing procedures naming it the "Haitian Program".

The complaint alleges 16 causes of action relating to the Service's systematic violation of regulations in the attempt to rush the Haitians through asylum and deportation hearings; deprivation of counsel by mass scheduling of asylum interviews and deportation hearings; failure to inform the Haitians of their right to counsel and remain silent before interrogation; failure to maintain prior asylum decisions; incarcerations of Haitians who asserted their Fifth Amendment right against self-incrimination.

On July 24, 1979, a temporary restraining order was issued against I.N.S. preventing the deportation of any Haitian asylum applicant pending a hearing on the merits of the preliminary injunction. The preliminary injunction hearing began on September 11, 1979. Two days of testimony was given regarding the massive violations of human rights by the government in Haiti. The hearing has been continued to mid-October 1979. Meanwhile, the temporary restraining order remains in effect.

For further information contact Peter A. Schey, NCIR, (213) 487-2531.

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ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE CHALLENGED

SAVALA v. CASTILLO, [E.D. Cal. No. F-78-173-Civ.(1978)]: This case seeks damages, declaratory, and injunctive relief from local police enforcement of immigration laws. Defendants are the City of Coalinga, designated officers thereof, and the Immigration and Naturalization Service. The suit was filed by California Rural Legal Assistance and NCIR.

The facts of the case are as follows: On July 6, 1978, plaintiffs left their homes for work in the tomato fields near the City of Coalinga. Some miles outside the city, their car developed mechanical difficulties; plaintiff Savala obtained a ride to the city while two other plaintiffs remained to repair the car. Plaintiff Savala was waiting in Coalinga for the arrival of his friends, when he was approached on the street by local police and required to produce identification. Plaintiff Savala showed the officer his driver's license, draft card and social security card. Similar documentation was requested and produced by plaintiffs Antonio and Isaias Camargo, who arrived some minutes after the initial stop of plaintiff Savala. Additionally, the Camargos produced receipts issued by I.N.S. indicating that their green cards had been lost and were in the process

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POLICE ENFORCEMENT . . . .

of being replaced. All three men were promptly handcuffed and placed in the patrol car. They were later searched and incarcerated in the city jail for approximately 32 hours. They were never booked nor afforded the procedural safeguards required during criminal detention.

The complaint alleges a pattern and practice whereby local police approach, question, and detain suspected undocumented immigrants pursuant to a continuing agreement with I.N.S. Plaintiff seeks to show that such detentions, carried out ostensibly as arrests for violation of 8 U.S.C. §§ 1325 and 1304(e), are for the sole purpose of making available such persons to federal agents for interrogations and possible initiation of administrative (deportation) proceedings. Plaintiffs further allege that defendants routinely make such detentions without probable cause to believe that a violation of any criminal statute has occurred, and that persons so detained are denied procedural safeguards normally accorded persons arrested on criminal charges, including denial of bail and failure to bring such persons before a magistrate without unnecessary delay.

The action was filed in state court, but was removed to federal court by the state defendants. Plaintiffs have moved to remand the case back to state court. This motion is pending while discovery is being completed.

For further information contact Carlos Holguin, NCIR, (213) 487-2531.

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APPEAL SEEKS EXPANSION OF § 1251(F)

CARLOS GONZALES-MORQUECHO v. I.N.S. (9th Cir. No. 78-2834): Petition for review of an order of deportation filed in the Ninth Circuit Court of Appeals, by NCIR.

Mr. Gonzalez immigrated to the United States through the wife as the immediate relative of a United States citizen. [8 U.S.C. § 1151(b).] However, at his visa interview in 1974, he failed to inform the consular officer that he was previously married to a Mexican citizen and had not finalized his divorce from her. The Immigration Service discovered this ommission in 1977 and initiated deportation proceedings against him even though he had at that time finalized the divorce proceedings, remarried his U.S. citizen wife and they had a child born here in the U.S.

The deportation charge was under 8 U.S.C. § 1251(a)(1), that Mr. Gonzalez was excludable at the time of his entry into the United States under (1) § 1182(a)(14), lack of a valid labor certification or exempt therefrom, (2) § 1182(a)(19), securing a visa by fraud and (3) § 1182(a)(20), lack of a valid visa. The defense under § 1251(f) was asserted which provides for the mandatory waiver of a deportation charge based upon procurement by fraud of a visa if the respondent has a United States citizen or permanent resident spouse, parent, or child.

The Immigration Judge and the Board of Immigration Appeals held that while § 1251(f) will waive the §§ 1182(a)(19) and (20) charges, it will not reach the § 1182(a)(14) charge. [Matter of Gonzalez, 15 I.N. ____ (I.D. 2662) (BIA 1978).] The case is now pending before the Court of Appeals on a petition for rehearing en banc. In essence we

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COURT CHALLENGE TO DELAYS IN VISA APPLICATION PROCESSING

VELAZCO v. CASTILLO, [C.D. Cal. No. 77-4271-ALS (1977)]: This action challenges lengthy delays in processing form I-130 immigrant visa petitions submitted on behalf of the immediate relatives of United States citizens.

When the action was filed, delays of up to 24 months were experienced by persons submitting petitions to many of the busier I.N.S. district offices. The beneficiaries of longstanding petitions were either forced to await a decision outside the United States, or if physically present in the U.S., were subject to all the hardships and disabilities of an undocumented alien.

Plaintiffs are thirty United States citizens and the beneficiaries of delayed I-130 petitions. Their complaint relies on internal I.N.S. Operations Instructions, the Administrative Procedure Act, the Immigration & Nationality Act, and due process clause of the Fifth Amendment of the United States Constitution. This suit seeks an order directing I.N.S. to reduce the time it takes to process I-130 petitions and to enjoin the deportation of beneficiaries of long standing petitions.

Defendants answered alleging, inter alia, that the delays in question are unavoidable and are caused by insufficient personnel.

Plaintiffs' motion for class certification was denied on March 22, 1979. The district court ruled that plaintiffs had not suffered a common harm from defendant's delays.

More recently, processing time for relative visa petitions has been reduced substantially, particularly those of the once heavily backlogged Los Angeles district office. In view of the generally unfavorable view the district court has taken toward plaintiff's case, we have decided that pressing a decision while delay times have been voluntarily reduced would be tactically unsound.

Nonetheless, all issues have been extensively briefed and discovery has been completed. We continue to monitor delay times and are prepared to move for summary judgment should unreasonably large backlogs in petition adjudications re-develop. We are presently involved in negotiations in which we have proposed a system that will require I.N.S. to report delays in processing to us on a monthly basis. This would allow us to closely monitor any future backlogs that may develop.

For further information contact Carlos Holguin, NCIR (213) 487-2531.

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IMMIGRATION LAW: POWER TO THE PARALEGAL

Most paralegals have, at one time or another, asked the question: How much can I really do as a paralegal? The drop-out rate among paralegals reflects the pessimism that seems to overcome most paralegals who have seriously evaluated their role; move on to law school or leave legal work all together. At least in immigration law, I have found it does not have to be that way.

Buried deep in Volume 8 of the Code of Federal Regulations is section 292. This section allows for the "certification" of "non-profit, religious, charitable, social service or similar organizations" to practice immigration law. Once certified, the organization may

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POWER TO THE PARALEGAL....

apply on behalf of its paralegals. They become accredited by showing their good moral character and exhibiting knowledge of immigration law. Upon accreditation the paralegal has the same powers as an attorney to represent clients before the Immigration Service. While there is no set method for demonstrating the experience or knowledge of a paralegal, an accepted practice in many I.N.S. offices requires submission of a resume followed by an interview covering basic immigration procedures. About four weeks of studying, say an hour or two a day, should be enough to prepare for this interview.

The accreditation allows you to represent clients in administrative hearings. You can assist people in visa applications, deportation and exclusion hearings, and practice before the Immigration Board of Appeals.

The Immigration Service shipped out over 1,000,000 people in 1978, the highest annual total in history. As a result, immigration has become one of the most burning long range issues faced by the world today. And even though the courts keep insisting that deportation is not a "punishment", the result of the deportation hearing can often split up a family, cause the loss of a job, and all that makes life worth living. I.N.S. does very little to protect peoples' rights while they go through the deportation process. In fact, I.N.S. agents convince most people they arrest that they should waive their right to a deportation hearing. I.N.S. agents frequently tell people that they will have to stay in jail many months if they want to fight their cases.

The paralegal can become involved in this process. He can both prepare for the hearing and represent these persons in deportation hearings as well as investigate the facts and interview potential witnesses. A paralegal can also do research on the legal issues involved in the case. It is in the area of deportation defense work, that an accredited paralegal can move beyond the usual work done by paralegals and can get into real trial practice. At the hearing, the paralegal can deal with bail questions, search and seizure issues, cross-examination of government witnesses, presenting evidence, and developing oral argument.

As a paralegal, I represent many people in deportation proceedings. These people would have no legal help at all if I was not there representing them. Many of our clients would have been wrongfully deported if we had not been there to help out. Paralegals should move for certification and join the effort to defend poor people. A paralegal can make the difference!

[Article written by Larry Kleinman, Accredited Paralegal with the Willamette Valley Immigration Project. Larry has done many deportation hearings and has written many appeals to the Board of Immigration Appeals.]

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APPEAL . . . .

are seeking a reversal of the Ninth Circuit decision in Cacho v. I.N.S. 547 F.2d 1057 (9th Cir. 1976) wherein it was decided that § 1251(f) would not extend its provisions to a § 1182(a)(14) charge.

For further information contact Tim Barker, NCIR, (213) 487-2531.

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FEDERAL REGISTER REPORT

SUBMISSION OF TRANSLATED DOCUMENTS, 44 FR 52169 (September 7, 1979) Final Rule, 8 C.F.R. § 103.2(b)(1). Effective September 7, 1979.

This new regulation limits the necessity to attach verbatim English translations, of foreign documents submitted to INS, to instances where instructions on the relevant petition or application is so required.

FALSE INFORMATION & CRIMINAL ACTIVITY BY NONIMMIGRANTS, 44 FR 46853 (August 9, 1979) Proposed Rule, 8 C.F.R. § 214.1.

This proposed new rule would require two conditions for admission and continued status of nonimmigrants: (1) Obeying laws concerning criminal conduct which may be punished by imprisonment for one year or more; and (2) Requiring that the applicant provide complete and accurate information to I.N.S. when submitting an application for change in any of the conditions of the nonimmigrant visa (e.g. an application to change schools, an application for work authorization, etc.).

EMPLOYMENT AUTHORIZATION, 44 FR 43480 (July 25, 1979) Proposed Rule, 8 C.F.R. § 109.1.

The regulation is proposed to codify the procedures and criteria for granting employment authorization to undocumented persons in the United States. Under the present regulations, certain nonimmigrants may apply for employment authorization as provided by 8 C.F.R. §§ 214.1 and 214.2. Under proposed rule, persons not maintaining lawful nonimmigrant status may apply for employment authorization if the applicant (1) establishes a prima facie claim of entitlement to a benefit which, if granted, would make the persons eligible to remain indefinitely; or (2) has been granted permission by INS to remain in the U.S. for an extended period of time. The only criteria for applicants under these two subsections is that s/he must establish that s/he is unable to financially maintain him/herself during the period of administrative processing or period permitted to remain in the United States by I.N.S.

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DEPORTATION HEARING OVERRULED BECAUSE OF LACK OF COUNSEL

PARTIBLE v. I.N.S., 600 F.2d 1094 (5th Cir. 1979): The petitioner entered the United States as an H-1 nonimmigrant professional nurse pursuant to 8 U.S.C. § 1101(a)(15)(H)(i). However, her status was questioned when the Immigration and Naturalization Service (INS) found that state law did not allow full performance of her duties until she was licensed as a registered nurse. I.N.S. initiated a deportation hearing at which the petitioner waived her right to counsel and was found deportable. Nevertheless, she was given a voluntary departure allowing her to remain in the United States until after the next licensing examination. Whereupon the Immigration Judge denied her motion to reopen the deportation proceedings.

The Court of Appeals was persuaded by evidence indicating I.N.S. excercised a lenient policy in these situtations. Generally, I.N.S. would grant voluntary departures in six month increments for up to three years to allow several opportunities to foreign nurses to pass the State licensing examination. Additionally, the court was convinced that the out-

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NATIONAL CENTER. . . .

We also maintain a brief and legal memoranda bank which is topically indexed for easy use by visitors and Center staff. Should you need a brief or legal memorandum on a particular topic, please write to us and give a short description of your case. This will allow us to locate research closely related to the issues with which you are confronted.

By means of this Immigration Law Bulletin, the Center will provide current information to legal services staff, eligible clients, and client organizations concerning rights. We will not (and could not) replace such valuable resources as Interpreter Releases or the Guild Immigration Newsletter (both of which we urge people to receive). Instead, we will provide information unique to the plight of indigent noncitizens residing in the United States.

We encourage contributions to this Bulletin. Please call José Acosta, NCIR, (213) 487-2531.

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RIGHT TO COUNSEL . . . .

come of the proceedings might have been different if counsel had been present to assist in articulating the issues raised in this complex situation.

The Court of Appeals held that it was abuse of discretion to deny the motion to reopen where petitioner's waiver of her right to counsel was deemed to be ineffective because the Immigration Judge did not inform her of the "complexity of her dilemma."

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FOURTH AMENDMENT EXCLUSIONARY RULE HELD UNAVAILABLE IN DEPORTATION PROCEEDINGS

(Lory D. Rosenberg, Cambridge & Somerville Legal Services)

Matter of Sandoval, Int. Dec. #2725, August 20, 1979, Board of Immigration Appeals.

This recent decision formally sanctions the well-known illegal activities of immigration agents in making arrests and searches in violation of the 4th Amendment, holding that considering the character of deportation proceedings as civil, the purpose of the remedy of exclusion of evidence seized in violation of the 4th Amendment, the existence of protections if such evidence were to be used in criminal proceedings, and the societal costs should the rule be imposed for agent misconduct, neither "legal [n]or policy considerations dictate the exclusion of unlawfully seized evidence from these proceedings."

The decision, consistent with the views of most Immigration Judges, and adopting the advisory opinion rendered last year by then Attorney General Griffin Bell, relies at least in part, on deportation proceedings as civil rather than criminal. It further appears that the BIA gave weight to its view that there has been no definitive Supreme Court holding on the question of exclusion of unlawfully seized evidence in the civil context, that a span of fifty-five years elapsed between the Supreme Court's Court decision in US ex rel Bilokumsky v. Tod, 263 US 149 (1923) containing dicta that evidence obtained through an unlawful search and seizure cannot

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ACCREDITATION FOR PARALEGALS

(Larry Kleinman, Willamette Valley Immigration Project)

"Accreditation" is a "license" issued by the U.S. Justice Department's Board of Immigration Appeals (BIA), allowing paralegals to practice immigration law in all of its administrative phases. In the last issue of the *Immigration Law Bulletin*, we described the crucial role that paralegals play in representing non-U.S. citizens: helping obtain legalized status, fighting to lower bail, appearing in hearings to defend against deportation and, overall, helping to displace the hundreds of "shady operators" who promise "papers" but often don't deliver after extracting huge sums of money.

But through what process do you obtain accreditation? Can it be done on your own? What kind of people and organizations have received accreditation to date?

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4TH AMENDMENT EXCLUSIONARY RULE . . .

be made the basis of a finding of deportation, and that during that period it believed that neither the Board nor the federal courts specifically ordered the exclusion of unlawfully seized evidence or ruled that such evidence is in fact inadmissible in deportation proceedings.

The BIA basically ignores other cases favorable to a ruling that the exclusionary rule is applicable in deportation proceedings. The cases of Wong Chung Che v. INS, 565 F2d (1977, 1st Cir.) is dismissed by stating that the holding was based on " 'assumed' inadmissibility, rather than a pragmatic analysis of the necessity, usefulness, and effect of applying the rule." It specifically withdrew from its own prior decisions appearing to recognize the rule's applicability. In footnote 7, the BIA states that it had never previously intended to reach the issue. The basic conclusion made by the BIA after its "pragmatic" analysis is that other alternatives for dealing with agent misconduct exist, and that deportation cases are centrally concerned with an alien's status. The Board suggests that use of the rule in attempts to suppress unlawfully obtained evidence diverts attention from the main issue of deportability, resulting in a long, confused record, long delays, and an adverse impact on the administration (read: enforcement) of the immigration laws.

The BIA majority held that the respondent's claim that immigration agents unlawfully searched her home would make a prima facie showing of excludability if the Board were to hold that the exclusionary rule was available to remedy unlawful searches and seizures. However, as the majority did not so hold, it rejected respondent's claim that Form I-213, and her statement acknowledging alienage and illegal entry were tainted as the product of an illegal search. As no Fifth Amendment claim was made, admissibility was considered only in the context of the applicability of the exclusionary rule under the 4th Amendment. The BIA specifically notes at footnote 23 of its opinion that its decision in the instant case does not affect the inadmissibility of statements which are involuntary, coerced, or obtained in violation of a respondent's right against self-incrimination.

For a fuller analysis, see the November issue of the National Lawyer's Guild *Immigration Newsletter*. For further information on the Fourth Amendment and INS conduct, contact Peter A. Schey at NCIR.

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CLASS ACTION CHALLENGES CONDITIONS IN NEW YORK INS DETENTION FACILITY

(Claudia Slovinsky, Queens Legal Services)

In light of the insistence by INS, judges and trail attorneys that deportation proceedings are "civil" rather than "criminal" in nature, one may be shocked upon entering an INS detention facility and finding that it is in fact a jail. And more often than not, a very bad jail. Such is certainly the case with the Federal Immigration Detention Center in Brooklyn, New York. In an old deteriorating building, formerly a part of the Brooklyn Navy Yard, are housed between 100 and 150 immigrants awaiting either deportation or exclusion hearings or the actual implementation of deportation or exclusion. The bars on all the windows, the jailer with his massive ring of keys, the long series of barred doors and checkpoints one must go through to obtain admittance create the unmistakable impression of prison.

There are serious questions to be raised about the entire policy of jailing immigrants who are allegedly in the United States in violation of

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CHALLENGE . . .

the Immigration and Nationality Act. Short of attacking this policy head on, a demand that the facilities and conditions of detention meet standards of decency and health, and that detainees' rights to privacy are respected, is one which in New York City is being taken up by the Hispanic and legal communities.

For the last few months detainees at the facility have several times gone on hunger strikes to protest severe conditions. These include limitation of access to recreation facilities to two or three hours per week despite the existence of a gym in the building, denial of contact visits with friends and family, and inhuman treatment by guards.

In March 1979, the New York Civil Liberties Union filed suit against INS officials for declaratory and injunctive relief challenging the unconstitutional conditions and practices at the Center. [Lam v. Bell, 79 Civ. 795, Eastern District of N.Y.] The action is brought by a 28-year-old Chinese man, Man Chung Lam, who has since been deported. A class has been certified in the case including all present and future detainees at the center.

Experts in the fields of public health, corrections and institutional psychiatry have made an extensive investigation of the facility and are prepared to testify for the plaintiff class. An early December trail is anticipated by NYCLU attorneys.

The suit has already had *some* positive impact in that many cosmetic changes have recently been made including sound-proofing and provision of sufficient numbers of tables and chairs for day rooms. INS officials contend that the current Detention Center is only temporary and that plans are in the wings for a move to a more modern and better facility in Manhattan. The suit has probably had the effect of speeding up such a move.

While some limited physical changes have been made, the changes in *practice*, which require little or no money, have not. Thus the trial, according to NYCLU attorneys, will concentrate on the continued use of isolation cells without prior opportunity for notice or a hearing, lack of adequate recreation time, and denial of contact visits.

For further information contact Claudia Slovinsky, Queens Legal Services, New York.

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INS AND LOCAL POLICE AGREE TO 24 HOUR LIMIT ON DETENTION

(Larry Kleinman, Willamette Valley Immigration Project)

In a final order in the case of De la Cerda v. County of Umatilla, et al, (Federal District Court, Portland, Oregon, Civil #78-908, dated October 17, 1979), INS has conceded that it must conduct a "face to face interview" on that person. If such interview is not conducted or if the individual is not then served with an Order to Show Cause, Request for Voluntary Departure Form (I-274) or Warrant of Arrest, the person must be released from custody.

On July 10, 1978, the plaintiff, Trinidad De la Cerda, accompanied a friend to a traffic court hearing in Pendleton, Oregon, in order to act as an interpreter. As he and his friend left the courtroom, a Umatilla County Sheriff's Deputy of Mexican ancestry, stopped them and demanded that they accompany him because "la migra quiere hablar con Uds." (the Immigration Service wants to talk to you). The deputy lead them to a nearby phone, called the INS and put De la Cerda on the line. After speaking with him, the INS agent, located some 200 miles away at Portland Service office, ordered the deputy to arrest De la Cerda on the spot and hold him for transfer to INS. A *habeas corpus* action was immediately commenced and a state court judge rul-

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24 Hour Limit . . .

ed three days later that De la Cerda's arrest was illegal. However, on that same day, July 13, an INS agent served him with an Order to Show Cause.

The Willamette Valley Immigration Project, in conjunction with Oregon Legal Services, sued both Umatilla County and INS, seeking damages and a declaratory judgment. Within four months of filing, Umatilla County settled their liability by paying De la Cerda $800, $250 in costs, and they entered into a stipulation promising no future actions.

The case continued against defendant INS on a conspiracy theory. As part of pre-trial discovery, INS released over 400 executed I-213's, representing reports on every person held in state jails pursuant to INS order over a three month period; this number constituted a full one-third of *all* persons apprehended by INS during these three months! Analyzing the documents, WVIP staff members ascertained that in one of every four cases, INS had violated its own internal directives.

In the text of the order, INS agreed that an oral hold was considered to be an "arrest without warrant", thus triggering the procedures required by 8 C.F.R. § 287.3. An "oral hold" was defined as follows:

> "a verbal authorization made by telephone or other non-written means of communication by an immigration officer to personnel of a state, county or other local law enforcement agency authorizing the local agency to detain a person on an immigration charge as set forth in 8 U.S.C. § 1357(a)(2)."

"Immigration officer" was defined as set forth in 8 C.F.R. § 103.1(q).

In addition to the "24 hour rule", INS agreed to distribute copies of the order to all county sheriffs and district attorneys' office in the state of Oregon, and so affirm in writing. Thus, the "lack of notice" smokescreen will be of little use should abuses be encountered in the future.

Persons or organizations with questions or comments concerning this case can contact: Willamette Valley Immigration Project, 120 Garfield St., Woodburn, Ore. 97971, (503) 982-0243, and Carlos Holguin at NCIR.

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CONTRERAS AND SILVA UPDATE

(Kristine Poplowski, Illinois Migrant Council)

On May 18th of this year, Judge Printice Marshall of the Federal District Court in Chicago determined that the U.S. State Department should have issued an additional 9,565 immigrant visas to Mexican visa applicants in fiscal year 1977 (October 1, 1976 to September 30, 1977). Imelda Contreras De Avila, et al. v. Griffin Bell, et al., No. 78 C 1166 (N.D. Ill., Order entered May 18, 1979). Only 5,435 preference system visas were issued to Mexican applicants during that year. The short fall of available visas in 1977 was the result of the State Department's unlawful implementation of the 1976 Amendments to the Immigration and Nationality Act (INA).

On September 17th, Judge Marshall certified two sub-classes for purposes of final relief. Sub-class one consists of all current Mexican preference visa applicants, and their sponsoring U.S. citizen and permanent resident relatives. Sub-class 2 consists of all current Mexican non-preference visa applicants, and their sponsoring U.S. citizen and permanent resident relatives.

While the court granted the visa

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UPDATE . . .

applicants judgment on the question of liability, it took no action with respect to relief. Therefore, plaintiffs are currently preparing a proposed final judgment order covering distribution of the visas and relief from deportation for those class members likely to be considered for a restored visa.

Plaintiffs have determined that had the 9,565 restored visa numbers been made available to visa applicants when originally authorized during January through September 1977, at least 8,800 would have been allocated to non-preference applicants. This distribution results from a lack of preference demand due to a time lag in approval of preference petitions after the effective date of the 1976 Amendments to the INA.

Plaintiffs are seeking the halting of deportation and explusion proceedings against those class members who will benefit from distribution of the restored visa numbers. Non preference applicants will be most affected, due to their proportion of the restored visa numbers. If INS refuses to voluntarily halt deportation action against these class members, plaintiffs will seek a preliminary injunction.

In the Silva case, upon petitions for rehearing by both parties, the 7th Circuit has modified its August 23, 1979 decision in Silva v. Bell to allow an expedited distribution of the recaptured visa numbers. The court also ordered the recapture program to be completed within two years.

Under the modified decision, the recaptured visa numbers will continue to be distributed to Silva class members *in each country in percentages which reflect each country's use of visas during the period of the illegal Cuban charging policy, July 1968 through December 1976.* It is expected that a number of countries will not use their entire historical share of visa numbers. These unused visa numbers will be redistributed among those countries where Silva applicant demand exceeds their historical share. The State Department believes that Mexico, Columbia, the Dominican Republic and Jamaica will have excess demand. Under the redistribution program, it appears that *a minimum of 30,000 additional visa numbers will go to Mexican applicants.* The parties will return to the district court during the week of November 5th with proposed orders to implement the appeals court's mandate.

Persons who wish more information on either the Silva or Contreras cases, or who are counseling class members in Contreras who face explusion, should contact Kristine Poplawski or Bruce Goldsmith, (312) 341-9180.

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ORGANIZATIONAL STRUCTURE OF I.N.S.

(Jose Acosta, National Center for Immigrants' Rights)

The Immigration and Naturalization Service (I.N.S.) is the principal agency entrusted with the administration of immigration laws. It rules on the eligibility for preferential status and excludibility of applicants. It is also authorized to waive certain grounds for ineligibility and deports persons without documents or persons who, after admission become deportable.

The present organizational structure of I.N.S. results from a 1975 realignment to decentralize responsibility. The main office is located in Washington, D.C. and is known as the Central Office. Its function is primarily administrative, providing direction and policy for the agency. There are four regional offices, whose function is primarily supervising and implementing the agency's policy. These regional offices oversee the functioning of the basic operating unit for I.N.S.,

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ACCREDITATION . . .

According to 8 C.F.R. § 292.2, a non-profit organization can apply for recognition from the BIA. Only after the organization is recognized, can individuals, associated with that organization be accredited.

At present, the BIA recognizes 150 organizations and 189 representatives of those organizations. Over half of the organizations currently have no accredited representative. That means no person from these groups can represent people before INS. Although accreditation has existed for over 20 years, just under half of the organizations received recognition within the last five years. Persons with hispanic surnames make up 25% of the accredited representatives.

While 33 Local legal aid offices are recognized, *only seven have accredited representatives, totaling 8 persons!* This is particularly distressing when compared with the nineteen recognized branch offices of the International Institute who collectively account for 47 representatives.

The accreditation process has two parts: recognition of the organization and accreditation of the individual representative. Accomplishing these separate tasks may be pursued simultaneously. To be recognized, *an organization* must demonstrate that they take, at most, "nominal charges" for their services, and that the organization has at its disposal adequate knowledge, information and experience concerning immigration law and practice. The former can be satisfied by simply reciting, in detail, what charges are assessed for immigration and non-immigration related services. Legal Aid offices should merely state that no charges are made. To show knowledge and experience, the following should be summarized: actual cases previously handled by organization personnel, materials on hand or available (e.g., a library containing Volume 8 of United States Code and the Code of Federal Regulations, subscriptions to *Interpreter Releases* or other related periodicals, etc.), "back-up" services available (e.g., through NCIR or other legal aid branches with more extensive experience), experience of attorneys available to assist the organization's paralegals.

The organization submits its application to the District Director of the local Immigration Service district office on form "I27"; no fee is charged. The District Director conducts whatever investigation is felt necessary and recommends approval or denial to the BIA. If denial is recommended, the BIA routinely allows an opportunity for written rebuttal before deciding. If approval is recommended, recognition is virtually guaranteed.

The *representative's* application must be filed by the recognized organization on his/her behalf (or by the organization seeking recognition). Generally in the form of a resume, the representative must show good moral character and his/her experience in and knowledge of immigration/naturalization law and procedure.

No precise standard has been established for "good moral character"; letters of recommendation may be submitted. To satisfy the experience and knowledge requirements, detailed accounts should be given of overall educational credentials, communication skills, law-related work experience, training courses in immigration law, actual work on immigration cases (assisting others), familiarity with statues and regulations, and exposure to immigration-related periodicals (to name a few factors). In some Immigration Service offices, the District Director may request that an "oral examine" be taken. Don't let this intimidate you: careful study of the Paralegal Training Manual (available through NCIR) will amply prepare you. The oral examine, if it is requested, will be an interview and will cover very simple immigration/deportation procedures.

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ACCREDITATION . . .

As with organization recognition, the District Director recommends approval or denial to the BIA and rebuttal is allowed. Once accredited, a representative must reapply every three years and may be disbarred for any one of a minimum of fifteen reasons (generally concerning unethical conduct; see 8 C.F.R. § 292.4).

It is important to note that an organization need not have a lawyer (with or without immigration experience) associated with it in order to qualify for recognition. NCIR will help any organization, especially legal aid programs, interested in pursuing recognition and accreditation. An authoritative and useful outline of these procedures can be found in *Interpreter Releases*, Vol. 53, #14 (April 5, 1976).

For further information contact Timothy Barker at NCIR.

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STRUCTURE . . .

the District Office. There are 37 District headquarters, with three of these abroad. Public contact is generally with these District Offices; applications for immigration initiate at this level and information and immigration forms are provided to the public by the District Offices.

The Immigration and Nationality Act places the powers, privileges and duties of implementing the Immigration and Naturalization laws upon the Attorney General. These powers however, have been delegated to the Commissioner of I.N.S. The Commissioner administers and directs I.N.S. , but more importantly has the power to promulgate regulations for the agency. Moreover, the Commissioner may direct that any case or class of cases be certified to him for decision.

Under the direction and supervision of the Commissioner, the Deputy Commissioner is assigned to the operation and management responsibilities of the Service. The four Associate Commissioners in the Central Office report to the Deputy Commissioner and are responsible for enforcement, examinations, operations support and management. Directly responsible to the Associate Commissioners are the Assistant Commissioners. Under the Associate Commissioner of Enforcement are found the Assistant Commissioner of the border patrol division, the Assistant Commissioner of the detention and deportation division and the Assistant Commissioner of the investigations division. Under the Associate Commissioner of examinations are found the Assistant Commissioner of the Inspections division, the Assistant Commissioner of the Naturalization division and the Assistant Commissioner of the Adjudications division. Directly responsible to the Associate Commissioner of Operations Support are the Assistant Commissioners of the Research and Development program, the Audit program, the Intellegence program and the Electronics Support program. The Associate Commissioner of Management directs the Assistant Commissioners of the administrative division, the information services division and the personnel division. This makes up the framework of the Central Office.

The four Regional Commissioners report to the Deputy Commissioner as well as the Commissioner of I.N.S. The regional offices closely follow the model of the Central office. Primarily responsible for management and supervision are the Regional Commissioner and the Deputy Regional Commissioner. The Regional Commissioner is authorized to consider appeals from some of the District Director's decisions. They are also responsible for hearing administrative tort claims resulting from the operation of I.N.S. Reporting to them are the Associate Regional Commissioners of Enforcement, Examinations and Management. The Associate Regional

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Commissioner of Enforcement is assisted by the Assistant Regional Commissioners of the Border Patrol Division, the Investigations Division and the Detention and Deportation Division.

The Associate Regional Commissioner of Examinations supervises the Assistant Regional Commissioners for the Inspections and Examinations Division and the Naturalization Division. The Associate Regional Commissioner of Management oversees the operation of the Assistant Regional Commissioners of Personnel, Budget and Accounting and Procurement, Property and Facility Management.

The District Offices and the Border Patrol Sectors report directly to the Regional Commissioner and the Deputy Regional Commissioner. At the District level, the person primarily in charge of the Services' operation is the District Director. The District Director has a broad range of powers; he may grant or deny any application or petition and may initiate certain proceedings. He is assisted by the Deputy District Director and the Assistant District Directors, the Chief Patrol Agents and the officers in charge of particular subofficers. Unlike the Regional and Central offices, the District office is responsible for the fundamental enforcement of the Immigration and Naturalization laws.

The organizational structure of I.N.S. is important in determining ultimate responsibility and authority to handle particular issues. In most situations the District Director is primarily responsible for the operation of his District's activities. The Regional Commissioners may at times review the actions of the District Director and review claims against I.N.S. after an investigation by the District Director.

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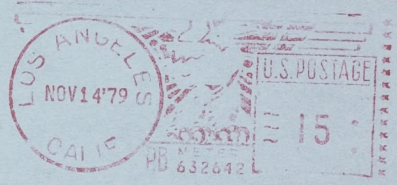
National Center For Immigrants' Rights
THE IMMIGRATION LAW CENTER
1550 WEST EIGHTH STREET • LOS ANGELES, CALIFORNIA 90017



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IMMIGRATION LAW BULLETIN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS
1550 WEST EIGHTH STREET LOS ANGELES, CALIFORNIA 90017 (213) 487-2531

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS INS ASYLUM CASES

(By Carlos Holguin, NCIR Staff Attorney)

It has become increasingly familiar to learn of yet another country in which political turmoil has led to the displacement of large numbers of persons. Not surprisingly, U.S. immigration laws relating to asylum procedures have become correspondingly important to aliens within the United States facing deportation. This article considers the availability and nature of judicial review of administrative decisions denying relief under 8 C.F.R. § 108, § 243(h) of the Immigration and Nationality Act of 1952, as amended, and the 1967 Protocol Relating to the Status of Refugees. Although judicial review may not be required in every case, knowledge of the standards employed by courts upon review is important for several reasons.

It is well-accepted that in reaching its asylum decisions INS is less concerned with the *bona fides* of an individual's claim of probable persecution than it is with the prevailing political views held by the U.S. government toward the putative refugee's country of origin. Hence, it is a lesson of common experience that the alien from Mexico or Haiti is likely to be denied asylum as a matter of course, while the alien from a country officially recognized as a violator of human rights will find official acceptance of his/her asylum claim. As a purely legal matter, U.S. foreign relations with another country should not affect the

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TEMPORARY RESTRAINING ORDER ISSUES IN CONTRERAS DE AVILA

(By Peter A. Schey, NCIR Directing Attorney)

A temporary restraining order has been issued by District Court Judge Prentice Marshall in the Contreras case filed by the Illinois Migrant Legal Assistance Project. The injunction prevents INS from deporting approximately 10,000 Mexican nationals who have filed applications to immigrate and are either (1) non-preference applicants with priority dates before July 1, 1976; or (2) second preference applicants with priority dates earlier than April 1, 1978. INS is prohibited from detaining these persons and also may not initiate deportation proceedings against them. The injunction only protects aliens who

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outcome of an asylum claim filed by an alien from that country. Nonetheless, foreign policy considerations are often dispositive in the eyes of INS. Unfortunately, whether the United States chooses to recognize political persecution carried out by a "friendly" foreign government, the reality faced by the unsuccessful alien upon deportation may be just as severe as deportation to an "unfriendly" country. It is for this reason that the refugee, faced with a rubber stamp denial of political asylum, will likely petition a court for redress.

Judicial review can be predicated on several theories. Included would be INS failure to adhere to procedural regulations relating to asylum applications, and misconstruction of relevant statutes by INS or the Board of Immigration Appeals. These two grounds have been considered before. [*See generally*, Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 Wash.U.L.Q. 59; *see also, Coridan v. Immigration and Naturalization Service: A Closer Look at Immigration Law and the Political Refugee*, 6 Syr.J.Int'l L. & Com. 133 (1978).]

It is, of course, hornbook law that aliens within the United States are entitled to fundamental fairness and due process of law in administrative proceedings. The procedural safeguards accruing under the I.N.A. and the due process clause in cases involving aliens who have made an "entry" within the meaning of the I.N.A. are different from those cases involving aliens who have not "entered". "Entry" is a term of art which is not synonymous with physical entry. Hence, aliens paroled into the U.S. may not be afforded the same protections as aliens who have "entered", even if without inspection. [*See, Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).] Due process guarantees have been applied to diverse case involving various rights. [*E.g., Chew v. Colding*, 344 U.S. 590, 596 (1953) [due process requires hearing before permanent resident alien may be deported pursuant to Attorney General exclusion order]; *Ng Fung Ho v. White*, 259 U.S. 276, 284-5 (1922) [due process applies to one who claims United States citizenship in deportation hearing]; *Japanese Immigrant Cases*, 189 U.S. 86, 100-1 (1903) [alien cannot be deported without opportunity to be heard]; *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975) [due process applies to aliens within the United States "even to aliens whose presence is illegal"]; *Jarecha v. I.N.S.*, 417 F.2d 220, 225 (5th Cir. 1969) [administrative discretion must be exercised within dictates of due process]; *Kam Ng v. Pilliod*, 279 F.2d 207.210 (7th Cir. 1960) [applicant for suspension of deportation must be accorded due process]; *Williams v. Williams*, 328 F.Supp. 1380, 1383 (D.Vt. 1971) [alien cannot be excluded from access to courts in conformity with due process]; *Tang v. I.N.S.*, 298 F.Supp. 413, 417 (C.D. Cal. 1969) [administrative decisions regarding preference visas must be made in compliance with due process standards.]

In § 243(h) cases, courts have been willing to review I.N.S. proceedings to ensure that due process and fundamental fairness have been accorded. The precise dictates of due process, however, remain uncertain. It has been held, for example, that the alien must be allowed to present evidence and have it considered by the adjudicating officer. [*United States ex rel. Dolenz v. Shaughnessy*, 206 F. 2d 392, 395 (2d Cir. 1953).] Several cases have considered whether I.N.S. use of opinions from the State Department's office of Refugee and Migration Affairs when adjudicating asylum applications violates due process, and have, with notable reservations, found the practice acceptable. [*Eg., Zamora v. Immigration and Naturalization Service*, 534 F.2d 1055, 1061-63 (2d Cir. 1976) [State Department opinions generally "best available source of information" on general conditions in foreign countries. Court noted that such opinions can "carry a weight which they do not

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THE FIGHT FOR TUITION-FREE EDUCATION FOR UNDOCUMENTED IMMIGRANT CHILDREN IN TEXAS CONTINUES

(By Isias Torres, Centro de Inmigracion de Houston Gulf Coast Legal Foundation)

In September 1978, the Centro Para Inmigrantes, Inc. (Gulf Coast Legal Foundation) along with the assistance of Peter A. Schey of the National Center for Immigrants' Rights, filed several lawsuits in federal court challenging the constitutionality of a Texas state statute which denies tuition-free public education to undocumented immigrant children. [*Cardenas v. Meyers; Mendoza v. Clark;* and *Garza v. Reagan.*]

These suits were brought a few days after the U.S. District Court in Tyler, Texas had issued a permanent injuction ordering the local school district and state of Texas to provide free schooling to undocumented immigrant children in the Tyler school district. The Tyler case [*Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex.)] is currently on appeal to the Fifth Circuit. No oral arguments have yet been scheduled.

Subsequent to the filing of the Houston federal cases, a flurry of federal suits were brought across the state. Currently, there are fourteen separate federal district court actions, pending in the Southern, Northern, Eastern and Western districts of Texas. Some of these suits have obtained interim relief for the plaintiff children in their specific geographical areas. For example, the district courts in Odessa and Beaumont have granted preliminary relief to the class of plaintiff children, while the district court in Dallas denied a preliminary injunction.

On November 16, 1979, the Judicial Panel on Multidistrict Litigation in Washington, D.C. issued an Order and Memorandum Opinion which consolidated all of the district court suits against the State of Texas before Judge Woodrow

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INJUNCTION ISSUED AGAINST INS ENFORCEMENT PRACTICES IN CENTRAL DISTRICT OF CALIFORNIA

(By Timothy Barker, NCIR Staff Attorney)

On November 20, 1979, Federal Judge David W. Williams issued a temporary injunction against certain INS enforcement practices in the Central District of California. The injunction, obtained by the Legal Aid of Orange County, the Los Angeles Center for Law and Justice, the ACLU and NCIR, put a stop to the dragnet raids being conducted in Latino communities in the Los Angeles area.

Since June 1979, INS, often-times in conjunction with local police authorities, has been conducting house to house searches for undocumented persons in Latino residential areas. During these operations INS agents allegedly made forced entries into homes without the authority of either warrant or consent. Once in the homes INS agents regularly conducted general searches without the consent of the occupants. Also, INS agents conducted sweeps through bus stations, restaurants, shopping centers, bars and on the streets, indiscriminately stopping and interrogating Latino persons about their immigration status. Plaintiffs obtained the temporary injunction enjoining INS agents from:

1. *Approaching* homes to question the occupants therein unless the INS agent has a reasonable suspicion that an *undocumented* alien is in the house;

2. *Approaching* homes to question the occupants therein between 8:00 p.m. and 7:00 a.m. unless a valid warrant has been issued or in exigent circumstances;

3. *Entering a home or nonpublic area of business* unless valid consent has been given or upon a warrant or in exigent circumstances;

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LUFKIN (TEXAS) I.N.S. RAIDS CHALLENGED

(By Jose Medina, Centro de Inmigracion de Houston Gulf Coast Legal Foundation)

Several organizations, including Centro Para Inmigrantes de Houston (Gulf Coast Legal Foundation), East Texas Legal Services, LULAC, La Raza Legal Alliance, and the Mexican American Bar Association recently filed suit against INS, Angelina county and the cities of Lufkin and Diboll, challenging the discriminatory and illegal raids carried out in East Texas by INS, Sheriff's Departments and local Police Departments. The suit was filed December 3, 1979 and seeks damages and an injunction to prevent further harrassment of the Mexican community. The case is styled *Espinoza, et al. v. Civiletti, et al.*, Ty-79-438-CA (Eastern District of Texas, Tyler Division).

The East Texas raids were carried out over a period of several days in November. People were arrested in their work places and on streets, as well as being roused from their homes. Local police and officers of the Sheriff's Departments participated by pointing out the homes of Mexican people, many of whom were U.S. citizens, and by stopping cars on the streets. INS agents forced their way into homes without warrants or lawful consent.

The suit alleges violations of the United States and Texas Constitutions, the Immigration and Nationality Act, Civil Rights Act of 1871 and the Administrative Procedures Act. In the past, INS had allegedly discontinued neighborhood raids. However, this new surge of INS activity in the community shows that residential dragnet activities will continue until restrained by court order. Following the issuance of a TRO in *Zepeda v. INS* on November 20, 1979, Attorney General Benjamin Civiletti issued an internal order limiting INS residential activities. The Civiletti order is unclear on precisely when residential enforcement activities can take place.

The *Lufkin* suit is also significant in that it combines the efforts of legal service programs, private attorneys and client groups. The defense committee is well integrated with all co-counsel contributing substantially to the case. Additionally, the coalition of organizations supporting the action represents a broad spectrum of the client community.

(For further information contact Tony Guajardo, Centro de Inmigracion de Houston, (713) 228-0091.

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4. Engaging in *general searches* of homes or nonpublic areas of businesses without warrant or valid consent;

5. *Approaching persons* for questioning unless the agent has a reasonable suspicion of alienage. Persons shall be not questioned solely based upon their Hispanic appearance, and/or because they are speaking Spanish and/or because they are located in an area predominately populated by Hispanic persons;

6. *Detaining and questioning* persons *short of arrest* without *reasonable suspicion* that the person so detained is an *alien and is unlawfully present in the United States;*

7. *Arresting* a person unless the agent has *probable cause* to believe that the *person is like-*

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TEMPORARY RESTRAINING ORDER . . .

entered the United States *before* December 15, 1979.

This order was issued after the district court determined that the State Department and INS had unlawfully applied the 1976 Eilberg amendment (which placed a 20,000 limit on preference immigrants from any single country) retroactively and thereby substantially reduced the number of persons who were allowed to immigrate between January and September 1977. The court will require that approximately 10,000 be allowed to immigrate as rapidly as possible and without reducing the current availability of visa numbers. These will be persons who would already be immigrated if the government had properly implemented the 1976 amendments.

More detailed information concerning this case can be obtained from Bruce Goldsmith or Tina Poplawski, Illinois Migrant Legal Assistance Project, (312) 341-9180.

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INJUNCTION ISSUED . . .

ly to escape before an arrest warrant can be issued *and is an alien unlawfully present in the United States;*

8. *Seeking or utilizing the assistance of local or state police agencies for enforcement activities*

The TRO is to remain in effect until the end of February when the preliminary injunction hearing is scheduled for hearing.

There is a possibility that Judge Williams would expand the suit to cover the INS Western Region (California, Nevada, Arizona and Hawaii) if similar INS activities were affecting clients outside the Central Judicial District of California. If you know of any such cases involving eligible clients who may want to join in this action, please contact NCIR.

(For further information, contact, Timothy S. Barker or Peter A. Schey, NCIR (213) 487-2531 or Edwin Printemps, David Quesada, or Gonzalo Pineda, Legal Aid of Orange County, (714) 835-8806.

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deserve" and should refrain from recommending how the particular application should be decided]; *Hosseinmardi v. Immigration and Naturalization Service*, 405 F.2d 25, 27 (9th Cir. 1968) [upholding receipt in evidence of State Department opinion, but noting on rehearing the "potential unreliability" of such recommendations and that "[i]t might well have been improper had the (I.N.S.) given substantial weight" to the opinion]. In the recent case *Dereougly v. District Director, Immigration and Naturalization Service*, No. 78 C 1106 (N.D.Ill. 1979) [slip opinion], the district court rejected plaintiffs' contention that the denial failed to advise him of the State Department recommendation in his case, and failed to provide him with an opportunity to explain why his application was filed after the initiation of deportation proceedings against him. The court appears to have based its decision solely on relevant regulations and statutes; no consitutional grounds were expressly addressed.]

In sum, a survey of judicial response to due process challenges in asylum cases reveals little in the way of uniform analysis; however, since courts have proved willing to apply due process standards to such questions as the admissibility of certain evidence, similar reasoning lends support to expand judicial review of asylum cases to ensure that the alien is accorded all the process

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TUITION-FREE EDUCATION . . .

Seals in Houston, and bifurcated the claims as to the individual school districts. This consolidation applied only to pre-trial matters.

At a pretrial conference on all the consolidated cases held in Houston on Thursday, December 20, 1979, it was decided that (1) actions against the independent school districts would be abated pending a decision against the state; (2) a trial will be held to begin on February 11, 1980; (3) the trial will be on the merits.

Many community groups have recently become involved in defending the rights of undocumented children. The Gulf Coast Immigration Coalition was recently formed and has spearheaded much of the community activity. Several community forums have been held in Houston and a large demonstration was held on December 13, 1979 at the Houston School District building. Other community groups have also come together and established five alternative schools for undocumented immigrant children. Although the alternative schools are poorly funded, these community groups and volunteers are making strong efforts to minimize the irreparable harm that the children are suffering due to the state law. We will keep you informed of developments in the case through future articles in NCIR's *Immigration Law Bulletin*. For further information contact Tony Guajardo, Centro de Inmigracion de Houston, (713) 228-0091 or Peter A. Schey, NCIR, (213) 487-2531.

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THE STAFF OF THE NATIONAL CENTER FOR IMMIGRANTS' RIGHTS WISHES ALL OF ITS CLIENTS AND ASSOCIATES

PEACE AND PROGRESS IN THE STRUGGLES OF THE 80's

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which is due. [*See generally, Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).]

Beyond the above-mentioned procedural considerations, the starting point for any clients who may eventually seek access to the courts is to develop a reasonably sound prima facie case of statutory eligibility under 8 C.F.R. § 108, under I.N.A. § 243(h) [8 U.S.C. § 1253(h)] or under the Protocol Relating to the Status of Refugees.

Section 243(h) is the closest analogous provision to 8 C.F.R. § 108 contained in the I.N.A. Applications under § 243(h) are made to an Immigration Judge during a deportation hearing. Applications under 8 C.F.R. § 108 are submitted to a District Director of I.N.S. for decision. Section 243(h) provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persectuion on account of race, religion, or political opinion ...

The Attorney General's authority under § 243(h) has been delegated to to the Commissioner of I.N.S. [8 C.F.R. § 2.1.] The Commisioner's authority may be redelegated to immigration judges.

Recently promulgated regulations provide that an alien seeking relief under 8 C.F.R. § 108 must be maintaining a lawful status or be authorized by I.N.S. to be within the United States. After an Order to Show Cause has issued, any request for asylum is considered by an Immigration Judge as a request for withholding of deportation under § 243(h) and for the benefits of the Protocol. [*See*, 44 F.R. 21253, 21258 (April, 1979).] Special provisions relate to persons paroled into the U.S. under I.N.A. § 212(d)

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(5), 8 U.S.C. § 1182(d)(5). [*Ibid.*] Current regulations authorize Immigration Judges to adjudicate asylum claims under the Protocol. [8 C.F.R. § 242.8.]

The burden placed on the alien under each of these authorities, as well as under the Protocol [19 U.S.T. 6233, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967)] is probably coextensive. While the language of the Protocol appears to be more favorable to the respondent than that of § 243(h) it has been held that the Protocol affects no change in rights accruing to the putative refugee. [*Kashani v. I.N.S.*, 547 F.2d 376, 379 (7th Cir. 1977), *citing*, *Matter of Dunar*, 14 I.N. 310 (1973).] The Supreme Court, however, has reserved judgment on the Protocol's effect on U.S. refugee Policy. [*Immigration and Naturaliztion Service v. Stansic*, 559 F.2d 993, 996-7 (5th Cir. 1977) (Discretion under § 243(h) "must now be measured in light of" Protocol).] For further discussion of the Protocol and asylum applicant, *see*, Comment, *Immigration Law and the Immigration and Naturalization Law and the Political Refugee*, 6 Syr.J.Int.L. and Com. 133 (1978). Analysis of the elements of an application under § 243(h) is relevant to an application under 8 C.F.R. § 108.

Persecution within the coverage of § 243(h) was originally limited to those cases in which an alien could show the probability of physical persecution; thus, it was held that relief under § 243(h) required a showing of probable "confinement, torture, or death inflicted on account of race, religion, or political viewpoint. [*Blazina v. Bouchard*, 286 F.2d 507, 511 (3d Cir. 1961).]

In a spirit of atypical concern for the plight of the asylum applicant, the necessity of showing probable physical persecution was deleted from § 243(h) by the 1965 amendments to the I.N.A. [Pub.L. 89-236. For a full discussion of the legislative history and intent surrounding the 1965 amendments to § 243(h), *see*, *Kovac v. Immigration and Naturalization Service*, 407 F.2d 102, 105-7 (9th Cir. 1969).] The leading decision defining persecution under the amended statute is *Kovac v. Immigration and Naturalization Service*, where the Ninth Circuit held:

> No doubt "persecution" is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience. But there is nothing to indicate that Congress intended section 243(h) to encompass any less than the word "persecution" ordinarily conveys— the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive. [*Id.* at 107.]

The standard articulated in *Kovac* was reaffirmed in *Moghanian v. U.S. Dept. of Justice, etc.*, 577 F.2d 14, 142 (9th Cir. 1978), where the court declined to follow the more limited Board of Immigration Appeals standard in favor of the *Kovac* test. Of course, the reason or motivation for such persecution must be political, racial, or religious. Illustrative in this regard is *Coriolan v. Immigration and Naturalization Service*, *supra*, note 5, where the court held that prima facie showing of probable political persecution could be made out notwithstanding failure to show overt political activity or adherence to minority political opinions. [559 F.2d at 1001.] The court further held that criminal prosecution for the offense of illegal departure could, under appropriate circumstances, amount to political persecution. [*Ibid.*, at 1000.] The court left open the question whether an initial departure motivated by factors other than race, religion, or politics precludes withholding deportation under § 243(h). [*Id.*]

It is well-settled that the bur-

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den of proving probable political persecution is on the asylum applicant. [*Martineau v. Immigration and Naturalization Service*, 556 F.2d 306, 307 (5th Cir. 1977).] It is generally assumed from analysis of relevant decisions that both the burden of producing evidence and the burden of persuasion rest on the putative refugee. [For discussion of the distinction between the two, *see*, James and Hazard, *Civil Procedure*, § 7.5 (2d ed. 1977).]

Although subject to some dispute, the prevailing view with respect to the quantum of evidence necessary to establish a prima facie case of probable political persecution is that the alien must demonstrate "a clear probability of persecution." [*Lena v. Immigration and Naturalization Service*, 379 F.2d 536, 538 (7th Cir. 1967).] Section 243(h) posits no standard of proof necessary to establish a statutorily sufficient probability of persecution. Rather, the statute is cast so as to require a showing of persecution sufficiently persuasive in the opinion of the Attorney General. Nonetheless, courts have historically exercised power to establish a standard of proof where the statute fails to do so. [*See, e.g. Shkukani v. Immigration and Naturalization Service*, note 1, *supra*.] However, the Supreme Court has, as a general rule, mandated a searching factual inquiry while preserving the ultimate standard on review: whether the agency abused its discretion or acted arbitrarily. [*Cf. Woodby v. Immigration and Naturalization Service*, *supra*, at 282 (drawing distinction between burden of proof and scope of review in deportation proceedings).] In practice, the clear probability standard has proved onerous to the asylum applicant. For a list of evidentiary patterns which have proved insufficient under the prevailing evidentiary standard, *see*, Note *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 Wash. U.L.Q. 59, 107-13.

A fortiori, the test ("clear probability of persecution") sets forth the standard which the Attorney General, or his deputy should employ when formulating his "opinion" under § 243(h).

Viewed in this way, it can be seen that the statute vests the Attorney General with two distinct functions: First, that of a fact-finder; second, he is "authorized" to withhold deportation as a matter of discretion where a clear probability of political persecution is shown. On review, the court examines the record for an abuse of fact-finding prerogative, and as a separate determination, decides whether as a matter of discretion denial of relief is arbitrary or capricious. [*Hamad v. United State Immigration and Naturalization Service*, 420 F.2d 645. 646-7 (D.C. Cir. 1969) (applying substantial evidence test to review of fact-finding function); *Kordic v. Esperdy*, 386 F.2d 232, 238 (2d Cir. 1967).] In practice, I.N.S. policy is always to withhold deportation when a clear probability of persecution is shown. [*See, Matter of Dunar*, *supra*, note 5 at 332.]

Notwithstanding, the foregoing, courts have not uniformly embraced this analysis. [*See e.g., Kashani v. Immigration and Naturalization Service*, 400 F.2d 675, 677, (9th Cir. 1968).] The standard treatise on immigration law argues that this view is unsound

> since the persecution claim, in which the statue makes the Attorney General's "opinion" decisive, does not appear to susceptible to division between the statutory eligibility and discretionary aspects of other administrative relief. The sounder approach appears to require treating the entire persecution claim as one discretionary package. Moreover, it is unlikely that the Attorney General

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> would direct deportation to a place where he believes persecution will occur. And it is hardly likely that the courts would endorse such a discretionary character of the proceeding actually does not prevent the courts from reviewing such determinations with care, taking into account the grave issues presented. [Gordon & Rosenfield, *Immigration Law and Procedure*, *supra*, note 7.]

The flaws with this criticism are several: First, courts have repeatedly articulated a burden of proof which an alien must meet to establish statutory eligibility, thereby necessarily establishing a standard of evidence which, as a matter of law, is to be applied during adjudication of an application under § 243(h). Were the Attorney General's opinion truly decisive, no standard of proof should be required, other than subjective satisfaction of the adjudicating officer. Moreover, discretion in the fact-finding process, i.e., the power to weigh evidence and reach conclusions, is not coterminous with discretion to grant or deny statutory relief. The Attorney General's factual conclusions are, however, entitled to deference on judicial review through the application of some lesser standard, such as the substantial evidence or abuse of discretion tests. Several courts have found an abuse of discretion where the Attorney General's factual determinations are clearly at odds with generally prevailing views on international politics. [*See, e.g. United States ex rel. Fong Foo v. Shaughnessy*, 243 F.2d 715 (2d Cir. 1955), (court took judicial notice of conditions in Communist China and ruled that contrary to I.N.S. finding of fact arbitrary and capricious); *see also, Kovac v. Immigration and Naturalization Service*, (court held decision arbitrary and capricious because of "patent misconstruction of the record").] Application of the substantial evidence test should technically require some affirmative evidence supporting the denial of relief. This of course has the effect of shifting the burden of coming forward with evidence to the prima facie case. Unfortunately, the court's application of the test in *Hamad*, eschews this interpretation; failure to meet the burden of proof is sufficient to deny relief notwithstanding the absence of affirmative evidence of nonpersecution. In any event, the practical effect of applying the substantial evidence test over the abuse of discretion standard may be negligible. [*See, Wood v. United States Post Office Dept.*, 427 F.2d 96, 99 n. 4 (7th Cir. 1973).]

Second, courts have strained to harmonize the language contained in the Protocol Relating to the Status of Refugees with that of § 243(h). Article 1 of the Protocol defines a refugee as a person who

> Owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.

In pertinent part, Article 33 provides:

> No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race,

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> religion, nationality, membership of a particular social group or political opinion.

Section 2 of Article 33 sets forth the only exception to the Protocol's coverage, denying relief to persons who present a security threat or danger to the community.

Kashani v. Immigration and Naturalization Service, supra, reconciled the language of the Protocol with that of § 243(h), stating:

> [T]he "well founded fear" standard contained in the Protocol and the "clear probability" standard which this court has engrafted onto section 243 (h) will in practice converge. Moreover, any difference in the operation of these two sources of law because section 243(h) contains an express grant of discretion while the protocol does not, has been effectively removed by the Attorney General's policy of always withholding deportation when a clear probability of persecution is shown. [*Id.* at 322.]

Hence, the Seventh Circuit has recognized that the factual showing of probable persecution is subject to an evidentiary standard at tension with traditional notions of administrative discretion. Although current I.N.S. practice is to grant relief to all persons who make the requisite showing, such need not always be the case. [*Cf. Hintopoulos v. Shaughnessy,* 535 U.S. 73 (1957) (statutorily eligible alien denied suspension of deportation in excercise of discretion).] It is conceivable that extraordinary national emergency, or other relevant change in national or international conditions, would justify denial of relief purely as a matter of discretion. In the absence of such circumstances, however, one might expect close judicial scrutiny of a purely discretionary denial. Such a prediction is, of course, not free from doubt; it might be that the practical effect of adopting the two-step analysis is academic.

Third, the "one discretionary package" theory severely hampers subsequent judicial review of the administrative decision, reducing it to a vague consideration of the totality of the administrative process under an ambiguous standard. An example of the courts' struggle with this state of affairs is found in *Coriolen, supra,* where the court was forced to speculate as to the reasoning of the immigration judge. [*Id.*, at 998-1001.] Technically, courts may be limited in their review of findings of fact since the statutory predecessor of § 243(h) contained a findings requirement which was eliminated in 1952, arguably to broaden the Attorney General's discretion. [*See,* Internal Security Act of 1950, Ch. 1024, § 23, 64 Stat. 87, *amending* the Immigration Act of 1917, ch. 29, § 20, 39 Stat. 874 as *amended,* Act of July 13, 1943, ch. 230, 57 Stat. 553.] In practice, most opinions in § 243(h) cases do set forth the factual basis for the decision.

Last unfettered discretion in fact-finding is inimical to due process and fundamental fairness. For example, juries have been historically vested with fact-finding "discretion", yet courts have reserved the right to remove from jury consideration those issues about which reasonable persons cannot differ. [*Wetzel v. Easton Corp.* 62 F.R.D. 22 (D.C. Minn. 1973).]

The foregoing analysis discloses varying judicial responses to challenged denials of political asylum. Although courts have been relatively receptive to procedural challenges, many asylum applicants have been unsuccessful in evoking judicial review to curb the underlying injustice in asylum cases — the heavy reliance of I.N.S. on the political considerations extraneous to the *bona fides* of the

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individual's claim.

Since judicial review of matters concerning foreign affairs has been historically limited under the "political question" doctrine, it is questionable whether a court could overturn a denial of asylum as a matter of discretion; however, it is arguable that many more aliens would be granted asylum were I.N.S. forced to determine statutory eligibility as distinct from an exercise of discretion. At a minimum, judicial review of a purely discretionary denial would be simplified by focusing attention not on whether the applicant is eligible as in the "opinion" of the Attorney General, but rather on any improprieties attendant to the exercise of that discretion.

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PROPOSED LEGISLATIVE EFFORTS IN 1980

NCIR'S AFFIRMATIVE LEGISLATIVE PROGRAM FOR 1980

(By Peter A. Schey, NCIR Directing Attorney)

After consulation with many people throughout the country, NCIR has developed a plank of *affirmative* legislative proposals to amend the Immigration Act which we believe should be addressed in 1980. This program is distinct from legislative advocacy which will be undertaken in behalf of eligible clients against a mass of pending and proposed legislation viewed as being detrimental to our client community. We believe that effective legislative advocacy must be viewed as consisting of both short and long-term activities. For the most part the short-term activities *presently* involve representation of client interests on pending legislation aimed at further restricting the rights of non-citizens. Our long-term activities should involve the process of educating key congressional staff members about our clients' views on the immigration question and the development of legislative proposals which serve the distinct interests of our client community.

In our legislative efforts over the past few years, we (meaning legal services, client groups, community advocates, etc.) have often been criticized by congressional staff for failing to put forward affirmative proposals for legislative consideration. Our limited activity in this area has resulted from a lack of resources in the Capitol which could advocate for affirmative proposals, and our need to concentrate on preventing the enactment of repressive legislation. The inherent difficulty in distinguishing between principled political demands (e.g. most client organizations call for some type of moratorium on deportations and for a complete overhaul of the Immigration Act) and legislative proposals which would relatively decrease repression against non-citizens has perhaps also delayed the formulation of an affirmative legislative program. The following is a tentative agenda of proposals which we would like to pursue in 1980. We invite your comments and assistance in finalizing a program for the coming year.

I.

RELIEF FROM DEPORTATION

(a) Statute of Limitations

Under current law a person can be deported from the United States no matter how long the person has been residing here. An undocumented alien who has lived and paid taxes here for twenty years is deportable when located by INS. A lawful immigrant who has raised children in the United States can be deported for various forms of misconduct (most of which do not rise to the level of even a felony). Naturalized citizens can be denaturalized and deported years after becoming U.S. citizens. These deportations almost always result in exteme hardships to both the

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person being expelled from the country and close family, friends and business associates. After a few years of residence in the United States, a person should be able to live without the perpetual threat of deportation. The triggering of a bar to deportation should be *mandatory* rather than discretionary and questions concerning the exact requirements of the residency period should be clearly outlined.

(b) *Amendment of Section 241(f)*

Congress should resurrect Section 241(f) of the Act [8 U.S.C. § 1251(f)] which has been effectively emasculated by the U.S. Supreme Court. The statute should clearly prevent the deportation of any person who (1) is the spouse, parent or child of a U.S. citizen or of an alien lawfully admitted for permanent residence, (2) who entered the country by fraud or misrepresentation, and (3) who would qualify for immigrant status at the present time as a result of a family relationship with someone lawfully present in the United States.

(c) *Amendment of Section 241*

Section 241(a)(2) of the Act [8 U.S.C. § 1251(a)(2)] should be amended so that a lawful permanent resident could not be deported for entering the United States without inspection.

Section 241(a)(4) of the Act [8 U.S.C. § 1251(a)(4)] should be amended such that a *suspended* sentence would not count as a sentence to confinement for purposes of establishing deportability for conviction of a crime. The second portion of the statute (which triggers deportation after conviction of any two crimes regardless of the sentences received) should be amended so that a person could be deported only after being convicted of two felonies and receiving a defined sentence to confinement.

Sections 241(a)(6) and (7) of the Act [8 U.S.C. § 1251(a)(6) and (7)] should be amended to prevent *any* deportations based on expression of political views. Deportations in this regard should only be based on criminal convictions.

Section 241(a)(8) of the Act [8 U.S.C. § 1251(a)(8)] should be amended to prevent the deportation of any person solely based on their need for government assistance.

Section 241(a)(11) of the Act [8 U.S.C. § 1251(a)(11)] should be amended (1) to prevent the deportation of any person based solely on their status as a narcotics addict, (2) to prevent the deportation of persons convicted solely of possession of marijuana, (3) to prevent the deportation of any person convicted of a drug-related offense who is sentenced to a hospital care program and not to confinement in a prison or jail, and (4) to prevent the deportation of any person whose drug-related conviction is expunged or otherwise removed from the court's records.

Other sections of the Act which allow for deportation for misconduct which falls short of criminal misconduct should likewise be amended so that only certain types of *criminal* misconduct become the standard basis for deportation from the United States.

II.

IMMIGRATION & EXCLUDABILITY

Legislation supporting increased quotas from Mexico and Canada should be pursued. Specifically, Section 202(a) and (e) of the Act [8 U.S.C. § 1152(a) and (e)] should be amended increasing the annual Mexican and Canadian quotas from 20,000 to 50,000. Prior to enactment of the 20,000 limitation in 1976, approximately 45,000 quota immigrants were entering the United States each

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year from Mexico. Increasing their quota at this time would dramatically reduce the number of undocumented aliens by allowing expeditious processing of all documentable aliens and elimination of the current backlogs.

Section 201(b) of the Act [8 U.S.C. § 1151(b)] should be amended to include the parents of U.S. citizens under 21 years of age as "immediate relatives." Again, prior to 1977 the parents of minor U.S. citizen children could immigrate into the United States. Under current law, the parents cannot apply for immigrant status until the child reaches the age of 21. A large number of undocumented workers could regularize their status if the statute was amended to allow for immediate immigration benefits to all parents of U.S. citizen children. These parents should be allowed to immigrate outside the quota system as "immediate relatives."

Section 203(a)(2) of the Act [8 U.S.C. § 1153(a)(2)] should be amended to allow the parents of aliens lawfully admitted for permanent residence to immigrate into the United States. At the present time this section only allows the spouses and children of permanent residents to immigrate into the United States.

Section 203(a)(5) of the Act [8 U.S.C. § 1253(a)(5)] should be amended to allow the brothers and sisters of U.S. citizens to immigrate into the United States regardless of the age of the citizen brother or sister. The underlying concept of family unity is not served by the current restriction in the statute which prevents brothers and sisters from joining one another in this country until the U.S. citizen brother or sister reaches the age of twenty-one.

Section 212(a)(3) of the Act [8 U.S.C. 1182(a)(3)] should be amended so that persons who have previously suffered an attack of insanity would not automatically be excluded from the United States.

Section 212(a)(9), (10) and (23) of the Act [8 U.S.C. § 1182(a)(9), (10) and (23)] should be amended so that (1) expungement of drug-related convictions removes those convictions from consideration for excludability purposes; (2) juvenile offenses are not considered as convictions for purposes of excludability; (3) convictions which occured a certain number of years *prior* to the application for immigrant status would not be used if rehabilitation was established; and (4) excludability could not be established solely based on the belief of the consular officer that the applicant has engaged in drug trafficking (i.e. excludability should only be based on criminal convictions).

Section 212(a)(15) of the Act [8 U.S.C. § 1182(a)(15)] should be amended so that the applicant need only establish that s/he would not qualify for public assistance at the time of application. The consular officer currently can exclude any person if, "in the opinion" of the consular officer, the applicant is "likely at any time to become [a] public charge ..." The term "at any time" should be repealed and the consular officer should be required to examine the eligiblity criteria for public assistance in the state to which the applicant is destined in determining current eligibility for government assistance. Applicants who do not currently qualify for public assistance (taking into consideration the applicant's anticipated earnings in an outstanding job offer) should not be excluded.

Section 212(a)(17) of the Act [8 U.S.C. § 1182(a)(17)] should be amended so that aliens previously removed from the United States at government expense would not be excludable unless records clearly show that the alien was advised of this ground of excludability at the time s/he agreed to be removed from the country at the government's expense.

Section 212(a)(31) of the Act [8 U.S.C. § 1182(a)(31)] should be amend-

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ed so that aliens would only be excludable if they have been convicted of smuggling another person into the United States and the conviction has not been expunged or otherwise removed from the court records.

Waivers of exludability should be available to aliens who are the parents, spouses or children of United States citizens and permanent resident aliens. All grounds of excludability should be waived for such aliens unless the grounds are extremely severe and overcome the underlying purpose of family unification.

II.

JURISDICTION OF FEDERAL COURTS

Section 279 of the Act [8 U.S.C. § 1329] should be amended to make clear that the district courts have jurisdiction over all cases arising under any provision of the Act instead of just Subchapter II of the Act. Subchapter II does not contain Sections 103 and 104 of the Act (found in Subchapter I) which spell out the general powers of the Attorney General and Secretary of State to promulgate regulations to implement the Act. As a result, some courts have held that the district courts have no jurisdiction over matters which arise solely under Sections 103 and 104. For example, if the Commissioner of INS promulgates certain regulations solely pursuant to his authority under Section 103 (and not upon any additional statute found in Subchapter II), the jurisidiction of the district courts to review such regulations is questionable.

Section 279 should also be amended to allow for *de novo* review (i.e. not limited to the administrative record created by INS) of decisions rendered by INS District Directors in the district courts. The right to present matters to the district court which are not found in the INS administrative record is often important to establish facts which INS should have but didn't consider.

This section should allow for judicial review of decisions made by the consular officer during the immigration process. The U.S. citizen or lawful immigrant petitioner should have standing to challenge the denial of an immigrant visa for which s/he has applied in behalf of a close relative. No such judicial reivew is currently available and consular officers therefore are free to issue arbitrary decisions effectively blocking lawful immigration and increasing the number of undocumented people in the United States.

IV.

ENFORCEMENT ACTIVITIES

The general enforcement provisions of the Act (Sections 261-287; 8 U.S.C. §§ 1301-1357) should be amended to prohibit local police from enforcing the provisions of the Immigration Act. Local police have neither the training nor expertise to enforce the federal immigration/deportation laws.

Section 264(e) of the Act [8 U.S.C. § 1304(e)] should be amended so that failure to carry one's alien registration card would not be deemed a criminal offense. Many people do not carry their alien registration cards simply because they know it takes more than one year to obtain a replacement of a lost card. People are rarely criminally charged with this section, but it provides a basis for the harrassment of Latino people.

Section 292 of the Act [8 U.S.C. § 1252(a)] should be amended to allow for bond settings in an amount under $500, the current minimum at which INS can set bail.

For further information or to provide us with your ideas on this legislative program, please contact, Peter A. Schey at NCIR, (213) 487-2531.

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IMMIGRATION LAW BULLETIN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS
1550 WEST EIGHTH STREET LOS ANGELES, CALIFORNIA 90017 (213) 487-2531

CONGRESS CONSIDERS LSC AUTHORIZATION: ALIEN RESTRICTION SEEN AS POSSIBILITY

(By Timothy S. Barker, Deputy Director, NCIR)

Last year Congress enacted a provision contained in LSC' appropriation bill for 1980 restricting the delivery of legal services to certain aliens under orders of deportation. (See *Immigration Law Bulletin*, September 1979). This provision was to last only for fiscal year 1980. However, Congress is now in the process of renewing LSC's existence through the authorization process done every three years. Substantive changes in the Act are possible during this process and many are concerned that Congress might put the alien restriction in the Act itself.

The LSC autorization bill has been referred to the House Judiciary Committee without any restrictions. However, when the Judiciary Committee refers the bill to the floor of the House (anytime after March 17, 1980) it will be open to amendment. It is expected that any restrictions will come at that time. Likewise, the bill was referred to the Senate Committee on Labor and Human Resources without restriction. When referred to the floor of the Senate it will also be open to amendments.

Restrictions upon the delivery of legal services to indigent aliens is patently offensive to our sense of justice. It is the first time a group of people has been singled out for discrimination in the area of legal

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LOCAL POLICE ENFORCEMENT OF OF IMMIGRATION LAWS:

LITIGATION UNDER THE FEDERAL CIVIL RIGHTS ACT, 42 U.S.C. § 1983

(By Carlos Holguin, Staff Attorney, NCIR)

Litigation in the areas of search, seizure, arrest, and incarceration of suspected undocumented persons frequently encounters law which is as fluid and unsettled as any of the immigration field. Issues regarding the power to arrest for immigration violations and the rights of the suspects detained are futher complicated where investtigation, arrest or detention are undertaken by local police agencies. This article presents a brief survey of the availability and requirements of the Civil Rights Act of 1871, 42 U.S.C. § 1983, in stating a federal cause of action as against local police and in

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services because of their status. Persons supporting these restrictions fail to recognize that in most cases there are close United States citizen or permanent resident family members involved. Further, by denying legal services to these persons, Congress is only increasing the exploitation of the undocumented by giving free reign to unscrupulous landlords, employers and business persons who know that they can now take even more advantage of undocumented aliens because they cannot seek legal assistance. This type of legislation must be stopped.

Assistance is needed in informing Congress that this type of legislation is not only counter-productive but also contrary to the basic mandate of LSC to provide equal access to our system of justice.

For more information contact Timothy S. Barker or Peter A. Schey, NCIR, (213) 388-8693 or 487-2531.

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appropriate cases, as against the Immigration and Naturalization Service ("INS").

Preliminarily, it should be noted that § 1983 is not exclusive in providing a theory of relief for injuries arising from local police enforcement immigration laws. The practitioner should carefully survey state statutory and constitutional provisions for authorization of a private cause of action suitable to the particular facts [*e.g.*, California Civil Code § 43 and Penal Code § 236 (false arrest/imprisonment); California Constitution Article 1, § 13 (proscribing unreasonable seizures)]. On the other hand, the importance of § 1983 in litigation against local police should not be underestimated. As we shall see, many courts have all but eliminated private causes of action based directly on the U.S. Constituion; therefore, § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343, may provide the only grounds for federal jurisdiction insofar as money damages are concerned.

§ 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

By its terms, § 1983 serves a limited purposes: it creates a civil cause of action for deprivations of federally secured rights, caused by a person acting under color of state law. Analysis of § 1983 reveals four distinct requirements: First, there must be a deprivation of statutory or constitutional rights secured by federal law; second, the plaintiff must plead and prove causation; third, the defendant must qualify as a "person" within the meaning of § 1983; fourth, the defendant must have been acting under color of state law. Facts establishing each of these elements should be carefully articulated by the complaint.

In considering the first of these requirements— a deprivation of federal rights— the use of a paradigm drawn from actual litigation is helpful. In *Savala, et al. v. Castillo, et al.*, No. CV-78-173-E.D.D. (E.D. Ca., Fresno Div. Filed May 8, 1978), plaintiffs alleged that they were approached by local police because of their racial appearance and were required to produce INS documentation. The plaintiffs exhibited receipts issued by INS showing that their "green cards" (INS form I-151) had been lost and were in the process of being replaced. Unsatisfied, the officers handcuffed the plaintiffs and transported them to the local jail, where they were booked on suspicion of illegal entry [8 U.S.C. § 1325] and placed on "immigration holds". During their 32 hours of in-

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DISTRICT COURT ENTERS FINAL JUDGMENT ORDER IN CONTRERAS DE AVILA V. BELL

(By Timothy S. Barker, Deputy Director, NCIR)

A favorable final judgment and permanent injunction were issued in the *Contreras* case by Judge Prentice Marshall on February 27, 1980. The case involved a challenge to the government's implementation of the 1976 Amendment to the INA in which 13,000 visas were wrongfully denied Mexico. Briefly, the district court ruled:

1. Nine thousand forty-one (9,041) visa numbers will be made available to non-preference visa applicants. Five hundred twenty-four (524) visa numbers will be made available to second preference visa applicants.

2. A recapture program like the *Silva* program will be used to process applicants.

3. All non-preference visa applicants with priority dates prior to July 1, 1976, will be permitted to remain in the United States if they entered before December 14, 1979. They are also entitled to employment authorization *nunc pro tunc* back to the date of last entry to the United States.

4. Limited protection is provided for second preference applicants. For the time being, the April 1, 1978 cutoff date contained in the previous temporary restraining orders is used. Once the Department of State can identify by name the second preference visa applicants likely to be considered for recaptured visa numbers, the injunc-

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AVAILABILITY OF RELIEF FROM DEPORTATION UNDER SECTION 1182(c) AND (H) IN LIGHT OF RECENT NINTH CIRCUIT RULINGS

(By Timothy S. Barker, Deputy Director, NCIR)

1. 8 U.S.C. § 1182(c)

A conflict between the Ninth and Second Circuits now exists regarding the availability of relief under 8 U.S.C. § 1182(c). The following is a discussion of the nature of the conflict and considerations of how to approach cases under the Ninth Circuit's restrictive rulings.

Section 1182(c) provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation and who are returning in a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraph (30) of subsection (a).

On its face, § 1182(c) appears to apply only to resident aliens who are seeking re-entry and face possible exclusion. However, in *Matter of L*, 1 I&N. Dec. 1 (1940), the Board of Immigration Appeals held that relief under § 1182 (c) (then it was the Seventh Proviso to Section 19 of the 1917 Act) could be granted in deportation proceedings to cure a ground of excludability at the time of the alien's *last* entry. In that case the respondent had left the United States *after* receiving a conviction for larceny. He had re-entered the U.S. and INS moved to deport him because he should have been denied permission to enter the country. The Board held that the immigration judge could grant him *nunc pro tunc* relief under § 1182(c) to cure the record of entry

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> tive relief will be limited to those on the Department of State list.

The *Contreras* case was litigated by the Illinois Migrant Legal Assistance Project, 343 S. Dearborn Street, Suite 806, Chicago, Illinois 60604 (312) 341-9180. Bruce L. Goldsmith has indicated that there is a possiblity the government may appeal the ruling. Additionally, they might cross-appeal on the issue that 4,000 additional visas should have been granted to Mexico under the decision.

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and that this would in turn cure the ground of deportation. Accordingly, relief under § 1182(c) became available in deportation proceedings to aliens who had left and re-entered the U.S. following the time which the ground for deportation arose. If the ground for which the individual was excludable was the same as that for deportation then § 1182(c) relief would dispose of the deportation charge(s). [The overlap of exclusionary and deportation grounds are as follows: exclusionary grounds § 1182(a)(9) and (10) and deportation ground § 1251(a)(4) - conviction of crime(s) of moral turpitude; exclusionary ground § 1182(a)(15) and deportation ground § 1251(a)(3) and (8) becoming a public charge; exclusionary ground § 1182(a)(23) and deportation ground § 1251(a)(11) - conviction of crime involving narcotics, cocaine or marijuana; exclusionary ground § 1182 (a)(31) and deportation ground § 1251 (a)(13) - smuggling aliens into U.S. for gain.]

Aliens who had not actually departed could invoke relief under § 1182(c) if they were eligible for adjustment of status on the theory that a person adjusting their status stands in the same position as an applicant who seeks to enter the U.S. with an immigrant visa. *Matter of Smith*, 11 I.&N. Dec. 325 (1965). This, though, was the only exception to the actual departure requirement. The Board refused to extend § 1182(c) relief across the board in deportation proceedings to otherwise eligible immigrants. *Matter of Arias-Uribe*, 13 I.&N. Dec. 696 (1971), affirmed *Arias-Uribe v. INS*, 466 F.2d 1198 (9th Cir. 1972).

In *Francis v. INS*, 532 F.2d 268 (2nd Cir. 1976) the Court of Appeals found that allowing § 1182(c) relief to be extended to persons who have departed the U.S. and re-entered following the commission of the deportable offense or who are eligible for adjustment of status and not to all otherwise eligible aliens is a denial of equal protection. The Board agreed to extend this decision nationwide. *Matter of Marin*, I.D. 2666 (1978); *Matter of Silva-Ovalle*, I.D. 2532 (1976). However, the Ninth Circuit has refused to follow *Francis*. In *Bowe v. INS*, 590 F.2d 802 (9th Cir. 1979), *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979), and *Castillo-Felix v. INS*, 601 F.2d 459 at note 6 (9th Cir. 1979) the court considered *Francis* but refused to alter its decision that there must be an actual departure or an adjustment of status application pending before eligibility for § 1182(c) relief could be established in a deportation proceeding.

Under the Ninth Circuit's decisions, it is therefore necessary that your client be:

1. an alien who departed the U.S. after the ground of deportability arose and has re-entered, or

2. eligible for adjustment of status, or

3. is eligible for voluntary departure and seeks advance determination of § 1182(c) relief to apply to a future entry.

[It is not entirely clear if the Immigration Judge has the power to grant advance relief under § 1182(c). The

(Continued pp. 5)

AVAILABILITY OF RELIEF . . .

Ninth Circuit has indicated that this might be possible, *see, Castillo-Felix v. INS, supra,* 601 F.2d at 459 n.5. However, other authority places the jurisdiction for advance relief with the district director. *Matter of Wolf,* 12 I.&N. Dec. 736 (1968); 8 C.F.R. § 212.3; *Matter of S,* 5 I.&N. Dec. 116 (1953); *Matter of Y.S.,* 5 I.&N. 658 (1954). As noted before, though, the only exclusion/deportation ground covered by § 1182(c) which an individual is not denied eligibility for voluntary departure under § 1252(b) or (e) is § 1251(a)(13), smuggling aliens for gain.]

Currently, there is considerable confusion regarding § 1182(c)'s application in the Ninth Circuit's jurisdiction. The Board has been upholding decisions in which the immigration judge has denied § 1182(c) relief in deference to the Court of Appeals' ruling. (*E.g., In re Ramiro Guerrero-Gomez,* A13 126 652 (11/16/79). However, the Service has now taken the position that *Francis* should be applied nationwide regardless of the Ninth Circuit's rulings. This position was set forth in a Memorandum dated February 19, 1980 to the Board in the *Bowe* case. In that memorandum the Service criticizes the Ninth Circuits' position and contends that it does not have to followed in cases arising under the Court of Appeals' jurisdiction, citing *Matter of Mangabat,* 14 I.&N. Dec. 75 (1972). Apparently, the trial attorneys are now requesting immigration judges to rule upon § 1182(c) applications under the *Francis* standard. Until the Board issues a precedent decision clearing up this confusion it would be advisable to attempt to bring your client's case within the parameters of the Ninth Circuit's rulings in order to preserve the record in case the Board rejects the Service's position. [It is still possible that the Ninth Circuit could change its position by an In Bank review of its prior rulings. If anyone has an appeal going to the Court in which this issue is raised NCIR would be willing to assist in the preparation of the appeal briefs.]

2. *8 U.S.C. § 1182(h)*

This section provides relief to persons convicted of crimes of moral turpitude. To be eligible the individual must be the spouse, parent or child of a U.S. citizen or lawful immigrant and that their exclusion would result in extreme hardship to that relative. Like § 1182(c), this section appears to be available only in exclusionary proceedings. However, like § 1182(c), it has become available in deportation proceedings where an adjustment of status application has been filed, *Tibke v. INS,* 335 F.2d 42 (2nd Cir. 1964); *Matter of Loo Bing,* 15 I&N Dec.___(ID 2385), or where there has been a departure and re-entry after the comission of the crime, *see, Matter of P,* 7 I&N Dec. 713 (1958); *Matter of Sanchez,* (A14 273 169) (1/15/80). Section 1182(h) relief will waive a ground of deportation under § 1251(a)(4). No court has yet considered whether to extend the *Francis* § 1182(c) rational of an across-the-board application to all persons in deportation proceedings on equal protection grounds to § 1182(h) relief.

* * * * * * * * * * * * * * * *

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The following publications are available through the Training Resource Center.

Immigration Defense Manual, 79-863-01 (892 pp., $ 40.00)

79-863-02 *Immigration Procedure. Criminals, prior deportees, iliterates, polygamists and other may not immigrate into the United States. The immigration efforts of some others (spouses and children of citizens, specially trained workers, etc.) receive special preference. This part also contains an unfavorable analysis of President Carter's immigration proposals concerning undocumented aliens. (214 pp. $10.70)*

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(Continued pp. 6)

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INTERNATIONAL CONFERENCE ON UNDOCUMENTED WORKERS: Labor and community organizations will be participating in this conference to be held in Mexico City on April 28, 29 and 30, 1980. For further information contact IBGW - Local 301, 3123 West 8th Street, Los Angeles, CA 90005. (213) 383-7057.

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* * * * * * * * * * * * * * * * * *

LOCAL POLICE ENFORCEMENT . . .

carceration, the plaintiffs were ineligible for release on bail, were not taken before a magistrate or court commissioner for a determination of the cause of their incarceration, were not given the advisals required under *Miranda v. Arizona*, 384 U.S. 436 (1966), and were denied access to telephones.

Examining the initial police contact set out in this illustration, it can be alleged that the stop and questioning of the plaintiffs violated the Fourth and Fourteenth Amendments in that the stop was not upon a reasonable suspicion based on articulable facts that the person "seized" was an unlawfully present alien, *see, Terry v. Ohio*, 392 U.S. 1 (1968), *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977), *see also, Marquez v. Kiley*, 436 F.Supp. 100 (S.D.N.Y. 1977) [mere questioning requires reasonable suspicion of alienage *and* unlawful presence]. Thus, allegations showing a violation of the federal constitutional right to be free from illegal seizures is actionable under § 1983. *Cf. Beightol v. Kunowski*, 486 F.2d 293 (3d Cir. 1973) [*de mimimus* infringements actionable under § 1983; brevity of seizure may mitigate damages but does not abort right of action]; *see also, Gilker v. Baker*, 576 F.2d 245 (9th Cir. 1978), *Rodriguez v. Ritchen*, 539 F.2d 397 (5th Cir. 1976) *cert. denied*, 434 U.S. 1047 (1978), *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976), *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968), and *Hairston v. Hutzler*, 334 F.Supp. 251 (D.C. Pa. 1972), *aff'd*, 468 F.2d 621 (3d Cir. 197), all regarding § 1983 actions for injury connected with unlawful arrest. Each potentially unlawful practice should be similarly analyzed to determine whether a federal constitutional or statutory violation can be alleged. *E.g., Pritz v. Hackett*, 440 F.Supp. 592 (W.D.Wis. 1977) [officer in charge of detention facility may be liable under § 1983 for post-arrest, unlawful detention]; *Thornton v. Buchmann*, 392 F.2d 870 (7th Cir. 1968) [failure to give *Miranda* warnings not constitutional violation]; *Stephenson v. Gaskins*, 539 F.2d 1066 (5th Cir. 1976) [denial of bail actionable under § 1983], *but see, U.S. v. O'Dell*, 462 F.2d 224 (6th Cir. 1972); *Anderson v. Nosser*, 456 F.2d 835 (5th Cir. 1972) [§ 1983 action lies for failure to bring before magistrate without unreasonable delay], *compare, Perry v. Jones*, 506 F.2d 778 (5th Cir. 1975) [violation of state magistrate statute held state law pendent claim to § 1983 action for unlawful arrest]; *Lathan v. Oswald*, 359 F.Supp. 85 (S.D. N.Y. 1973) [failure to allow access to phones may amount to unconstitutional denial of counsel actionable under § 1983].

The next point for consideration is whether the constitutional deprivation was caused by a "person" within the scope of § 1983.

Prior to 1978, the federal courts had taken an extremely underinclusive view toward the range of government entitites liable as "persons" under § 1983. *See generally, Monroe v. Pape*, 365 U.S. 167 (1961) [municipalities not "persons" within § 1983]. In *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978), the Supreme Court partially overruled *Monroe* in holding that municipalities are "persons" within the meaning of § 1983. In reaching its decision, the Court reexamined the legislative history of the statute and concluded,

> [s]ince municipalities through their official acts, could equally with natural persons create the harms intended to be remedied by [§ 1983], and further, since Congress intended [§ 1983] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of [§ 1983].

Id. 365 U.S. at ___; 98 S.Ct. at 2033-4.

In the aftermath of *Monell*, courts have adopted an increasingly pragmatic interpretation of "persons" within the purview of § 1983; hence, it has been held that a collegiate athletic conference is amenable to suit under § 1983, *Stanley v. Big Eight Conference*, 463 F.Supp. 920, 927 (W.D.MO. 1978); that a school district is a "person" for

(Continued p. 8)

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purposes of § 1983, *Stoddard v. School District No. 1, etc.*, 590 F.2d 829, 834-5 (10th Cir. 1979 and *Kelly v. Richland School Dist. 2*, 463 F.Supp. 216, 221-2 (D.S.C. 1978); that a municipal health department is within those persons contemplated by § 1983; *Alexander v. Polk*, 459 F.2d 883, (E.D.Pa. 1978); that a local park district may be held liable under § 1983; *Kurek v. Pleasure Driveway & Park Dist. of Peoria*, 583 F. 2d 378, 380 (7th Cir. 1978), cert. denied, ___U.S.___, 99 S.Ct. 873 (1979); and that a county is not immune from § 1983 suits, *Knight v. Carlson*, 478 F. Supp. 55 (E.D. Ca. 1979). Note, however, that certain parties may defend against a § 1983 action on grounds of official immunity. *E.g., Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978)[Eleventh Amendment state immunity]; *Pierson v. Ray*, 386 U.S. 547 (1967) [judges' immunity].

In broadly expanding the availability of § 1983 in suits against government agencies, *Monell* had an additional consequence: courts have since held or implied that no cause of action based directly on the Constitution is available where § 1983 provides a remedy. *E.g. Molina v. Richardson*, 578 F. 2d 846 (9th Cir. 1978), *cert. denied*, 439 U.S. 1048 (1979). The reasoning of these courts is that the Supreme Court majority in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) were pursuaded to imply a cause of action directly on the Constituion for money damages in order to fill a void in statutory law. Although an unconstitutional statute or practice could be enjoined, the *Bivens*-type action was necessary to provide redress for isolated acts leading to constitutional injuries.

By analogy to *Bivens*, lower courts had implied a cause of action against municipalities notwithstanding the § 1983 exemption conferred upon political entities by *Monroe*. With the expansion of § 1983 by *Monell*, the remedial void, insofar as state's bodies politic are concerned, has been filled. Compare *Kotska v. Hogg*, 560 F.2d 37 (1st Cir. 1977) and *Turpin v. Mailet*, 579 F.2d 152 (2d Cir. 1978) [Taking opposite views on availability of *Bivens* type action against state actors.] Thus, although, an action for injunctive relief should still be available directly on the Constitution, *see generally*, *Bivens, supra*, 403 U.S. at 404 (Harlan, J. concurring), § 1983 is likely to preempt the constitutional cause of action unless an enjoinable program or pattern of unconstitutional conduct is alleged.

Perhaps the most complex and confused area of § 1983 liability is that involving causation. *Monell* made clear that the issues of municipal and supervisorial liability, are in essence questions of causation:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort ... [The] language [of § 1983] plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights ... [T]he fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent. 365 U.S. at ___; [98 S.Ct. at 2036-7].

The Supreme Court in *Monell* was unquestionably clear that a municipality, although unable to literally effect an unlawful arrest or incarceration, may nonetheless be liable under § 1983 if its policies, customs, or practices are shown to possess an affirmative causal nexus with actual constitutional deprivations.

A question which remains unsettled, however, is the degree of causal proximity which a governmental custom, policy, or usuage must possess to the actual injury complained of. In a leading pre-*Monell* case, *Rizzo v. Goode*,

(Continued pp. 8)

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423 U.S. 362 (1976), the Court reversed a lower court order which required the Philadelphia Police Department to submit for court approval a comprehensive program for improving the handling of citizen complaints against police officers. The lower court's findings supporting its order were equivocal. The district court found no policy on the part of the named defendants to violate constitutional rights, but that the internal police department procedures minimized the consequences of police misconduct. The district court also found that only a small percentage of police officers committed constitutional transgressions, but that the incidents of police misconduct could not be dismissed as rare or isolated.

The Supreme Court in a 5-3 opinion by Justice Rehnquist, reversed, holding, *inter alia*, that the only causal link underlying the district court's order was the defendants' failure to take remedial measures in the face of statistics showing police abuses. The Court concluded that this failure to act did not satisfy the causation requirement of § 1983 and that a contrary ruling would "blur accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983". 423 U.S. at 376.

Rizzo, of course, must be considered in light of the Court's subsequent decision in *Monell*, where the Court noted that "the mere right to control without any control or direction having been exercised is not enough to support § 1983 liability" 436 U.S. at 694 n. 58. As a lower court observed, *Monell* "suggests that at least one form of inaction — failure to supervise combined with the exercise of some control — may be actionable." *Mayes v. Elrod*, 470 F.Supp. 1188, 1194 (M.D. Ill. 1979); *see also, Estelle v. Gamble*, 429 U.S. 97, 106 (1976) [post-*Rizzo* case indicating that omission to act sufficiently harmful to evidence "deliberate indifference" to probability of serious constitutional deprivations actionable under § 1983].

Lower Courts have struggled to apply the often vague language of the Court to the myriad of civil rights actions brought by litigants daily. The result is a body of relatively narrow precedent which is rarely controlling as a matter of *stare decisis*. The crux, however, is that causation is in essence a question of fact which should be decided in light of the evidence adduced at trial. *Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir. 1977), *Mayes v. Elrod*, *supra*, 470 F.Supp. at 1195. It should therefore suffice if the pleadings show an affirmative policy of immigration law enforcement which the defendant should reasonably know would result in constitutional deprivations: "A person subjects another to the deprivation of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made. [citiation omitted] Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-4 (9th Cir. 1978).

In litigation directed solely against local police, the § 1983 "state action" requirement will obviously present few obstacles. However, § 1983 can support an action against federal defendants in appropriate circumstances. The question thus becomes when can the INS be sued under § 1983 which by its terms provides redress only for constitutional deprivations visited under color of <u>state</u> law.

The test for "state action" under § 1983 is equivalent to that applied under the Fourteenth Amendment to the United States Constitution, *United States v. Price*, 383 U.S. 787, 794-5 n. 7 (1966); thus, a symbiotic rela-

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tionship between state and non-state actors renders all joint activities "state action" under § 1983:

> "When the violation is the joint product of the exercise of a State power and a non-state power then the test under the Fourteenth Amendment and § 1983 is whether the state or its officials played a 'significant' role in the result."

Green v. Dumke, 480 F.2d 624, 629 (9th Cir. 1973), *quoting Kletschka v. Driver*, 411 F.2d 436, 449 (2nd (2d Cir. 1969); *see also, Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

The Ninth Circuit's adoption of the test for state action set out by the court in *Kletschka* is significant to litigation against the INS for the additional reason: the jointly responsible non-state power at issue in *Kletschka* was the Veterans Administration, a federal agency which the plaintiff alleged had conspired with state medical school officials to undermine his employment. The court in *Kletschka* concluded:

> We can see no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons. It is the evident purpose of § 1983 to provide a remedy where federal rights have been violated through the use or misuse of a power derived from a state [citation omitted] ... Plaintiff has alleged facts, not directly refuted by defendants, which entitle him to an opportunity to prove that ... "The State [entity] has so far insinuated into a position of interdependence *** [with] [the federal entity] that it must be recognized as a joint participant in the challenged activity, which on that account cannot be considered to have been so *** ('purely federal') as to fall without the scope of the Fourteenth Amendment."

411 F.2d at 448-9 [bracketed material added; parenthetical in original.]

The normative practice, whereby local police arrest suspected deportable aliens for later interview by INS, would seem to fall squarely within the joint action theory of liability such that damages, declaratory and injunctive relief would lie against the INS. Insofar as the § 1983 "person" requirement is concerned, there is no apparent reason why the INS as an entity is inherently different from the various state political subdivisions which have been considered amenable to suit under the civil rights statue.

Nonetheless, actions for declaratory and injunctive relief must be distinguished from actions seeking damages where a federal government entity is involved: the doctrine of sovereign immunity is of crucial importance in determining the availability of money damages.

Examining first actions for declaratory and injunctive relief, no obstacle should exist to bar suits directly against the INS or its officers in their official capacities. The Administrative Procedure Act was amended in 1976 to allow suits for specific relief directly against a federal agency or officer. 5 U.S.C. §§ 702 and 703. The amendments to the APA settled a long-confused area of law in which the courts had first developed, and then eroded, legal fictions which exempted suits against government agencies for specific relief from the soverign immunity defense. *Compare, Ex Parte Young*, 209 U.S. 123 (1908) [allowing suits directly against state officers to enjoin unconstitutional, and therefore *ultra vires* conduct], with *Hawaii v. Gordon*, 373 U.S. 57 (1963) [noting general rule that sovereign immunity bars suits nominally brought against officers which in fact operate against the sovereign].

Suits seeking monetary relief, how-

(Continued pp.11)

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ever, are subject to different law. Here the general rule that the United States must consent to suit apparently remains intact. *See, City and County of San Francisco v. United States*, 443 F.Supp. 1116, 1129 (N.D.Ca. 1977). It should be remembered that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra*, authorized monetary recovery only against individual federal officers, and not directly against the federal government. *Molina v. Richardson, supra*, 578 F.2d at 853. Thus, the closely analagous constitutionally based action lends no support to imposition of government damages liability under § 1983.

Alternatively, damages may still be recoverable in § 1983 actions against federal officials sued in their individual capacities. *Cf. Bivens, supra*, [suit directly on constitution for damages]. The law here is currently subject to reassessment in the light of the 1974 additions to the Federal Tort Claims Act, 28 U.S.C. § 2680(h), which now provides redress for "any claim arising ... out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" involving "acts or admissions of investigative or law enforcement officers of the United States Government ... " *See generally, Norton v. United States*, 581 F.2d 390 (7th Cir. 1978) [discussing purpose of amendments as providing relief anolagous to *Bivens*-type actions]. If the rationale that *Bivens* should be limited to those situations where it is necessary to fill a remedial void is extended beyond the § 1983 context to include actions against federal officers, it might well sound the death knell of *Bivens*-type actions altogether, limiting the litigant to his or her remedy under the Federal Torts Claims Act.

This article has briefly sketched some of the more important conceptual issues involved in bringing a civil rights action against local police and the INS involved in join immigration law enforcement operations. Clearly, the law in this area is as yet unsettled, particularly with respect to proper parties-defendant (§ 1983 "persons"), causation, and liability of federal officers and agencies under § 1983.

Although beyond the scope of this article, a final word of caution is in order: the Fifth Circuit has recently indicated that lack of the good-faith defense to damages actions under § 1983 must be affirmatively pleaded and proved by the plaintiff. *Cruz v. Beto*, 603 F.2d 1178, 1183 (5th Cir. 1979); *compare, Bryan v. Jones*, 530 F.2d 1210, 1212-13 (5th Cir. 1976), *cert. denied*, 429 U.S. 865 (1977) [prime facie case of false imprisonment made out; good faith is element of affirmative defense]; *Pinckey v. Northhampton County*, 433 F.Supp. 373, 378 (E.D. Pa. 1976) [same]. For obvious reasons, this added burden is an unwelcome and unnecessary obstacle to the individual litigant confronting powerful governmental opponents such as police and the INS.

* * * * * * * * * * * * * * *

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* * * * * * * * * *

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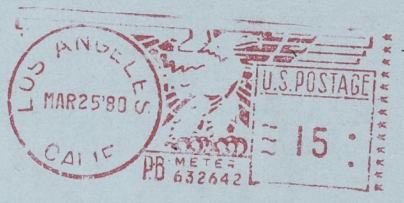

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Special Issue

Select Commission on Immigration and Refugee Policy —A Lost Opportunity for Progress

This double issue of the *Immigration Law Bulletin* (covering November 1980 through January 1981) addresses some of the major questions voted upon by the Select Commission on Immigration and Refugee Policy. Future editions of the *Immigration Law Bulletin* will deal with issues voted on by the Commission but not covered here. The final report of the Commission will be submitted to President Reagan and the Congress on or about March 15, 1981. It will probably include an official report of approximately 100-200 pages containing a discussion of the broad conclusions reached by the Commissioners and an Appendix dealing in more detail with the data and research papers collected by the Commision.

The final votes of the Commission, to the extent available to NCIR, are reported on in an article in this edition. Many of the votes on critical issues were closely divided, reflecting continuing confusion over the meaning of avilable demographic data, the economic impacts of migration, the inter-relationship between migration and U.S. foreign policy, and the long-range goals of U.S. immigration policy. Reports received by NCIR from the offices of various Commissioners indicate a fair amount of displeasure with the failure of the Commission staff to coherently analyze existing research data and to integrate such data into plausible policy options. Materials prepared by the staff for the final Commission meeting (December 6-7, 1980) were received by the Commissioners only a few days before the meeting at which most of the final votes were recorded. Some of the Commissioners had not had an opportunity to even review these materials before the final meeting. Some Commissioners felt that the staff materials were inadequate to form the basis for rational discussion and voting on crucial issues.

The final meeting was marked by confusion as the Commissioners struggled with a multitude of complex questions without having access to materials clearly defining the current state of the law, summaries of empirical data or policy options. Judge Reynoso, one of the few Commissioners who had clearly studied the staff materials before the meeting, was often forced to abstain from voting "on the basis of not understanding" the issues being voted on. [All quotes are taken from the transcript of the December 7 final meeting.] Some of the staff recommendations, unsupported by empirical data, were termed "outrageous" and a "disservice" to the Commission by Judge Reynoso. Commissioner Otero suggested at one point that the absence of explanatory material supporting staff recommendations could lead to the "conclusion that there is some subterfuge" taking place. When asked to vote on criteria for admitting a *new* category of "independant" immigrants, Commissioner Otero said he was being asked to vote in a "vacuum" as the staff had provided no "guidance as to how this [eligibility for immigrant status] would be handled." Commissioner Ochi concluded that the proposed staff criteria were "too undefined ..." Discussing possible amendments to the adjustment of status statute (Section 245) the Commissioners were thoroughly confused on how the *current* statute operates and Sam Bernsen, Director of Legal Research for the Commission, eventually had to clarify Attorney General Civiletti's incorrect interpretation of the statute which had formed the basis of a lengthy, largely incoherent discussion. Sam Bernsen opposed the staff recommendation (to restrict access to adjustment of status), saying "this is an airlines bill. You are making money for the transportation companies."

Dealing with the complex socio-political question of a worldwide numerical limitation on lawful immigration, Father Hesburgh said "the thing is so complicated ... the best we could do is to say we would agree with a certain ballpark figure. *I would say 450,000 is as good as any others I have seen.*" No objective explanation was provided for this "ballpark figure." Commissioner Holtzman commented that "I don't understand" the basis

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for the staff recommendation on numbers, the staff [has not] provided those reasons." Father Hesburgh finally suggested that the "various options", which were listed on "one sheet of paper", be provided to the Commissioners *"and they can look at it during the noon [lunch] hour ..."* He added that the Commission's conclusions on numerical limitations "dosen't make that much difference" because it would ultimately "be decided by the Congress and we are merely giving a suggestion ..." After the lunch hour a confused discussion on numerical limitations continued — Congressman McClory participated in the discussion *mistakenly thinking they were discussing "legalization ..."* Such was the nature of the Commission's final meeting. At no time was the public input discussed, in fact the staff had never seriously quantified or analyzed the input received at public hearings. And, while viturally every expert in the country must have submitted research to the staff, these materials were never studied and incorporated into staff recommendations.

In the final analysis the Select Commission gathered a large volume of public testimony and expert research but failed to analyze this data and incorporate it into policy options. Staff recommendations and Commission votes were therefore ultimately based on an inadequate factual record. Highly complex questions, such as where to set a cap on lawful immigration, how to "streamline" the "H-2" temporary worker program, whether to enact an employers' sanctions law and if so how it should be implemented, etc., were approached in a manner aimed more at winning public and Congressional acceptance rather than a search for empirical truths.

This Commission represents a lost opportunity to seriously address the immigration issues faced by this country today. The positions adopted involve multiple contradictions. While agreeing that unlawful migration may, at best, involve some job displacement in the marginal sectors of the secondary labor market, the Commission supports the development of a billion-dollar "secure" national ID card to implement an employer sanctions law. The Commission failed to consider the severe difficulties that poor persons will have in obtaining birth certificates and other documents which will be required to establish eligibility for a "secure" ID card. The Commission failed to consider the need for (or cost of) an administrative appeal process for persons denied an ID work card. The Commission did not consider the impact of taking money that would be required to implement a "secure" national ID card and placing it instead into a job-training program for those workers in the marginal sectors of the secondary labor market who *might* suffer job displacement because of illegal migration. As pointed out by numerous experts, the implementation of a "secure" national ID work will negatively impact on the very workers who the program would ostensibly be established to help. At the same time as proposing a new "independent" category of immigrants unrelated to family reunification, the Commission voted to continue the policy of deporting the mothers and fathers of minor U.S. citizen children (a practice whch frequently involves the *de facto* deportation of the U.S. citizen child). While agreeing that job displacement may occur in marginal areas of the secondary labor market, the Commission endorsed a "streamlined" H-2 temporary worker program which would increase the number of H-2 workers entering the U.S. to work in direct competition with workers in the marginal sectors of the secondary labor market. While supporting a fairly liberal amnesty program, the Commission voted to implement amnesty only *after* an "effective enforcement mechanism is in place ..." Seemingly undocumented workers will first be flushed out of the labor market (through employer sanctions) and many deported *before* an amnesty program is implemented.

Senator Alan Simpson has been designated as the Chairman of a new Senate subcommittee on immigration. He has already stated that he will hold further hearings before legislation is introduced in the Senate. The Commission's findings and recommendations will undoubtedly form the framework for the legislative package ultimately introduced by Senator Simpson. Concerned individuals and organizations will therefore have a further opportunity to express their views on the many complex issues involved in the immigration question.

The articles appearing in this edition have been edited by NCIR. Where materials are deleted, four dots (....) will appear in the text. Emphasis (text in italics) has been added by the editors and may or may not appear in the original research papers. Complete texts of these articles should be available through the Select Commission under the Freedom of Information Act. They are also available through NCIR at our cost of reproduction and postage.

Attorney Sought for NCIR Washington, D.C. Office

NCIR is presently accepting applications for an attorney position available in Washington, D.C. Duties will include monitoring immigration legislation, client advocacy on regulation and policy changes, and selected litigation in the D.C. Circuit. Salary range: $18,000 to $24,000 depending on experience. Applications must be received by March 15, 1981. Selection will be made by March 30, 1981. We are hoping to locate an attorney who could begin in the position by April 15, 1981. Forward resume and writing samples to Timothy Barker, NCIR, 1550 W. 8th St., Los Angeles, CA 90017.

The National Center for Immigrants' Rights is actively soliciting articles from immigration attorneys for publication in the Immigration Law Bulletin. Please send all material for consideration to:

National Center for Immigrants' Rights
1550 West Eighth Street
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Discriminatory Effects of Employer Sanctions

Prepared by
Institute for Public Representation
Washington, D.C.
(November, 1980)

This paper presents an analysis by the Institute for Public Representation ("IPR") of proposals for the imposition of sanctions against employers hiring undocumented alien workers. The analysis focuses on the discriminatory effects of alternative schemes for employer sanctions combined with systems for uniform verification of worker status ....

I. INTRODUCTION

Employer sanctions proposals which are not combined with safeguards against racial discrimination are widely regarded as unworthy of serious consideration. All observers recognize that a law simply making it illegal for an employer to hire persons suspected of being undocumented aliens would cause a massive increase in employment discrimination. A person who "appeared foreign", whether he was a citizen, a resident alien, or an undocumented worker, would be subjected to special scrutiny and other discriminatory burdens when seeking employment ....

IPR undertook this analysis in order to test the assumption that the various "objective verification" schemes under review would not increase discrimination. As explained in detail herein, we have determined that this assumption is untenable. While the opportunities and incentives for discrimination that would be created by the proposed "objective" schemes would be less obvious than those created by a "subjective" verification program, they would be no less real or significant.

The administrative burdens imposed on employees by each of the programs would fall almost exclusively on marginal workers with transitional work status. In contravention of their stated purposes, the programs would place more barriers in the path of minority youth seeking employment. In addition the administrative procedures that would be employed by the programs to ascertain work authorization status would be extremely discriminatory. Each of the schemes would accord government officials extensive discretion to decide who is authorized to work. These officials will inevitably apply a far more stringent test to Hispanics, Asians and other persons of foreign ancestry.

Employers already inclined to discriminate will perceive that discrimination against persons of foreign ancestry is somehow legitimized by the program. Other employers may feel it is their civic duty to go beyond the minimum requirements of the sanctions program and make their own subjective assessments of a job applicant's work authorization status.

Moreover, the proposed programs would encourage many employers to discriminate by furnishing an apparently legitimate but actually pretextual basis for discrimination based on race and national origin. Employers would be delegated the authority to match the characteristics of propective employees with information furnished by the government. An employer who is in fact discriminating could insulate himself from a civil rights action by claiming that he was not satisfied that a particular applicant conformed to the government's description ....

Finally, the proposed programs will cause employers to discriminate by rendering existing civil remedies less effective. Since claims of employment discrimination against Hispanics, Asians and other persons of foreign ancestry will substantially increase, the already backlogged EEOC will be capable of handling fewer cases alleging employment discrimination against blacks and other minorities.

II. ISSUANCE OF WORKER AUTHORIZATION OR IDENTIFICATION CARDS

Under this scheme, workers seeking new jobs or falling within certain age brackets would apply for work permits at local Employment Service offices. A worker would nominate two or more data sources to validate his or her application for a work permit, including: (a) filing an income tax return nine years or more before the date of application; (b) withholding of social security taxes in the same time frame; (c) service in the United States armed forces at any time; and (d) employment by the United States government.

Workers found eligible would be issued work authorization cards with their photographs, other identifying data and, perhaps, fingerprints. Workers unable to prove legal status but whose applications appeared "plausible" would be issued temporary permits while various data systems would be searched for proof of legitimate presence in the work force. Workers whose applications did not appear "plausible" would be referred to the nearest INS office for deportation procedures .... The employer could not hire any persons without a card or whose characteristics did not match those on the card. [**Editors Note:** On January 6, 1981, the Commission by a slim majority voted to support creation of a "secure" national ID card to be issued to all persons authorized to work in the United States.] Employers would be required to keep detailed records of all "transactions" with workers so that INS could assess compliance with verification obligations.

III. NATIONAL EMPLOYABILITY DATA BANKS

Under this scheme, workers would apply for work authorization status in a similar fashion to the process described above. Workers found eligible would be given a unique work permit number and would have a work permit file constructed for him or her. The work permit file would consist of data from the nominated data sources and identifying information on the individual, such as full name, date and place of birth, full names of both parents and height and weight.

When an individual applied for a job, the employer would call the data bank and provide the applicant's number, and, in turn, would be provided with two sets of information. First, he would be told either that the number was a valid one for a legitimate worker, or that the number did not exist, in which case the worker could not be hired. Secondly, if the number was valid, identifying data would be supplied to the employer .... If the information supplied did not accord with the worker's charac-

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...Discriminatory Effects

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teristics, the employer would be prohibited from hiring the worker ....

IV. AFFIDAVIT-BASED EMPLOYER REPORTER SYSTEM

In this scheme, employers would be required to keep records containing employee affidavits asserting legal authorization to work in the United States and some form of substantiating documentation. A copy of these employee records would be sent to the government which would then screen them, focusing attention on geographical areas and industries where undocumented workers are expected to concentrate. When incomplete or unclear data is submitted, employers would be required to secure additional information and forward it to the government.

When INS received complete employee records it would check these records against its own data files and other data systems. Where INS' follow-up of a specific worker's records indicated a high probability of illegal status, the employer would be required to give the worker a brief period of time to obtain documentation from INS of his legitimacy; if the worker did not do so he would be fired at the end of the time period ....

The principal enforcement activity would take place in the field by INS investigators. Employers would have the responsibility of maintaining a file of new-hire reports. Investigators would examine the file and ask a 'sampling' of workers to identify themselves. One or more instances of new workers who could not be linked with the new-hires reports file would suggest that the employer had failed to file reports and could subject the employer to prosecution ....

V. IMPACTS OF PROPOSED SANCTIONS SCHEMES ON EMPLOYMENT DISCRIMINATION

Employer sanctions schemes that do not safeguard against racial discrimination are regarded as unworthy of serious consideration in a society committed to stamping out racial bigotry in the hiring and promotion of workers. Accordingly, *the fundamental acceptability of the proposed sanctions schemes under review hinges on the assumption that they would not cause discrimination.* Proponents of the systems would support this assumption by arguing that the schemes involve simply objective verification responsibilities for employers which furnish little room for an employer's exercise of discretion ....

The assumption that the schemes will operate in a non-discriminatory manner is as incorrect as it is superficially appealing. The proposed schemes will generate discrimination against Hispanic-Americans, Asian Americans, other minorities of foreign ancestry and blacks in both the employment and law enforcement contexts ....

A. Discrimination in the Administration of the Program

1. Discrimination in the Determination of Work Authorization Status

Under the proposed systems, receiving governmental authorization to work will be essential for all individuals seeking legal employment in the United States ....Under the proposed programs, only workers seeking new jobs or changing jobs would be required to obtain government authorization to work. In addition, only these persons would be required to present identification cards to employers for verification, have their status checked by computer or submit affidavits. Thus the program's administrative burdens would fall squarely on individuals with a highly transitional and fluid work status. Those persons with permanent, stable employment would hardly be affected by the programs. Persons with unstable occupational patterns, in turn, are disproportionately minority citizens.[2] Thus, *the proposed systems place their heavy administrative burdens primarily on those minority individuals who find it most difficult to get stable jobs and who have historically been exposed to extreme employment discrimination* ....

Of even greater concern, however, are the disastrous practical consequences the programs would have for already marginal minority workers. *Many of these workers may drop out of the employment market altogether instead of expending time and energy obtaining government permission to work at tedious and low-paying jobs.* Other poor, minority persons, too unsophisticated to comply with the requirements of the proposed systems or wary of contact with the government will, in essence, become illegal workers. Employers will benefit from the 'black market' in labor that will flourish under the proposed systems by paying these workers even lower wages and providing even worse working conditions than are presently available. *Employees who have not achieved legal work authorization status will be unlikely to report Fair Labor Standards Act or Occupational Health and Safety Act violations to the government* ....

The procedures by which applicants must obtain government authorization to work under the systems will discriminate against minority citizens in another way. As noted above, in the ID card and data bank schemes, individuals seeking work authorization must nominate at least two data sources to document legitimate presence in the United States .... While established, economically secure members of society will have no trouble finding themselves in IRS or social security data banks, this will be no easy task for many minority job applicants .... The failure to support a worker permit application or affidavit with valid data sources will result in complete denial of governmental permission to work or, at least, a delayed determination of employment eligibility ....

2. Discrimination in the Reissuance of Cards

The foregoing discussion suggests another way in which the administration of the identification card system will discriminate against foreign-looking persons. It can be expected that many people will lose or accidentally destroy their work authorization cards. The process for reissuing lost cards will invariably function in a discriminatory way. Persons without characteristics indicating foreign ancestry who claim loss of their cards will be granted temporary replacement cards while their data records are analyzed. Hispanic-Americans claiming loss of ID cards are not likely to be so treated; their applications for reissuance will be viewed skeptically until their authorization to work is definitely established ....

3. Discrimination in the Resolution of Conflicts Between Data Bank Records and Information Supplied by Employers

.... When an employer calls a permit number into the data center, or submits an employee affidavit, a government official

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Alternatives to Employer Sanctions

Prepared by Notre Dame University Law School
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(Fall 1980)

I. INTRODUCTION

In the early 1970's, Congressional hearings were held to examine the alternative measures to deal with the problem of undocumented workers. The hearings revealed an alarming lack of concrete statistics on the number of undocumented workers in the U.S. at any given time, their impact on the American labor force, and their effect on the economy in general. Despite widespread belief that undocumented workers depress the U.S. economy, many experts and significant statistical studies note contrary findings.[1] Estimates of the number of undocumented workers in the U.S. range from 3 million to 10-12 million, with most studies placing the figure at approximately 6 million undocumented workers currently in the U.S. Absent a knowledge of these fundamental facts on the scope and nature of the problem, policy-making is rendered a difficult, if not impossible, task ....

II. EXISTING STATUTORY CONTROLS ON UNDOCUMENTED WORKERS

Both proponents and opponents of statutory controls on undocumented or "illegal" aliens within the American labor force agree that undocumented workers have an impact on the labor market. Due to lack of adequate data, however, the precise effects on the labor market are disputed—indeed, unknown.[2] Proponents of employer sanctions and other restrictive policies maintain that undocumented workers displace native or resident workers and have a depressive influence on wages and working conditions. Most of the government agencies involved in immigration issues are numbered within the ranks of these "restrictionists." Opponents of more restrictive immigration policies insist that such conclusions are based upon unreliable data and ignore key factors spurring employment of undocumented workers, such as their high productivity.[3] Such conclusory analyses obscure the potential for exploitation of these workers which the present system both condones and perpetuates.

Effective enforcement of existing labor, tax and social security legislation offers an alternative to enactment of specific employer sanctions or of mandatory "work card" requirements. Use of existing laws may act either as a component of legislation controlling employment of undocumented aliens or as an interim measure pending the enactment of specific sanctions. Reliance on existing statutes has two benefits. First, it reinforces the accepted social policy against substandard wages and working condition. It thereby diminishes exploitation of undocumented workers. Secondly, it relies upon administrative and enforcement machinery already in existence. Examination of existing means for the control of undocumented migration, thus, places demands for stricter methods in perspective.

(1) The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA)[4] is a constitutional exercise of the Commerce Power, by which the existence of wages and labor conditions detrimental to the well-being of workers engaged in interstate commerce is prohibited. The FLSA affords equal protection to all employees regardless of citizenship status. Enforcement of the FLSA vis-a-vis undocumented workers would inhibit the growth of a secondary labor force, composed of underpaid alien workers. Because of this secondary labor force negates the normal supply-and-demand responses of the labor market, restraint of its growth may increase the availability and quality of jobs for domestic workers. The FLSA defines an "employee" as "any individual employed by an employer"[5]. An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." Undocumented aliens have been granted the benefits of such protective labor legislation for,

> [it would be anomalous to allow an employer to benefit from violations of protective labor laws on the basis that his employee lacked the right to employment. That would encourage the hiring of illegal employees, for the employer would realize a financial advantage by hiring illegal migrants, while being immune from prosecution. This double advantage would provide employers with a substantial incentive to prefer illegal migrants over legal workers.[6] ....

The FLSA require payment of the statutorily mandated minimum wage[7] and of wages at one and on-half times an employee's regular wage rate for work in excess of the statutorily designated workweek of forty hours.[8] 29 U.S.C. §213 exempts from coverage many types of businesses, several of which are particularly likely to employ undocumented aliens.[9] Section 213 exempts far fewer businesses from the minimum wage provisions of Section 206 than from the provision in Section 207 regulating maximum hours and overtime pay. However, notwithstanding the exemption of § 213 (a) (6) for migrant agricultural workers who commute from their permanent residence to work, the FLSA exempts from coverage no worker on the basis of citizenship.

Any direct violation of FLSA provisions is unlawful according to 29 U.S.C. §215 (Supp. 1978). That section also provides that any person who transports or sells goods with knowledge that they were produced in violation of sections 206 and 207 is liable under the the FLSA. Willful violations of the FLSA are penalized under section 216 of the FLSA, Willful violations by "any person" are punishable by a finr of up to $10,000 NS imprisonment for up to six months.[10] An employer violating sections 206 or 207 is liable to injured employees for the amount of back wages due and for an equal amount in liquidated damages. In addition, violations of section 215 and the failure to pay back wages due an employee may be enjoined under 29 U.S.C. §217 (Supp. 1978).

The injured employee must initiate all causes of action brought under the FLSA. The statute requires that notice of the consent of each employee be filed in court before that employee be named a party plaintiff in any suit.[11] This provision exposes undocumented aliens to the possibility of deportation once their

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... Alternative Measures

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identity is so published.

Stricter enforcement of the FLSA offers the advantage of reducing both the exploitative working conditions of undocumented aliens and the economic incentive for hiring them. It will benefit the entire American work force by reinforcing the United States' commitment to decent wages and working conditions for all workers, native or alien. It will curtail exploitation of undocumented workers by employers who at present fear no sanctions for employment of such workers under substandard conditions. In doing so, broader enforcement of the FLSA will eliminate the existing *de facto* exemption of illegal aliens from FLSA coverage.

However, before effective enforcement of the FLSA can begin to remedy the problem of undocumented workers, the remedy available to an aggrieved employee must be changed. Presently, the sole remedy available to injured employees is the private cause of action provided under FLSA section 216. Any action by the Secretary of Labor in the employee's behalf extinguishes the employee's cause of action. However, an alien who is in violation of United States immigration laws risks deportation if he sues under the FLSA, for his illegal status will be discovered. Thus, the protective provisions of the FLSA can never be an effective restraint on either employment or exploitation of undocumented aliens until the provisions can be effectively enforced by these aliens without risk of deportation ....

(2) The National Labor Relations Act

The National Labor Relations Act (NLRA)[12] broadly defines "employee" to

> ... include any employee [; it] shall not be limited to the employees of an particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment.[13]

This definition specifically excludes agricultural laborers, domestic-service employees and employees of anyone who falls outside the NLRA's definition of "employer."[14] Case law requires a broad reading of this definition with respect to the abuses which the Act is intended to correct. Thus, unless an employee falls within a specific exclusion in 29 U.S.C. § 152 (3), he is covered by the NLRA ....

Section 8 of the NLRA defines "unfair labor practices." It states that neither an employer[15] nor a labor organization[16] may interfere with rights guaranteed by 29 U.S.C. §157 or discriminate against an employee in the exercise of those rights. This section also specifies that the employer and the representative of the employees have a mutual obligation to bargain collectively "in good faith with respect to wages, hours, and other terms and conditions of employment."[17] Collective bargaining is conducted on behalf of the employees by their elected representatives. The election of these representatives, however, does not vitiate the right of "any individual employee or group of employees" to present grievances to the employer for adjustment.

These provisions are enforced by two sections of the NLRA. Section 10 vests in the National Labor Relations Board the power to prevent any person from committing an unfair labor practice which affects commerce.[18] This provision empowers the Board to issue complaints and conduct hearings into charges of such unfair labor practices. Willful resistance or interference with NLRB functions is punishable by fines of up to $5,000.00 or imprisonment of up to one year or both.[19]

Undocumented workers have no legal right to be present in the United States and are entitled only to certain fundamental rights. Two recent cases, however, have upheld their right to protection under the NLRA. In *NLRB v. Sure-Tan, Inc.*,[20] Sure-Tan opposed enforcement of an order issued by the Board to bargain collectively with the employee union, six of its members being undocumented aliens. The company interposed two defenses: first, that the employees' illegal status was contrary to U.S. immigration laws and therefore negated the election and NLRB certification of the union; second, that these aliens were deported after the election of the union, thereby vitiating that election. The court rejected these claims. In keeping with the NLRA's indifference to alien status, the established policy of including aliens within the statutory definition of "employee" was given great deference. The court noted that no federal statute forbids employment of undocumented aliens. The court intended that its holding benefit the union, not the deported violators of U.S. immigration law ....

The Ninth Circuit followed the holding of *NLRB v. Sure Tan* in *NLRB v. Apollo Tire, Co.*[21] The defendant company in this case had laid off undocumented aliens, in violation of 29 U.S.C. §158(a) (1) and (4) (Supp. 1978), for filing complaints with the Wage and Hour Division of the Department of Labor. The court's holding emphasized that unfair labor practices were subject to NLRA remedies, regardless of the employees' status.

The major flaw of the NLRA vis-a-vis undocumented aliens lies in enforcement. As illustrated in *Sure-Tan,* any undocumented alien seeking protection under the NLRA faces the very real risk of deportation and loss of livelihood. In light of this risk, aliens are constrained to enforce their rights only when they are guaranteed anonymity or when they are willing to risk deportation. *If the NLRA were effectively enforced with regard to undocumented aliens, the economic incentive for employers to hire aliens at substandard rates would be removed. Such enforcement could remedy not only the allegedly depressive impact of undocumented aliens on American wage levels*[22] *but also the possible exploitation of these aliens by American employers.* Elimination of the NLRA exemption for workers in the agriculture industry, a major employer of undocumented workers, would broaden the NLRA's impact.

(3) The Potential of Other Federal Laws to Control Illegal Immigration

Federal legislation regulating employee benefits, tax payments and health standards may effectively augment enforcement standards under the FLSA and NLRA. Recognition of the role that undocumented workers play in these federal programs may encourage equal protection of workers in the United States, regardless of alien status. In addition, it may effect two goals of the American labor force: decent working conditions and egalitarian treatment. Current laws provide no disincentive to the employment of undocumented aliens. Furthermore, these laws lack provisions as to the discovery of an individual's citizenship status and as to documentation of employment. *Amendments to these laws may increase their utility as a method of regulating immigration and provide a less drastic means of control than would employer sanctions or implementation of a work card.*

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Opposition to a U.S. Temporary Worker Program

Prepared by Peter A. Schey (NCIR)
for the United Farmworkers' Union
Arizona Farmworkers' Union
and
Texas Farmworkers' Union
(December, 1980)

The Select Commission on Immigration and Refugee Policy voted to "streamline the H-2 [temporary worker] program." By "streamline" the majority of Commissioners meant *reduction* of the employers' responsibilities in locating domestic workers before importing foreign contract laborers. This policy decision ignores voluminous expert testimony and writings on the total failure of the H-2 program, the horrendous suffering endured by H-2 workers, the economic dependence on foreign workers which develops in employers of H-2 workers, and the social and political ramifications of expanding this program ...

The concluding words of an extensive 1980 report prepared by the Congressional Research Service, Library of Congress on temporary workers sum up the issue facing the Select Commission:

> If the decision is made to move in the direction of an expanded temporary worker program, among the principal lessons to be learned from our 22-year experience with the bracero program and from the European guestworker experience is that *the seriousness, complexity, and far-reaching consequences of such an undertaking can hardly be overestimed.*[1]

1. PAST U.S. TEMPORARY WORKER PROGRAMS

Only months after the United States enacted the most restric-

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A. Federal Insurance Contributions Act and Income Tax Withholding

Employers of undocumented workers generally comply with the Federal Insurance Contributions Act (FICA)[23] and the income tax withholding[24] provisions of the Internal Revenue Code, because violations of these laws are easily detected. Payment requirements are based upon the number of persons employed, a number that inspectors can readily ascertain. In the survey of undocumented workers conducted by David North and Marion Houstoun, the rate of compliance with these provisions exceeded 75 percent ....

The withholding provisions of the Code require every employer to deduct a specified amount of an employee's wages for the payment of the employee's income tax.[25] This amount is determined from tables established by the Secretary of the Treasury. All employees, regardless of alien status, are subject to these withholding provisions.[26] Earnings from certain types of labor or services are not included in the broad definition of "wages" in this chapter of the Code.[27]

'Every employer is liable for sums deducted under either the FICA or the withholding provisions. Underpayment of these employment taxes may be adjusted or assessed and collected.[28] Evasion of these taxes or failure to collect or to account truthfully for them may be penalized by an amount equal to the tax evaded.[29] Any person who willfully neglects to deduct or account truthfully for taxes is guilty of a felony punishable by fines of up to $10,000.00 or imprisonment for a maximum of five years or both.[30]

Strict enforcement of these provisions would signal a firm commitment to equal protection of all workers without regard to citizenship status. Although it may diminish only slightly the motivation to hire undocumented aliens, greater enforcement of these provisions, in conjunction with increased reliance on other statutes, would function as a control on undocumented migration ....

B. Federal Unemployment Tax Act

The Federal Unemployment Tax Act requires employers to pay excise taxes constituting a fixed percentage of total wages paid out during the year.[31] Monies so received are credited to an employment security administration account in order to provide unemployment compensation. This account is the source of disbursements to the various state accounts in the Unemployment Trust Fund, a pool of federal monies for unemployment compensation.

Pay-in requirements under the Act cover all individuals without regard to citizenship status .... [32]

In order for the Act to function as a disincentive to employment of undocumented workers, it must be amended, making the employer bear the onus of misrepresentation of legal status of his employees. The Act currently penalizes only the employee and, thus, does not discourage future employment of undocumented aliens. Such an amendment must address, however, the complex question of how it can be proven that an employer "knowingly" employed an undocumented alien.

C. Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA)[33] regulates hazards in the workplace through the establishment and enforcement of mandatory health and safety standards. Employers are obliged to provide places of employment free from hazards likely to cause death or serious injury. OSHA affords equal protection to all employees, regardless of citizenship or immigrant status.[34] Upon citation for OSHA violations, an employer may be assessed a penalty. Civil penalties are assessed for failure to correct cited violations[35] and criminal penalties for willful violations of the act.[36]

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...Opposition

(Continued from page 7)

tive immigration legislation in its history, the Immigration Act of 1917, the first foreign labor program was devised and implemented.[2] In May 1917, a "temporary" farm worker program was established. This program lasted until 1922. As has been the historical experience with subsequent temporary foreign worker programs in the United States and Western Europe, rules and regulations promulgated to protect these early temporary workers from exploitation "were unenforced."[3] And, as with later temporary worker programs adopted in the United States and abroad, large numbers of temporary workers in the 1917-22 program remained in the United States after the termination of the program. It is estimated that of the 76,862 Mexican workers involved in the program, only 34,922 ever returned to Mexico[4] ....

The Mexican Labor Program, commonly called the Bracero Program, was formalized in August 1942 as a result of a bilateral agreement reached between the U.S. and Mexico. Temporary workers admitted in this program were originally limited to agricultural work. Later the program was expanded into other sectors of the economy. Implementation of the Bracero program resulted in *massive* civil rights and labor law violations by employers. The Braceros were "captive workers who were totally subject to the unilateral demands of employers ...[5]

Both during the Bracero Program and following its termination in 1964, the United States experienced a continuing growth in the number of undocumented workers entering the country.[6] During its twenty-two years of existence, approximately four million temporary workers entered the United States in the Bracero Program.[7] Since the termination of the now discredited Bracero Program, the United States has continued to allow entry to temporary foreign workers under the "H-2" program[8] ....

2. H-2 TEMPORARY WORKER

The Immigration and Nationality Act of 1952 authorized the Attorney General, acting through the Immigration and Naturalization Service (INS), to admit temporary workers for temporary jobs "if unemployed persons capable of performing such service or labor cannot be found in this country."[9] The legislative history of this law clearly demonstrates that it was intended to alleviate unusual domestic labor shortages during periods of exceptional production. The H-2 program was a response to the findings of the President's Special Commission on Migratory Labor that the large-scale employment of temporary foreign labor was displacing domestic workers and depressing wages and working conditions.[10] The House Committee Report specifically states that

> These provisions of the bill grant the Attorney General sufficient authority to admit temporarily certain alien workers ... for the purpose of *alleviating labor shortages as they may exist or may develop in certain areas of certain branches of American productive enterprises, particularly in periods of intensified production.*[11]

The Attorney General may admit H-2 workers "after consultation with appropriate agencies of the Government, upon petition of the importing employer.[12] Under current regulations the employer's petition must be accompanied by

> a certification from the Secretary of Labor ... stating that *qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed ...*[13]

The courts have uniformly held that the H-2 program was intended to protect the jobs, wages and working conditions of domestic workers.[14] In the past few years the H-2 program has been limited to approximately 25,000 workers per year.

3. IMPLEMENTATION OF THE H-2 PROGRAM, CONTRARY TO THE LEGISLATIVE INTENT OF CONGRESS, HAS DEPRESSED WAGES AND WORKING CONDITIONS

The fact that the H-2 program has had the unintended effect of depressing wages and working conditions is beyond dispute.[15] The Department of Labor has conceded that "the influx of temporary foreign labor in agriculture has the effect of lowering prevailing wage rates ..."[16] Earlier, in 1972, the Department of Labor stated that "foreign [H-2] workers do depress earnings."[17] A comprehensive agriculture prevailing wage survey recently completed by the New York Department of Labor clearly illustrates the adverse impact from the presence of H-2 workers on the wages of domestic laborers.[18] This survey compared wage rates in areas where employers used H-2 workers and areas where domestic workers were used. Wages were consistently depressed in areas where employers relied upon H-2 workers. As recognized by the Department of Labor, temporary workers can be made to work for lower wages and under depressed working conditions because they "fear repatriation."[19]

In the 1970's the Western European temporary worker programs were "exploding as a socio-political issue ... "

Despite its pronouncements on the depressing effects of the H-2 program, the Department of Labor has not been effective in countering these negative impacts felt by domestic workers. Employers, assured of a steady supply of cheap labor, do not "have to make the kinds of wage and working condition inducements that would attract indigenous workers to these Jobs."[20]

While the Western European temporary worker programs were "largely unconstroversial during the 1950's and early 1960's", in the 1970's they were "exploding as a socio-political issue ..."[21] In contrast, the U.S. public and policy makers seem to be willing to live with an H-2 temporary worker program which exploits "indentured labor" (according to a leading proponent of a temporary worker model)[22] and exacerbates the plight of the domestic rural poor. The labor shortages claimed by employers to promote an expanded (or continued) H-2 program are created and determined by preferences for temporary foreign workers and the increasing unwillingness of domestic workers to accept artifically low wages and working conditions brought about by a historical reliance on indentured foreign labor ....

4. TEMPORARY WORKER PROGRAMS HAVE NOT SERVED AS A TOOL TO REDUCE UNDOCUMENTED MIGRATION

There is strong empirical data which indicate that temporary worker programs may "compound the problem of illegal migration rather than solve it."[23] No country has yet developed a reliable method to ensure repatriation. As noted earlier in this article, massive numbers of workers in former U.S. temporary worker programs have remained in the United States or later entered in an undocumented status. This result is reflected in the fact that the INS now finds itself "in the legally dubious position of periodically renewing H-2 visas for aliens which it considers permanent residents of the Virgin Islands."[24]

The consequences of Western European use of temporary worker program affirms the U.S. experience:

> The Western European experience ... casts doubt upon the starting assumpting of a foreign worker policy that the programme and its workers are temporary ... *[M]illions of supposedly temporary foreign workers and their dependents have become long term of permanent residents of Western Europe.*[25]

As the staff of the Select Commission states: "The only proven method of assuring compliance [with repatriation requirements] is the use of effective enforcement."[26] However, the history of temporary worker programs both here and abroad suggests that very substantial resources must be made available to ensure repatriation of temporary foreign workers. Governments have seldom committed sufficient resources for enforcement purposes except during times of economic down-swings.

5. THOSE SEEKING A CONTINUED OR EXPANDED TEMPORARY WORKER PROGRAM HAVE FAILED TO ESTABLISH THE ECONOMIC NEED FOR SUCH A PROGRAM

Those supporting the H-2 program have not established "the existence of a demonstrated need in the labor market."[27] This fact should not be surprising given that most H-2 workers enter to engage in agricultural labor, and unemployment rates in this sector of the market are among the highest in the country ....

When growers are currently able to claim that domestic workers cannot be located for particular harvest seasons, one need look no further than the insufficient recruiting efforts required under current D.O.L. regulations (coupled with depressed wages and working conditions caused by historical reliance on foreign labor) to explain this artificial shortage. For example, the Florida Department of Commerce, which recruits migrant farmworkers in a leading labor supply state, has specifically expressed a need for a D.O.L. rule requiring an *expanded* recruitment period.[28] As one expert has said:

> The basic problem is that the Department's certification process ... is out of phase with the need of growers and farmworkers and the time table of commitments necessary to link American Workers with American jobs.[29]

"The H-2 Program carries with it the serious problem of indentured labor."

While current recruitment is limited to 60 days, D.O.L. initially proposed a 90 day recruitment period "to allow the employment service system sufficient time to recruit U.S. migrant workers."[30] At that time (1978), the Department of Labor admitted that even the 90 day period would "not be long enough to recruit" domestic workers from two supply states, Florida and Texas.[31] D.O.L.'s figures on the employment of H-2 workers shows that the numbers have not fluctuated widely and growers could easily begin recruitment for domestic workers more than 60 days before the needed date for workers. "Streamlining" the H-2 program to most Commissioners meant reducing recruitment efforts. In fact, as noted above, D.O.L. itself conceded that expanded recruitment would alleviate domestic unemployment and underemployment. The fact that growers have used H-2 programs in the past therefore does not point to a shortage of domestic workers but rather to the inadequacy of existing recruitment requirements and the artifically created low level of wage or working conditions which is precisely caused by the continued use of H-2 workers.

No available empirical data suggest an economic need for continuation or expansion of the H-2 program. The program should not be "streamlined" to reduce either the geographical range of recruitment (currently, recruitment theoretically is nationwide), or the time period during which recruitment must be undertaken.

6. TEMPORARY (H-2) WORKERS SUFFER SUPER-EXPLOITATION AT THE HANDS OF U.S. EMPLOYERS

The inability of employers who use H-2 workers and appropriate government agencies to ensure compliance with existing labor and immigration laws results in massive exploitation of temporary workers in the United States. One proponent of a temporary worker model states that expanding the H-2 program "carries with it the serious problem of indentured labor."[32] As one economist points out, the H-2 worker "can only be assured of the opportunity to return again if his work and attitude please the American employer."[33] David North understates that point when he says, "it is little wonder that H-2 aliens are 'hard working and diligent.'"[34] As pointed out in the subsections above, rules and regulations aimed at protecting the rights and well-being of foreign workers have also generally gone unenforcd in previous U.S. temporary worker programs ....

In response to a freedom of information request filed by the National Association of Farmworker Organizations (NAFO) on October 20, 1978, seeking records concerning D.O.L.'s imposition of sanctions against employers who have violated their obligations under the H-2 program, "the D.O.L. national office produced no documents."[35] Sanctions against employers currently threaten only denial of the use of H-2 workers for a one year period.[36] Suggestions have been made that compliance with H-2 laws will not be achieved unless D.O.L. imposed civil and/or criminal fines for violations.[37]

The historical failure to effectively enforce the contract and statutory rights of H-2 workers significantly contributes to the employer's tendency to exploit these vulnerable workers. Housing and sanitation conditions in migrant camps where H-2 workers are often forced to live are unconscionable. Employers demand "speed-ups" and heightened productivity in a manner

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... Opposition

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which often seriously endangers the health and well-being of H-2 workers. These are the experiences that the National Center for Immigrants' Rights and other service organizations consistently encounter in cases involving H-2 workers. This experience parallels the European guest worker programs where the maltreatment of foreign workers "has become the source of sociopolitical unrest ..."[38] Our inability or unwillingness to diminish the exploitation of H-2 workers mitigates in favor of elimination of the H-2 program ....

CONCLUSION

After considering a proposal for an expanded temporary worker program prepared for the National Commission for Manpower Policy, [39] Professor Eli Ginzburg, Chairman of the Commission, wrote to Secretary of Labor Ray Marshall that he was "strongly against" any expanded H-2 program.[40] With the Select Commission proposing a broad legalization ("amnesty") program, and increased lawful immigration, now is the time to face elimination of the temporary (H-2) worker program. No sound policy reasons support the proposal of the Select Commission to streamline the H-2 program. Only the short-sighted economic greed of a handful of employers will be served by the continuation of this program. Forcing these employers to abandon their reliance of H-2 workers will not in any significant way increase consumer prices[41] ....

A non-exploitative temporary worker program could conceivably be designed if unions (from both the source country and the United States) were provided a major role in the development and implementation of the program. For now we can only urge that the H-2 program, the final remnant of the contract-labor Bracero Program, be phased out.

FOOTNOTES

1. *Temporary Workers Programs: Background and Issues,* prepared for use of the Select Commission on Immigration and Refugee Policy by the Congressional Research Service, Library of Congress, February 1980, hereinafter *Temporary Worker programs,* at page 120.
2. *See,* e.g. Kiser & Kiser, *Mexican Workers in the United States: Historical & Political Perspectives,* Albuquerque, The University of New Mexico Press (1979) hereinafter *Kiser & Kiser,* at Chapter I.
3. *Id.* at page 10.
4. Henry Kiser, *Mexican American Labor Force Before World War II,* Journal of Mexican American History, Vol. 2 (1972), hereinafter *Kiser,* at page 130.
5. *See* Vernon Briggs, *Foreign Labor Programs as as Alternative to Illegal Immigration into the U.S.: A Dissenting View,* Center for Philosophy and Public Policy, University of Virginia, (1980), hereinafter *Briggs,* at page 4.
6. *Illegal Aliens: Estimating Their Impact on the United States,* Report of the Comptroller General to the U.S. Congress (Washington, D.C., U.S. General Accounting Office, 1980) at pages 82-83.
7. Jorge Bustamante, *Commodity Migrants: Structural Analysis of Mexican Immigration Into the United States,* in S. Ross (ed.) *Views Across the Border: The United States and Mexico,* (Albuquerque, University of New Mexico Press, 1928), hereinafter *Bustamante,* at page 196.
8. U.S.C. § 1101(a) (15) (H) (ii) (1952).
9. *Ibid.*
10. *See* statement of Ronald L. Goldfarb, submitted during Rulemaking on Temporary Employment of Aliens in Agriculture, (July 1, 1977) at page 3.
11. H.R. Rep. No. 1365, 83d Cong., 2d Sess., reprinted in (1952) U.S. Code Cong. & Ad. News 1653, 1698 (emphasis added).
12. 8 U.S.C. § 1184(c).
13. 8 C.F.R. § 214.2 (h) (3) (1978) (emphasis added).
14. *Florida Sugar Cane League, Inc. v. Usery,* 531 F.2d 299, 300-01 (5th Cir. 1976); *Bustos v. Mitchell,* 481 F2d 479, 482 (D.C. Cir. 1973).
15. *See e.g.,* J. Medoff and K. Abraham, *An Economic Analysis of the Department of Labor's H-2 Program,* Harvard University & National Bureau of Economic Research (March 1979); *Review of the Rural Manpower Service,* Department of Labor (1972) at page 33; *Briggs, Supra,* at page 20; Miller and Yeres, *A Massive Temporary Worker Programme for the U.S.: Solution of Mirage?* World Employment Programme Research, Working Papers, Int'l. Labour Office, Geneva, (1979), hereinafter *Miller & Yeres* at pages 8-12.
16. 41 Federal Register 25017, 25018 (January 22, 1976).
17. *Review of Rural Manpower Service, supra,* at page 33.
18. *Agricultural Prevailing Wage Survey Summary Report,* 1978 Apple Harvest, New York State Department of Labor, Hudson Valley Apple Area (Feb. 15, 1979) and Clinton, Essex, and Washington Counties (Jan. 24, 1979).
19. *Review of the Rural Manpower Service, supra,* at 37.
20. *Nonimmigrant Alien Labor, supra,* at page 10.
21. Sinkin, Weintraub and Ross, *A Phased Out Guest Worker Proposal,* submitted to the Select Commission on Immigration & Refugee Policy (October 9, 1980), hereinafter *Weintraub,* at page 2.
23. *Miller & Yeres, supra,* at page 38.
24. *Id.* at 12.
25. *Id.* at 16.
26. *Questions & Answers—Temporary Worker Programs,* Select Commission on Immigration & Refugee Policy, staff memorandum (1980), at page 4.
27. *Briggs, supra,* at 16.
28. *See Second Report of Plaintiffs Representative on Brennan Special Revieq Committee,* (April 21, 1976), [appointed by the court in *NAACP v. Brennan,* Civ. No. 72-2010, 360 F.Supp. 1006 (D.D.C. 1973)], at page 6.
29. Statement of Ronald Goldfarb, *Rulemaking on Temporary Employment of Aliens in Agriculture* before D.O.L., (July 1, 1977) at page 6.
30. 43 Federal Register at 10,307 (March 10, 1978).
31. *Ibid.*
32. *Weintraub, supra,* at page 2.
33. *Briggs, supra,* at page 12.
34. Martin & North, *Nonimmigrant Aliens in American Agriculture,* Paper presented at the Conference on Seasonal Agricultural Labor Markets in the U.S., Washington, D.C. (January 10, 1980), at page 20.
36. 20 C.F.R. § 655.210.
37. *NAFO Request for Rilemaking, supra,* at page 81; *see also* R. Marshall, *Rural Workers in the Rural Labor Markets,* (1974), at 106.
38. *Miller & Yeres, supra,* at page 14.
39. Edwin Reubens, *Temporary Admission of Foreign Workers: Dimensions & Policies,* Special Report No. 34, National Commission for Manpower Policy (Washington, D.C. U.S. Government Printing Office, 1979).
40. Letter to Secretary of Labor from professor Eli Ginzburg dated May 1, 1979.
41. *NAFO Request for Rulemaking, supra,* at page 95; Podany & Fochs, *Cost of Harvesting, Packaging & Storing Apples for the Fresh Market with Regional and Seasonal Comparisons,* in USDA *Fruit Situation,* TFS-191, (1974), at page 17.

Political Grounds for Exclusion

Prepared by Tom A. Bernstein
for The American Library Association
Lawyers Committee for International Human Rights
National Academy of Sciences
And Other Academic Groups
(September, 1980)

Enacted in 1952 during the height of the McCarthy era, the McCarren-Walter Act was unsuccessfully vetoed by President Truman, who warned: "Seldom has a bill exhibited the distrust evidenced here for citizens and aliens alike."[1] Section 212 (a) (28) of the Act excludes aliens who are members of Communist or anarchist organizations as well as those who are not members, but merely "write, publish ... circulate, display or distribute ... any written or printed matter advocating or teaching opposition to all organized government .... " or "advocating and teaching the economic, international and government doctrines of world communism."[2] A federal court summarized the scope of the statute as follows:

> Subsection (a) (28) ... is explicit in its selective direction against that which is specifically not active subversion but belief and preachment. It operates not only against present adherence to disfavored political doctrines, associations and programs but also against any past adherence to them, and any affiliation with any organization that either advocates or teaches the doctrines or programs .... [3]

Refusing nonimigrant visas on ideological grounds embarrasses our intellectual community at home and exposes us as hypocrites abroad. For although we profess devotion to democracy and free speech, we hold ourselves out to the rest of the world in precisely the opposite fashion—as a people afraid of ideas, so afraid that we bar foreigners with unpopular political beliefs from visiting our shores. The time has come to abandon the un-American business of punishing aliens for their unpopular beliefs.

Consider the case of Dario Fo, one of Italy's best known playwrights and actors. On May 22, 1980, Fo and his actress wife, Franca Rame, were denied entrance to the United States to perform in an Italian festival sponsored by the Italian government and New York University. According to the *New York Times:*

> A spokesman for the American Embassy said that the moment for Mr. Fo's visit had been judged 'inappropriate'. Other sources said the action was due to the couple's active role in a group called Soccorso Rosso, or Red Aid, which the embassy regarded as 'sympathetic to the terrorist movement.' Soccorso Rosso is a leftist organization that helps people imprisoned for politically motivated crimes.[4]

In refusing Fo his visa, the State Department conceded that Fo has actively denounced terrorism and political violence. "Nobody in State thinks that Fo is going to foment revolution or throw bombs," an officer at the Italian desk of the State Department told one reporter. "It's just that Fo's record of performance with regard to the United States is not good. Dario Fo has never had a good word to say about [the United States]".[5]

Fo and Rame are not the first distinguished foreigners to be barred from visiting the United States. They join a long list of eminent artists, authors, academics, publishers and scientists from around the world, including over the past two decades (to name just a few), such renowned Latin American writers as the Mexican novelist Carlos Fuentes,[6] the Argentinian author Julio Cortazar,[7] [and] the Colombian writer Gabriel Garcia Marquez .... [8]

In 1972, the Supreme Court upheld Section 212 (a) (28) as constitutional. The test case involved Ernest E. Mandel, a Belgian journalist and Marxian theoretician (but not a member of the Communist party) who tried to obtain a nonimmigrant visa to participate in various academic conferences. Denied his visa, Mandel nevertheless addressed one of his scheduled audiences by transatlantic telephone. Then, along with six American professors, he sued the United States Government.

The lower court determined that U.S. citizens had a First Amendment right to hear, speak and debate with Mandel in person. This, the court said, "is of the essence of self-government."[10] The Supreme Court, however, ruling that the courts should not second guess the Attorney General's statuatory authority to exclude undesireable aliens. In reaching its decision, the Court declined to follow its 1965 ruling in *Lamont v. Postmaster General.*[11] In that case, it determined that the government could not impede the delivery to United States citizens of foreign mailings of "communist political propaganda" by requiring the addressee to make a written request to the Post Office for the delivery of such mail.

Together, the *Mandel* and *Lamont* decisions yield a rather anomalous result: an alien Marxist may send his writings into the United States, or even discuss Marxism by long distance telephone with Americans, but he may not set foot in the United States to personally communicate his views. The Supreme Court's reasoning in *Mandel* is unpersuasive and should be rejected by the Commission and the Congress ....

In an effort to reform the law, in 1977 Congress enacted the so-called McGovern Amendment. The McGovern Amendment streamlines the application process for aliens excludable because of "membership in a proscribed [e.g. Communist] organization." It presumes that such aliens are eligible for a visa, unless within 30 days after they apply for admission, the Secretary of State certifies in writing to the Speaker of the House of Representatives and the Chairman of the Senate Foreign Relations Committee that the United States security interests would be adversely affected by the applicant's admission.[12] ....

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...Exclusion

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However, according to recent testimony given to the Commission on Security and Cooperation in Europe by Barbara Watson, Assistant Secretary of State for Consular Affairs, there is a gaping loophole in the McGovern Amendment; it does not apply to "applicants ineligible on grounds other than, or in addition to, mere organization membership."[13]

An applicant who seeks to enter the United States "solely, principally or incidentally to engage in activities which would be *prejudicial to the public interest,* or endanger the welfare, safety, or security of the United States" is ineligible to receive a nonimmigrant visa under Section 212 (a) (27) of the Immigration and Nationality Act.[14] Under Section (212) (a) (27), the consular officer must seek the State Department's advisory opinion, but the consular officer's decision is final and unreviewable. An alien deemed ineligible by the consular officer may not seek a waiver of ineligibility from the Secretary of State and the Attorney General. Allegedly, in an effort to circumvent the McGovern Amendment, the government has increasingly relied on Section 212 (a) (27) to deny nonimmigrant visas. The State Department has yet to furnish statistics to refute this charge ...

[M]any foreigners find our system of ideological scrutiny so demeaning that they refuse to apply for visitors visas. According to Laurie Sapper, General Secretary of the British Association of University Teachers, the deterrent effect of Section 212 (a) (28) is substantial:

> The record of actual refusals is small. not because of the liberal attitude of the United States Government, but because many of our members, as a matter of principle, consider it anathema to have to attest to their political views and affiliations; thus many academics will not apply because they do not wish to place themselves in the position of signing declarations to this effect.[15]

Finally, because the State Department has not yet released the 1978 and 1979 statistics on the denial of nonimmigrant visas under Sections 212 (a) (27) amd 212 (a) (28), it is impossible to guage the recent impact of the law. The Fo, Rame and Covian cases, however, make clear that aliens continue to be denied visas in a most arbitrary fashion.

The State Department's position on the necessity of Section 212 (a) (28) remains unclear. When asked whether the law should be abolished, Secretary Watson sidestepped the question, suggesting that the desirability of the law should be considered by the Select Commission on Immigration and Refugee Policy.[16]

Clearly the Commission should recommend the repeal of Section 212 (a) (28). Even if not constitutionally mandated, such action is certainly required by U.S. obligations under international law. The Helsinki Final Act of 1975, which the United States has signed, calls upon each of the 35 participating States to "gradually simplify ... and administer flexibly the procedures for exit and entry" and "to ease regulations concerning movement of citizens from other participating States in their territory, with due regard to security requirements."[17]

There are other provisions in our immigration law that protect the country from subversion.[18] As Bernard Malamud recently noted in his protest of the exclusion of Dario Fo and Franca Rame: "The free exchange of ideas among nations and individuals does not endanger our national security but strengthens it. The denial of [nonimmigrant] visas ... is a denial of the opportunity to enrich the intellectual and artistic life of our country."

[Editor's Note: The Select Commission never seriously addressed the issues raised in this article. The majority of Commissioners appear to support maintenance of the *status quo.* See the introductory notes to this newsletter for further discussion.]

FOOTNOTES

1. 98 CONG. REC. 8082, 8084 (1952) (veto message of President Truman, June 25, 1952).
2. 8 U.S.C. § 1182 (a) (28).
3. *Mandel v. Mitchell,* 325 F. Supp. 620, 625 (1971), *rev'd sub. nom Kleindienst v. Mandel,* 408 U.S. 753 (1952)....
4. Henry Tanner, "Satirist is Hurt by Absurdities of Life in Italy" *The New York Times,* May 22, 1980, p. 17.
5. Erika Munk, "Cross Left" *The Village Voice,* June 2, 1980 p. 86.
6. *See* statement of Carlos Fuentes dated August 11, 1980, recounting the history of Fuentes' problems with the United States immigration authorities; Abba Scharwtz, *The Open Society* (Morrow 1986), pp. 46-50. 115 *Congressional Record,* S8218-19 (daily ed. July 17, 1969).
7. *See* Letter dated May 28, 1980 from Julio Cortazar to Sophie G. Silberberg, Executive Director, The Fund for Free Expression ....
8. Marquez was denied a visitor's visa in Bogata in 9163, given a provisional visa followed by a multiple visa in Bogata in 1971. In Barcelona, in 1974, Marquez was issued a provisional visa once again but told that he might be returned to Colombia upon entering the United States. The unpredictability of the process forced Marquez to cancel his plans to visit the United States that year. *See* text of 1974 letter to Frank McShane from Gabriel Marquez ....
9. *Kleindienst v. Mandel,* 408 U.S. 753 (1972).
10. *Mandel v. Mitchell,* 325 F. Supp. 620, 631 (E.D.N.Y. 1971).
11. *Lamont v. Postmaster General,* 381 U.S. 301 (1965).
12. Section 112 of Public Law 95-105, enacted on August 17, 1977. The McGovern Amendment requires that the Secretary of State recommend that the Attorney General grant a waiver (under the authority contained in section 212(d)(3)(A) for any nonimmigrant application ineligible for a visa solely by reason of membership in a "proscribed organization", unless the applicant's admission "would be contrary to the security interests of the United States." The law does not require the Attorney General to grant the waiver recommended by the Secretary of State. However, according to recent testimony of Barbara Watson, Assistant Secretary of State for Consular Affairs, the State Department knows of no instance since the enactment of the McGovern Amendment in which the Attorney General has rejected such a waiver recommendation. Testimony of Barbara Watson, Hearings Before the Commission on Security and Cooperation in Europe, 96th Cong. 1st Sess. on Implementation of the Helsinki Accords, Vol. IX, U.S. Visa Policies (April 5, 1979), at pp. 49-50 (herinafter "Helsinki Hearings").
13. Testimony of Barbara Watson, *Helsinki Hearings,* at p. 50.
14. 8 U.S.A. § 1182(a) (27). Section 212(a) (27) is further discussed in note 18 below.
15. Letter dated March 1, 1980 from Laurie Sapper LL. B. Barrister-at-Law, General Secretary of the British Association of University Teachers to Mr. Jonathon Knight, American Association of University Professors.
16. Testimony of Barbara Watson, *Helsinki Hearings,* at pp. 76-77.
17. Conference on Security and Cooperation in Europe: Final Act, Helsinki, 1975, Co-Operation in Humanitarian and Other Fields 1(d) — Travel for Personal or Professional Reasons.
18. *See e.g.* 8 U.S.C.(a) (27) and 8 U.S.C. 1182(a) (29), which define two categories of aliens ineligible to recieve visas to the United States on the grounds that if admitted, they would be likely to engage in activities prejudicial to the public interest of national security.

The Right to Counsel—Policy Options

[**Editor's Note:** *The following paper was prepared by Peter A. Schey while working as a consultant for the Select Commission.*]

The testimony of numerous witnesses who appeared before the Select Commission has raised three essential questions concerning the right to the assistance of counsel in administrative immigration and deportation proceedings:

- At precisely what stages of these proceedings are persons entitled to the assistance of counsel?
- At what point should persons be advised that they may have the assistance of counsel?
- Are there any circumstances under which indigent persons should be provided counsel or a non-attorney legal representative at these administrative hearings?

These questions must be addressed in light of the important role that counsel can play in assisting persons in immigration and deportation proceedings, and the impact that the presence of counsel has on the efficient administration of our immigration and deportation laws. While the Immigration and Naturalization Service is concerned with the impact of advising persons of a right to counsel in certain situations, particularly persons apprehended attempting to enter the United States unlawfully, representatives of immigrant and minority communities have complained that persons lawfully present in the United States, including Mexican-American citizens of this country, are suffering deportations because, at least in part, they are not adequately informed about their right to counsel. There appears however to be agreement that the 1952 Immigration Act inadequately defines the parameters of the right to counsel and that amendment in this area would be beneficial to both the government agencies responsible for implementing our immigration and deportation laws, and those persons required to appear in administrative proceedings before these agencies.

I. STAGES OF THE PROCEEDINGS AT WHICH PERSONS SHOULD HAVE THE RIGHT TO COUNSEL

The Immigration and Nationality Act of 1952 provides that a person may be represented by counsel, at no expense to the Government, in "exclusion or deportation proceedings ..." Section 292, 1952 Act, 8 U.S.C. Section 1352. Various court decisions have obscurred the exact boundaries of what comprises the "exclusion" or "deportation" "proceeding ..." As a matter of policy, the Immigration Service has expanded the circumstances under which a person may obtain the assistance of counsel in administrative proceedings before the agency. *See* 8 C.F.R. Section 292.5. By regulation, the Immigration Service currently extends the right to counsel whenever (1) a person is required to give or be given a "notice" by INS; (2) a person is required "to serve or be served with a paper other than a warrant of arrest or subpoena"; (3) a person is entitled to "submit an application or other document" to the Service; and (4) a person is required to "perform or waive the performance of any act ..." *Ibid.*

In contrast, the Department of State has promulgated no regulations on a person's right to have the assistance of counsel during visa interviews held at Consular Offices. Testimony received by the Commission indicates that Consular Officers determine on an *ad hoc* basis whether or not to allow the presence of counsel during visa interviews. No written guidelines explain the circumstances under which counsel may attend the visa interviews or what role they may play in assisting their client if their presence is allowed by the Consular Officer ....

In earlier days some administrative authorities looked with disfavor upon attorneys and sought to discourage their presence in administrative proceedings. *See* William Van Vleck, *The Administrative Control of Aliens,* New York, The Commonwealth Fund, 1932, at 231. However, studies of our immigration and deportation procedures dating back to 1931 have called for expanded representation by counsel. *See, e.g., Report on the Enforcement of the Deportation Laws of the United States,* known as the *Wickersham Commission Report,* prepared for the National Commission on Law Observance and Enforcement, G.P.O. 1931, at 106-107, 155, hereinafter "Wickersham Report"; *Report of Secretary of Labor's Committee to Study Immigration Practice and Procedure* (1940), at 71, 83, hereinafter "Sec. of Labor's Report". Charles Gordon, the former General Counsel of the Immigration Service and author of the foremost treatise in immigration law, has written that

> represented aliens prevailed in a far higher proportion of cases, since their counsel were much more effective in raising points of law, in questioning due process, in marshalling relevant evidence, and in advancing claims to United States citizenship ... *[T]he administrative process as well could benefit from greater praticipation by counsel.* Charles Gordon, *Right to Counsel in Immigration Proceedings,* Vol. 45 Minnesota Law Review, page 875, at 878-79 (1961) (emphasis added).

This view has been reaffirmed recently by both the INS and the Justice Department in letters to Congress opposing efforts to prohibit federally-funded legal service attorneys from assisting persons in deportation proceedings.

The presence of counsel would likewise be of assistance to persons appearing before Consular Officers for visa interviews. The role of counsel in visa interviews could be limited to (1) gathering and assisting in the presentation of relevant documents; (2) advising his or her client during the course of the interview; and (3) clarifying legal or factual questions as requested by the Consular Officer. Only a small number of visa applicants are likely to seek the assistance of counsel during the visa issuance process. However, these cases will often involve applicants seeking permanent residence based on close family ties in the United States where the consequences of the visa interview can mean the difference between family separation or reunification.

Recommendation: *Persons appearing before the Immigration and Naturalization Service or the Department of State in immigration or deportation proceedings should be entitled to obtain the assistance of counsel at all stages of the administrative process. As manifested in current policies of the Immigration Service, the right to the assistance of counsel should not be limited to merely the exclusion or deportation hearing. The role of counsel at certain preliminary administrative proceedings (e.g. pre-hearing*

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... Right to Counsel

(Continued from Page 13)

interrogations) and at visa interviews abroad should be limited to (1) gathering and presenting documentary evidence; (2) advising the client during the course of the proceeding; and (3) clarifying legal and/or factual questions at the request of the administrative officer conducting the examination.

II. TIMING OF THE ADVISAL OF THE RIGHT TO COUNSEL

The views of witnesses who have testified before the Commission have varied on the question of *when* persons should be advised of their right to seek the assistance of counsel. Representatives of the Immigration Service, fearful of the impact of advising persons apprehended in close proximity to the borders and in remote areas of their right to counsel, have suggested that the advisal should not be given until subsequent to interrogation at the time when a decision is made to initiate formal deportation proceedings. Representatives of immigrant and minority communities, and members of the private bar and organizations which provide free legal services to immigrants have argued that persons should be advised of their right to counsel at the initiation of any *custodial* interrogation, including interrogations effected while temporarily detaining a person. A middle ground, and one which was followed by the Immigration Service for approximately fifteen years until March, 1979, would require that persons be advised of the right to seek the assistance of counsel at the time of arrest. See 8 C.F.R. Section 287.3 (1967). While this regulation apparently has no negative impact on INS's enforcement mission, it was nevertheless amended in March 1979 and the present regulation provides that persons arrested *without a warrant* shall only be advised of their right to the assistance of counsel subsequent to interrogation if a determination is made to initiate deportation proceedings ....

As early as 1920, when deportation proceedings were implemented by the Department of Labor, that agency adopted the position that

> Statements of the accused alien, whether oral or in writing *made while he is in custody and without opportunity fairly afforded him from the beginning to be represented by counsel, and without clear warning that anything he says may be used against him will be disregarded ... as having been unlawfully obtained.* See Statement of Louis F. Post, Assistant Secretary of Labor, Congressional Record, at 5560-61, April 12, 1920.

As discussed above, the policy of the Immigration Service was, until March 1979, to advise persons in custody of their right to counsel prior to the initiation of interrogation. Early commentators on the deportation process pointed out that the entire factual basis of the deportation charge is often developed at the preliminary interrogation at which the prospective respondent is unrepresented by counsel. They believed that there would be greater assurances of fairness and reliability in the information gathering process if the alien were permitted the assistance of counsel. *See, e.g., Wickersham Report, supra,* 85, 137, 143, 174; *Van Vleck, supra,* at 182, 231; *Sec. of Labor's Report, supra,* at 18, 69-72, 83.

In the criminal context the Supreme Court has stated that the "right to use counsel at the formal trial [would be] a very hollow thing [if] for all practical purposes, the conviction is already assured by pretrial examination." *Escobedo v. Illinois,* 378 U.S. 478, 487 (1964). While deportation hearings are not criminal in nature, the rationale and concern of the Supreme Court in the *Escobedo* case is relevant to pre-deportation hearing *custodial* interrogations. The Supreme Court was generally concerned with the coercive tendencyof incommunicado interrogations, that the person interrogated may so prejudice his own case by statements during interrogation that constitutional and stuatory safeguards available at the trial stage would become meaningless, that statements made while held incommunicado may be the result of fear and may not be reliable, and that enforcement officers may take advantage of the person's ignorance of the law to induce him to make statements whose legal significance he did not realize. These concerns may be equally held with regards prehearing *custodial* interrogations conducted by the Immigration Service. In fact, representatives of organizations which provide legal services to immigrant communities and private attorneys who testified at Commission public hearings and participated in Commission "Consultations" consistently pointed out that their clients subjected to incommunicado interrogations more often than not feared their interrogators, felt compelled to answer their questions, and often provided incorrect responses which were meant to satisfy those conducting the interrogations.

Recommendation: *Persons detained or arrested by the Immigration and Naturalization Service are suspected of civil, not criminal offenses. Upon being temporarily detained or arrested a person suffers a suspension of numerous fundamental constitutional rights. In conformity with the long standing practice of the Immigration Service, the Select Commission should recommend that persons detained or arrested by INS officers should immediately be informed that they may seek the assistance of counsel. Failure to so advise persons impacts exclusively on uneducated detainees who are unaware of their legal rights. Advising persons of their right to seek the assistance of counsel at the time of detention or arrest would obviate the need to advise people of their right to counsel prior to each and every custodial interrogation effected by INS officers ....*

III. CIRCUMSTANCES UNDER WHICH AN INDIGENT PERSON SHOULD BE PROVIDED COUNSEL IN DEPORTATION PROCEEDINGS AT GOVERNMENT EXPENSE

Maurice Roberts, long time Chairman of the Board of Immigration Appeals, has written that for indigent persons required to appear in deportation proceedings the right to counsel is "more fanciful than real." *Interpreter Releases,* published by the American Counsel for Nationality Services, Vol. 54, No. 10 at 93 (March 10, 1977). Since the 1930s commentators and reports have called for the establishment of some mechanism to provide indigent persons in deportation proceedings with some form of legal representation. See, e.g. *Wickersham Report, supra,* at 155, 168; *Sec. of Labor's Report, supra,* at 83. Charles Gordon, former General Counsel of INS, has written that while "immigration proceedings are not criminal cases ... it would not require too great a leap to find that the conceptions of fundamental fairness under the due process clause" require that counsel should be provided to indigent persons in deportation proceedings. *Gordon, supra,* at 894.

The federal courts have expressed varying views on this question. The Sixth Circuit Court of Appeals has stated that

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... Discriminatory Effects

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must determine whether information submitted by the employer matches information on that employee in the government's possession. It can be expected that discrepancies between information furnished by the employer and existing or newly constructed data bank records will occur frequently. In many instances, there will be errors in the transcribing of information from the employee's original work permit application to the data bank record. In other cases employers will commit errors when relating particular information to the data bank clerk ....

These inevitable informational discrepancies will be resolved in a highly discriminatory fashion. As the above discussion suggests, questions about job applicants who are not apparently of foreign ancestry will be treated in a different fashion from questions about applicants who "appear" foreign or have foreign surnames .... The job applications of these persons will be held up while questions are resolved. Obviously, persons whose authorization status is held in limbo will suffer in the labor marketplace compared with the job applicants whose 'employability' is ascertained immediately ....

VI. CONCLUSION

We believe that, given the present state of knowledge and analysis, there are compelling reasons for refraining from recommending an employer sanctions law to Congress. While we are not presently qualified to adopt a position on the necessity for stringent measures to curtail unauthorized entry and employment, we are aware of the widespread sentiment in favor of some such measures. However, given what is presently known, we do not believe that employer sanctions are an appropriate means for accomplishing the desired ends ....

The rationale for our position is as follows. We have detailed at length our concerns about the risk of discrimination posed by the scheme. We also summarize above some of the threats to essential civil liberties and personal autonomy. Clearly, such risks should not be undertaken without both a compelling necessity for and a reasonable expectation that the scheme will indeed yield the desired outcome. There has yet been no such showing.[3]

There should be no mistake about the impact of an employer sanctions scheme on American life. The mechanisms required for effective emforcement of such a scheme will have more that a marginal effect on our society. Not only will any such scheme raise concerns about discrimination and civil liberties, but will do so in the context of one of the most significant areas of an individual's life, employment.

While these effects will vary with the particular scheme used, there can be no question that an such scheme will bring the government into aspects of the individual's life hitherto impermeable to such intervention. While the regulation of the employment relationship to ensure minimum standards for workers and peaceful and effective dispute-resolution is a commonplace of our law, employer sanctions will be concerned with something more than such incidental aspects of the relationship. *In order to be enforceable, a sanctions scheme will inevitably allow government to determine who may or may not work. One may legitimately be concerned about the susceptibility of such a scheme to abuse by government officials.* The obtaining and proving of authorization to work will become additional considerations in decisions to relocate and to seek or change jobs, inhibiting the mobility of domestic labor ...

The Institute for Public Representation proposes, in light of the above considerations that

1. The Select Commission refrain from recommending an employer sanctions law to Congress and the President;
2. The Commission transmit to Congress and the President its sense that the concerns detailed above suggest that such a law would, on the present record, be ill-advised;
3. The Commission should recommend to Congress and the President the expansion of laws which protect efforts at labor organization, and enhanced enforcement of labor laws ....
4. The Immigration and Nationality Act should be amended to prohibit the Immigration and Naturalization Service from acting upon complaints of undocumented workers from employers who are faced with union organizing drives or complaints about terms and conditions of work ....

1. **Editor's Note:** On January 6, 1981 the Commission by a slim majority voted to support creation of a "secure" national ID card to be issued to all persons authorized to work in the United States.
2. *See e.g.,* Equal Employment Opportunity Commission, *Equal Employment Opportunity Report: Job Patterns for Minorities and Women in Private Industry,* p. xviii (1975).
3. Indeed, Vernon Briggs, Professor of Industrial and Labor Relations at Cornell University and a leading scholar and proponent of employer sanctions, has stated that

   > candidly speaking, one must say that the enactment of a law against employment of illegal aliens will not accomplish much.

   Briggs, The Quest for an Enforceable Immigration Policy, *Employment and Training,* Fall 1979, Pg. 385, 393.

Impact of Immigrants On Social Services

Prepared by: Julian Simon
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(September 1980)

I. INTRODUCTION

A rational immigration policy would take into account all the costs and benefits of immigrants with respect to natives' incomes, employment, and tax burdens, with their net balance. The main aim of this study is to estimate the amounts of public services that immigrants use, including social security, unemployment compensation, public assistance, food stamps, and education ....

A secondary aim of the study is to estimate the incomes of immigrant families, and from these incomes to roughly calculate the taxes paid by immigrants. With such data on tax contributions, plus the data on transfers to the immigrants, it should then be possible to estimate the net transfers between immigrants and natives, that is, the net effect of immigrants on natives through the public coffers.

The basic source of data is the 1976 Survey of Income and Education (SIE), conducted by the Bureau of the Census.

Estimates are developed for all immigrants entering in a

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... Social Services

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given year in such fashion that the effects of a proportional change in immigration quotas can be projected. The data for immigrants as an entry cohort yield information about the "cost" side of admitting a group if immigrants, to be balanced against the "benefits" of taxes paid and other social contributions by that group. Other economic and non-economic influences are very important, too, but are not dealt with in this report ....

There has been little systematic work on this topic. I have gotten ideas from North and Houston's study of services used by illegal immigrants (1976), from Jones' and Smith's (1970) study of new Commonwealth immigrants into the UK, and from Israeli and Canadian panel studies. The results are broadly consistent with these other studies of immigrants ....

II. THE SAMPLE

The SIE gathered data nationally on 158,000 households, stratified in such a manner as to include more-than-proportional numbers of households with children living in poverty. The survey coverage is good, because only 7,300 households refused interview. All households with foreign-born heads constitute the main sample used in this work. A random subsample of native-American households is used for comparison purposes drawn from the entire sample less families with immigrant or Puerto Rican members. The native sample was drawn with four systematic starts, so that the means of the sub-samples may be compared as a quick check of sample variability. Persons in private and public institutions such as nursing homes and hospitals were not included in the SIE survey ....

III. PUBLIC SERVICES USED BY IMMIGRANTS AND NATIVES

The aim of this section is to estimate the overall gross cost to U.S. citizens of admitting an average immigrant to the U.S. (Gross benefits and net effects are discussed in subsequent sections.) More specifically, we wish to estimate for the average immigrant in an entry cohort (a) the amount of each service used for each year after entry, and (b) the yearly total.

The estimate for immigrants as an entire cohort is the most important for our purposes, because it is relevant to policy decisions about the total number of immigrants to allow in; it tells the gross cost to natives of the average immigrant family ....

Table 1 [see page 17] shows the amount of the various types of payments received by persons who have been in the U.S. varying lengths of time. Columns 1-8 show the various transfer payments to entry cohorts and to natives. For example, for all immigrants who arrived in 1974 (leaving aside the female immigrants who married native males), the average unemployment compensation received in 1975 was $204 ....

The results for natives are shown [on line 10] ... The results for families that arrived in 1976 are shown on line [11]; the meaning of these numbers is exceedingly unclear, because the data supposedly refers to the calendar year 1975. And the cohorts that arrived in 1949 or before are shown for completeness, though they are not relevant to policy decisions concerning immigration for the twin reasons discussed at greater length earlier: (a) At even a very low discount rate, the magnitudes related to persons who arrived a quarter of a century earlier do not weight heavily in a present-value computation. (b) More important, the older immigrants must now be seen as part of an equilibrium system. Their children, and the economic impacts of those children, are an important part of the total effects of this cohort, but data on their children is not available; for the same reason, the 1950-59 cohort should not be considered an important part of the sample ....

A simplified model may help. Consider a community of subsistence farmers where there is a surplus of land, and each farm produces the same output. Each family consists of a married couple, two children, and two retired adults. Children do not work until age 20, at which time they marry, have two children, and work for 20 years. At age forty the couple retires and lives until age sixty. On each farm, then, there are always one working couple, two child dependents and two aged dependents, a stationary demographic system. The farm produces no surplus or saving; all production is consumed.

Consider, now, a newly married couple who move into the community. For 20 years, their production need support only the couple and their children leaving a surplus which the community can tax part of. During this period the "immigrant" family is an economic benefit to the native. After 20 years, when the immigrant couple retire, the family has the same characteristics of an "equilibrium" native family, and the retirement consumption of the "immigrant" couple is paid for by their children. *This illustrates how there is a one-time benefit to natives during the first years that an immigrant couple is in the community, and that there is no reverse flow from their own "social security payment" after they retire ....*

In column 9 we read the totals for the five most important categories of welfare payment transfers aside from social security. We see that the average family in each of the cohorts of immigrants since 1950-59 uses about the same or slightly more such services than do native families—ranging from $137 less to $148 more. But when Social Security is included, we see in column 10 that immigrants received much less such welfare payments in total than do natives—ranging from $294 less to $823 less .... *The main economic significance is that the immigrants do not use higher amounts of services as is frequently alleged ....*

Now we are in a position to estimate the average services used by the various groups. This total is shown in column 12. There we see that *the very recent cohorts use much less services than do the natives—for example, $971 less per family for the 1973-74 cohorts considered together than for natives. The amounts of services used by older cohorts are higher; they move upward and reach equality with natives some 10-15 years after arrival ....*

IV. TAXES PAID BY IMMIGRANTS

To avoid confusion, it is crucial not to compare the data on earning patterns in this report with earning patterns discussed by Chiswick (1978), Blau (1980), and others. Their aim is to compare natives to immigrants with as many factors other than immigrant-native differences held constant, in order to understand the nature of the immigrant-native difference; by

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TABLE 1
MEANS OF VARIOUS TRANSFER PAYMENTS RECEIVED BY VARIOUS ENTRY COHORTS* AND BY NATIVES
(WEIGHTED BY SAMPLE PROBABILITIES TO BE UNBIASED ESTIMATE OF THE U.S.)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Year of Entry	Unemployment Compensation Workmen's Compensation, Veteran's Benefits	Public Welfare	Supplemental Security	ADC	Food Stamps	Social Security	Medicare at $598 per Patient Year	Medicaid at $126 per Patient Year	Total Columns 1-5	Total Columns 1-6	Number of Children Aged 5-17 $1302 per Child Year Schooling	Total Columns 1-8 & 11	Number of Families
1974	$204	$131	$91	$91	$15	$3	$29	$32	$532	$535	$820	$1416	154
					(15%)		(.049)	(.256)			(.63)		
1973	238	47	63	6	7	49	23	12	361	410	755	1200	171
					(5%)		(.039)	(.097)			(.58)		
1972	237	85	38	164	12	127	42	24	536	563	781	1510	188
					(8%)		(.070)	(.191)			(.60)		
1971	261	189	16	13	17	5	2	14	496	501	716	1233	202
					(12%)		(.003)	(.111)			(.55)		
1970	341	100	50	11	16	34	45	19	518	552	1042	1659	224
					(10%)		(.076)	(.157)			(.80)		
1965-69	339	191	86	18	12	152	48	27	546	598	1068	1941	977
					(12%)		(.081)	(.212)			(.82)		
1960-64	385	91	69	18	12	326	88	21	575	901	1237	2247	769
					(8%)		(.147)	(.169)			(.95)		
1950-59	301	122	31	50	11	424	76	20	515	939	1237	2292	1762
					(9%)		(.160)	(.156)			(.95)		
Natives (all)	288	108	46	45	11	735	167	20	498	1233	859	2279	11212
					(.9%)		(.280)	(.159)			(.66)		
1976**	20	0	360	8	0	6							50
					(0%)		(.0)	(.102)			(.38)		
1975**	40	76	6	88	7	31							204
					(9%)		(.045)	(.234)			(.71)		
1920-49	239	32	73	11	3	2229							3697
					(3%)		(.805)	(.118)					
before 1920	164	30	116	56	3	3090							1075
					(3%)		(.129)	(.186)					

*Puerto Ricans not included with either immigrants or native.
**Data not reliable. See footnote in text.

TABLE [2]
OVERALL BALANCE SHEET FOR IMMIGRANTS

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Year	Services used by cohort: from Table 1, Column 12	Services used by natives from Table 1, Column 12	(3) − (2)	Taxes paid by cohort, from Table 2,* Column (11)	20% of taxes paid for pure public goods .2 × (5)	Taxes paid by natives from Table 2,* Column (11)	(5) − (7)	(100% − 20%) × (8)	(4) + (6) + (9) Net effect of immigrant cohort upon natives per immigrant family	(4) + [(5) − (7)] Alternate calculation of net effect of immigrant cohort upon natives, per immigrant family, no allowance for public goods contribution
1974	$1416	$2279	863	$2666	$ 533	$3201	$−535	$−428	$ 968	$ 328
1973	1200	2279	1079	3302	660	3201	101	81	1820	1180
1972	1510	2279	769	3077	615	3201	−124	− 99	1285	645
1971	1233	2279	1046	3140	628	3201	− 61	− 49	1625	985
1970	1659	2279	620	3011	602	3201	−190	−152	1070	430
1965-69	1941	2279	338	3552	710	3201	351	281	1329	689
1960-64	2247	2279	32	4064	813	3201	863	690	1535	895
1950-59	2292	2279	13	3927	785	3201	726	581	1353	713

[Editor's Note: Table 2 appears in Simon's complete paper; this table is designated as Table 3 in his paper.]

...Social Services

(Continued from page 16)

contrast in this report, nothing is held constant other than year of entry, because—as mentioned earlier—the aim here is to assess the unconditional impact of that cohort on the natives' standard of living ....

[S]omewhere between 2-6 years after entry, the average immigrant family comes to earn as much as the average native family, and after that earns more. (This finding is based on the averages for the 1970-73 cohorts.) This rapid approach to equality is heavily influenced, of course, by age and education composition, and especially the absence of retired family heads among the immigrants ....

Table [2] consolidates the relevant data. Columns 2 and 3 show the total transfer payments and services used by immigrants in various years after entry (actually by various entry cohorts during 1975), and by natives. Column 4 shows the differences between columns 2 and 3. On the assumption that the average family just pays for the average family's services used—an assumption that says no more than that government receipts equal the sum of government expenditures for various purposes—then column 4 indicates the net balance of immigrants with respect to services alone. That is, this is the amount of services more or less that an average taxpayer pays for that an immigrant uses ....

V. THE NET EFFECT OF IMMIGRANTS UPON NATIVES

Now we are in a position to sum the effects on a year-by-year basis. This summary is shown in column 10 of Table [2]. *There we see that in every year after entry (until they themselves retire, at which time their own children are supporting them through the Social Security and Medicare system) immigrants benefit natives through the public coffers. And a calculation of the net present value of the stream of differences shows that immigrants are a remarkable good investment at any conceivable rate of discount.* At a 3% discount rate, each immigrant family was worth about $20,600 to natives around 1975, to be compared with the mean yearly native family earnings of $11, 037; at 6% the present value would be about $15,800 and at 9% it would be about $12,400 ....

The obvious implication of these calculations is that, in the numbers in which they are now admitted, immigrants have a positive effect on natives' incomes ...

VI. SUMMARY AND CONCLUSIONS

From the time of entry until about 12 years later, immigrants use substantially less public services (largely due to less use of Social Security because of youth) than do native families. Then immigrant usage becomes roughly equal to natives. After about 2-6 years immigrant families come to pay as much in taxes than do native families, and after that they pay substantially more. And the net balance of these two forces is positive in every year for natives. That is, *immigrants contribute more to the public coffers than they take from them ....*

... Alternative Measures

Continued from page 7)

III. NEED FOR OSHA ENFORCEMENT

OSHA provides another tool by which to demonstrate the United States' commitment to decent working conditions for all people, citizens and aliens alike. *Enforcement on behalf of undocumented aliens would help eliminate tacit exploitation of their illegal status.* However, OSHA has a significant drawback: because it does not specifically discourage their employment, OSHA does not decrease the undocumented aliens' motive for pursuing employment in this country.

IV. CONCLUSION

Before more drastic means are considered as tools for discouraging undocumented migration, the application of existing labor and tax laws as controls should be examined. Use of these statutory provisions offers two important advantages. First, the enforcement machinery for the FLSA, the NLRA, the FICA, tax withholding statutes and OSHA already exists and could be employed as a control upon the provision of adequate funding and personnel. Second, the question of discriminatory treatment of aliens, especially with regard to Mexicans, need never arise.

Enforcement of labor and tax statutes alone may prove inadequate as a check on undocumented migration. Alternatives which provide stronger means for controlling employment of undocumented workers include use of a work card and sanctions on "knowing" employment of such workers ....

[Editor's Note: This research paper goes on to analyze in great detail how an employer sanctions law could be implemented. The paper simply outlines the mechanisms that would be involved while not actually supporting an employer sanctions law as a policy alternative.]

FOOTNOTES

1. *See* Select Commission on Immigration and Refugee Policy, *Semi-annual Report to Congress* 14 (1980).
2. *See, e.g., Illegal Aliens: Hearings before Subcomm. No. 1 of the House Comm. on the Judiciary,* 93rd Cong., 1st Sess. 19, 559, 574, 944, 1145, 1323 (1973); C. Keely, *The Disposable Worker: Historical and Comparative Perspectives on Clandestine Migration* (1976) [hereinafter cited as *The Disposable Worker*]. *See also,* Domestic Council Committee on Illegal Aliens, *Preliminary Report* (1976).
3. Mexican American Legal Defense and Education Fund, *The Impact of Undocumented Aliens on the U.S. Labor Market and on U.S. Public Assistance Programs* 1, 7 (1978).
4. 29 U.S.C. §§ 201-217 (Supp. 1978) Regulations are found at 29 C.F.R. § 776.0 *et. seq.* (1979).
5. 29 U.S.C. § 203(d) (Supp. 1978).
6. *Interagency Task Force On Immigration Policy, Staff Report* at 362 (1979).
7. 29 U.S.C. § 206 (Supp. 1978).
8. 29 U.S.C. § 207 (Supp. 1978).
9. 29 U.S.C. § 213 (a) (6) (Supp. 1978) exempts certain establishments and businesses from coverage under either § 206 or § 207. 29 U.S.C. §213 (a) (b) (supp. 1978) is particularly applicable to alien laborers, as it exempts certain agricultural workers who work as "hand-harvest laborers." 29 U.S.C. § 213(b) (12) (13) (16) and (21) (Supp. 1978). 29 U.S.C. § 213(c) (Supp. 1978) provides a specific exemption from the child-labor restrictions of 29 U.S.C. § 212 (Supp. 1978) for agricultural employment of children.
10. 29 U.S.C. §216 (Supp. 1978). 29 U.S.C. § 211 (Supp. 1978) provides a means for both enforcing the provisions of the FLSA and for discovering violations subject to § 216(a) penalties. It provides for administrative inspections and investigations by the Wage and Hour Division of the Department of Labor. It also requires employers to keep records on their employees and on wages and working conditions. *See Guidebook,* supra note 16, at 289.
11. 29 U.S.C. § 216(b) (Supp. 1978). Section 216(c) authorizes the Secretary of Labor to supervise any payments owing to employees, acceptance of which constitutes a waiver of the right of action under subsection b. In addition, the Secretary may sue to recover these back wages, if the employee files a written request with the Department of Labor. Any action by the Secretary pf Labor extinguishes the employee's right to sue in his own behalf; this right can be terminated without the employee's consent. *See Guidebook, supra* note 16, at 296.
12. 29 U.S.C. §§ 151-169 (Supp. 1978). Regulations are found at 29 C.F.R. § 100.735 (1980).
13. 29 U.S.C. § 152(3) (Supp. 1978).
14. The term "employer" includes any person acting as an agent of a private employer, either directly or indirectly; it also covers labor unions in their capacities as employees. Exemptions for independent contractors, supervisors and individuals employed by employers who do not fall within the NLRA definition of "employer" were added in 1947. Conference Report on the Labor-Management Relations Act of § 904, 80th Cong., 1st Sess., *reprinted in* [1947] U.S. Code Cong. & Ad. News 1135, 1137-1139. The conference committee rejected the wording of "individuals employed in agriculture," as proposed in the Senate bill, in favor of the narrower exemption of "agricultural laborers."
15. 29 U.S.C. § 158 (a) (Supp. 1978).
16. 29 U.S.C. § 158 (b) (Supp. 1978).
17. 29 U.S.C. § 158(d) (Supp. 1978). This subsection provides that no existing collective-bargaining contract shall be terminated or modified by any of the parties without (1) serving written notice, (2) offering to renegotiate, (3) notifying the Federal Mediation and Conciliation Service and (4) continuing under the contract terms for at least 60 days. 29 U.S.C. § 158(c) (Supp. 1978) guarantees the free expression of opinion in any labor matter, as long as it does not make "Threat[s] of reprisal or force or promise[s] of benefit."
18. 29 U.S.C. § 160 (Supp. 1978).
19. 29 U.S.C. § 162 (Supp. 1978).
20. 583 F.2d 355 (7th Cir. 1978).
21. 604 F.2d 1180 (9th Cir. 1979).
22. *See* Interagency Task Force on Immigration Policy, *Staff Report Companion Papers* 47-61 (August 1979).
23. I.R.C. § 3101 *et seq.*
24. I.R.C. § 3401 *et seq.*
25. I.R.C. § 3402.
26. I.R.C. § 3401(a) and (c).
27. I.R.C. § 3401(a).
28. I.R.C. § 6205.
29. I.R.C. § 6672.
30. I.R.C. § 7202.
31. I.R.C. § 3301.
32. *See* I.R.C. §§ 3306(c) and (i), 3121(d).
33. 29 U.S.C. § 651 *et seq.* (supp. 1978). Regulations are found at 29 C.F.R. § 1975.1 *et seq.* (1980).
34. 29 U.S.C. § 652(b) (Supp. 1978).
35. 29 U.S.C. §§ 659(b) and 666 (Supp. 1978).
36. 29 U.S.C. § 666(e) (Supp. 1978).

Final Positions Adopted by the Select Commission

Prepared by NCIR
(January, 1981)

The following is a summary of the key votes taken by the Select Commission on Immigration and Refugee Policy at their final meetings held on December 6-7, 1980 and January 6, 1981. Some of the tallies described below may be somewhat incomplete as some Commissioners did not attend the final meetings and instead mailed in their votes. We do not have access to some of these votes. However, we do not believe that these votes substantially changed the majority positions adopted by the Commission.

I. EMPLOYER SANCTIONS

All Commissioners present at the final meetings, except Judge Cruz Reynoso and Rose Ochi voted in favor of employer sanctions. At the December meeting, nine (9) Commissioners voted to use "some existing form" of identification to implement the employer sanction law, and six (6) Commissioners opposed, presumably supporting creating of a national I.D. card. However, at the same meeting, when asked to vote on creation of a "more secure" form of identification, eight (8) Commissioners voted in favor of this proposal and seven (7) were opposed. The Commission never clarified what it meant by a "more secure" identification card. Among those voting against a new "secure" national ID system were Judge Reynoso, Rose Ochi, Congressman Robert McClory, Congresswoman Elizabeth Holtzman and Secretary Patricia Harris.

II. INCREASED ENFORCEMENT OF EXISTING LABOR LAWS

Eight (8) Commissioners voted in favor of increasing enforcement of *existing* protective labor legislation, one abstained and Senator Alan Simpson voted against such increased enforcement.

III. BORDER AND INTERIOR ENFORCEMENT

By fifteen (15) to one (1) the Commissioners voted to increase Border Patrol funding levels (in an unspecified amount), increase the number of primary inspectors at points of entry, institute a "mobile inspections task force", and establish "regional border enforcement command posts ... " The Commission also voted in favor of increased funds "to encourage voluntary repatriation to the interior of Mexico." Interior enforcement was largely dealt with by the vote favoring an employer sanctions law. It was agreed that INS should receive additional funding in order to computerize a system for the "prompt tracking" of non-immigrants.

IV. TEMPORARY WORKER PROGRAM

After much confused discussion on the need (or lack of need) for a temporary worker program, the Commission rejected proposals for a new, massive temporary worker program and voted instead to recommend that the existing "H-2" temporary worker program should be "streamlined." Specifically, with Attorney General Civiletti and Representative Hamilton Fish voting no, it was agreed that the proposed changes in the "H-2" program should (1) "improve the timeliness of decisions regarding the admission of H-2 workers" (i.e. reduce the period for recruitment of U.S. workers) and (2) "remove the current economic incentive to hire U.S. workers by requiring, for example, employers to pay FICA and unemployment insurance for H-2 workers ..." The Commissioners did not further analyze or discuss the multitude of negative impacts on U.S. workers experienced due to the existing "H-2" programs as implemented by the Department of Labor.

V. LEGALIZATION

The Commission voted to extend "legalization" ("amnesty") to persons who were present in the United States before January 1, 1980. The Commission failed to agree upon the scope of a residency requirement (i.e. how long persons must have been living in the United States), and "expects Congress to establish a minimum period of continuous residency to further establish eligibility" for the legalization program. It was agreed that "*the legalization program should not take place until new enforcement measures for curbing illegal migration* [presumably including employer sanctions] *have been instituted.*" With Judge Reynoso and Rose Ochi dissenting, the Commissioners voted to deport those who will make up the "residual group" of persons not qualifying for legalization. The Commission apparently failed to reach any conclusions on which particular grounds of exclusion should be applied in the legalization program. The Commission voted that the voluntary agencies should be given "a significant role" in the legalization program.

VI. NUMERICAL AND QUALITATIVE LIMITS ON IMMIGRATION

The Commission voted to retain the basic preference categories and for a world-wide limit on immigration (excluding immediate relatives and refugees). Senator Simpson voted against allowing certain categories (e.g. immediate relatives) to enter outside of numerical limitations believing that there should be a "firm cap" on lawful immigration.

The Commission voted to make the unmarried sons and daughters (over 21 years of age) of U.S. Citizens and the grandparents of adult U.S. citizens (a new category) *exempt* from numerical limitations. Judge Reynoso and Rose Ochi voted in favor of granting immigration benefits to the parents of minor U.S. citizen children; the majority of Commissioners voted against such an amendment. Nine (9) Commissioners voted to retain the present policy of admitting the spouses and unmarried sons and daughters of legal permanent residents in a preference category. Four (4) Commissioners voted in favor of exempting this group from numerical limitations and four voted to restrict the category to the unmarried sons and daughters of lawful permanent residents. Eleven (11) Commissioners voted to create a new preference category for the parents of adult legal per-

manent residents, if the parents are over the age of 60 *and* all of their children live in the United States. Three (3) Commisioners voted to retain the present policy which grants no benefits to the parents of permanent residents and two voted to allow immigration through a numerically limited preference.

On per-country ceilings, three (3) Commissioners voted to eliminate such ceilings, eight (8) voted to eliminate the ceilings for the spouses and minor children of lawful permanent residents, two (2) voted to maintain the present restriction, and two (2) voted to raise the ceilings to partially accomodate all sending countries.

The Commission voted to create a "new seed" independent immigration category. Immigrants with "exceptional qualifications" will be included in this "new seed" group, as will a small group of "investors". *The Commissioners were split on how this new independent category should be implemented.* Some Commissioners felt that it should involve U.S. employers offering jobs and a labor certification program somewhat like the existing Third and Sixth Preference systems. Some Commissioners felt that a job offer should *not* be required. Others felt that the Department of Labor should issue a list of job categories in which U.S. workers are available and persons falling into this list would be precluded from immigrating while others could immigrate without a labor certification.

On the question of assigning *percentages* to the numerically limited preferences categories, twelve (12) Commissioners voted in favor of applying percentages only to the proposed "independent" category, one (1) voted to maintain the current system, and three (3) voted to eliminate percentages and to meet visa demands in higher preferences before issuing visas in lower preferences. While the meaning of this vote is not altogether clear, apparently the Commissioners contemplate that family preference categories should not be assigned specific percentages of an overall world-wide numerical limitation. Thus, persons in higher preferences would be issued visas before persons in lower preferences.

Based on a proposal made by Congressman Fish, the Commission voted for an annual ceiling on permanent immigration of 350,000 (not including the non-numerically limited categories mentioned above). Currently the world-wide ceiling on immigration stands at 270,000. Additionally the Commission voted for 100,000 visas to be made available annually for a five year period "to phase in backlogged applicants and derivatives of legalized aliens ... " Senator Simpson unsuccessfully proposed that the present ceiling of 270,000 be maintained.

VII. GROUNDS FOR DEPORTATION AND EXCLUSION; POWERS OF INS AGENTS; LEGAL ISSUES

The Commission failed to reach any conclusions on amending the present laws concerning the grounds for deportation and exclusion.

On the reentry doctrine (permanent residents subject to the exclusion laws upon each new entry), eight (8) Commissioners voted to modify existing law so that only certain serious grounds for exclusions (crimes, national security, etc.) would be applied to permanent residents returning from brief trips abroad, three (3) voted in favor of amending current law to "include [a] detailed statutory definition of innocent, casual and brief trips abroad" (i.e. clarify the *Fleuti* standards), and two (2) voted for elimination of the reentry doctrine entirely.

Regarding suspension of deportation, eleven (11) votes favored amending the law (Section 244) so that the applicant would have to show the required period of residence and "hardship" (rather that "extreme hardship") if deported. Only one (1) Commissioner opposed this change. Nine (9) Commissioners voted to eliminate Congressional confirmation of suspension cases; four (4) opposed this amendment.

When asked whether "long-term, permanent residence in the U.S. [should] be a bar to the deportation of *[lawful] permanent resident aliens,* except in the case of aliens who commit certain serious crimes", five (5) Commissioners supported this proposal, three (3) were opposed, *and five (5) abstained.*

On the question of suppressing illegally seized evidence in deportation hearings, ten (10) Commissioners voted against such an amendment, instead supporting the notion that "enforcement officials using illegal means ... should be penalized." Three (3) Commissioners voted in favor of an amendment which would exclude illegally seized evidence in deportation proceedings.

The Commission rejected efforts to create a formal mechanism for reviewing consular decisions on visa denials. They voted instead in favor of "improving" the existing "informal review system."

Eight (8) Commissioners voted in favor of creating an Immigration Court under Article I of the U.S. Constitution. Four (4) votes opposed this change. While the Staff recommended creation of an Article I court *and* elimination of review in the Circuit Court of Appeals, the latter issue was apparently not presented to the Commissioners when they discussed and voted on this question.

Twelve (12) Commissioners voted in favor of notification and the right to counsel "at the time of exclusion and deportation hearings and adjudication hearings under the Act." The Commission also voted in favor of providing counsel at government expense to indigent, lawful permanent residents when alternative free legal services are unavailable. **[Editor's Note:** An article appearing in this edition deals with the right to counsel issue.]

The only substantive amendment to existing law on the arrest and search powers of INS officers is a proposal to statutorily require that such officers obtain *judicial* search warrants, other than in exigent circumstances, upon receiving consent, and searches conducted pursuant to a valid arrest.

VII. REFUGEES AND ASYLUM LAW

The Commission voted to retain the Refugee Act of 1980 without substantial amendment. A majority of Commissioners favored creation of an "interagency body ... to develop procedures, including contingency plans for opening and managing federal processing centers, for handling possible mass asylum emergencies." The Commission also favored the development of "group profiles" to assist in (or expedite) the determination of refugee or asylee status. Most Commissioners favored an "interagency body" including "the Coordinator for Refugee Affairs, the Department of Justice, Health and Human Services and Education, the Department of the Army, the F.B.I., the C.I.A. and the White House." A majority of Commissioners voted in favor of new procedures which would "expedite" the processing of asylum claims.

[Editor's Note: Final tabulations on all votes should be available from the Select Commission under the Freedom of Information Act.]

Public Responses to the Findings of the Select Commission

In November, 1980 the Select Commission staff issued its report in preparation for the final Commission meeting. Concerned organizations throughout the country forwarded telegrams to the Commission expressing their opposition to many of the staff recommendations. Copies of some of these communications were sent to NCIR and edited portions are reproduced below.

I. MIDWEST COALITION IN DEFENSE OF IMMIGRANTS

The following mailgram was sent on December 5, 1980:

"We are an umbrella organization of religious, social and community groups .... We are against employer sanction legislation and a national work identification card because of the discriminating impact that it will have on the legal immigrant and minority community generally .... The millions expended in this project should be directed at enforcement of the [existing] labor laws, which seek to protect all workers, eliminating the incentive that employers have for hiring the undocumented .... We are against any form of [an] H-2 program .... Minor U.S. citizen children should be allowed to immigrate their parents .... "

II. CONTINENTAL CONFERENCE/SOLIDARITY WITH HAITI

The Continental Conference/Solidarity with Haiti is an umbrella organization of Haitian refugee and support groups. A press-release issued on December 5, 1980 read as follows:

"We are shocked and dismayed at the short-sighted and racist report of the staff of the Select Commission on Immigration and Refugee Policy as it concerns refugee matters. Huge amounts of research and data submitted by various international human rights groups, including the Amnesty International, Lawyers Committee for International Human Rights and Haitian support groups has blatantly been ignored by the staff .... *In fact, the Staff report reads as if it were written by a person or persons who knew absolutely nothing about either refugee law or about current problems with the implementation of the Refugee Act of 1980* .... We suggest that the staff stop talking about a refugee 'crisis' that does not exist .... The Cubans came here on the invitation of the White House. Haitian refugees have been trickling into this country for ten years. Their coming here is a drop in the bucket of undocumented migration and cannot be called a 'crisis'. There is no crisis at the present time although continued compromise of human rights positions abroad will certainly precipitate more refugees coming to the U.S. Our response should not be to set up 'camps' as suggested by the Commission staff where refugees will be isolated from legal help. The Commission should stop talking about 'camps' and begin talking about how to make our asylum & refugee laws fair and impartial, rather than ideologically based ....

III. LEAGUE OF UNITED LATIN AMERICAN CITIZENS

The following press release was issued by LULAC on December 8, 1980:

"The Select Commission on Immigration and Refugee Policy (SCRIP) met on December 5 and 7, 1980, and reached some final decisions on many critical issues which would, if enacted, impact harshly on the lives of millions of Hispanic-American citizens and other minorties, well into the future. The Commissioners, for the most part have accepted the recommendations staff circulated for their review ten days before the meeting. There is growing concern among Hispanic organizations .... that the direction the Select Commission has taken will only serve to increase problems in certain areas of immigration rather than begin to solve or minimize the problems.

One of the most evident actions taken by the Select Commission which reflects this position is the approval of employer sanctions which will serve to only erode civil rights and civil liberties of American society. In addition, *the Commissioners appeared to be more concerned with the political acceptability of their recommendations than discussing and attempting to solve problems on the merits surrounding the issues.* What has resulted are recommendations which ignore the findings voluminous research and testimony compiled during the past year and one-half.

The Hispanic community remains opposed to the concept of employer sanctions, temporary guest worker programs and any immigration policy which does not attempt to emphasize family reunification as it's primary goal. The Commission has decided to take a very dangerous road of enforcement as its primary approach to curbing the flow of undocumented workers to the U.S. This action has been taken despite various studies which indicate that increased enforcement along the border can only result in costly expenditures and could increase violence significantly while only having a minimal impact, if any [on the flow of undocumented migration.] It is truly unfortunate that the Commission has not examined other avenues to effectively deal with these matters. It has decided that attacks on the civil rights and civil liberties of the Hispanic community are perhaps more productive than seriously and objectively dealing with the immigration problem.

We do not oppose the enforcement of immigration law but we do oppose the mentality which blames the Hispanic in this world for the immigration matters which trouble this country. We are tired of serving as the scapegoat for the economic ills of the U.S. and the serious repercussions this attitude has brought upon our community. It is necessary that the immigration policy of this country be based on a realistic and human foundation rather than on a reactionary response and narrow perspective of the methods available to address the immigration issues confronting us .... "

IV. INTERNATIONAL COORDINATING COMMITTEE FOR THE FIRST INTERNATIONAL CONFERENCE FOR THE FULL RIGHTS OF UNDOCUMENTED WORKERS

The International Coordinating Committee sent the following message to the Select Commission on December 2, 1980:

"The First International Conference for the Full Rights of Undocumented Workers was held in Mexico City on April 28, 29, 1980. Representatives of major unions and organizations from

both the United States and Mexico attended the conference. Representatives from the following major Mexican unions attended the conference and have joined the International Coordinating Committee: Workers Congress, Confederation of Mexican Workers, Telephone Workers Union of the Republic of Mexico, the Electrical Workers Union and others. These powerful unions represent millions of workers in the Republic of Mexico. The International Conference endorsed resolutions calling for greater protections of undocumented workers in the United States, a strong commitment to family reunifications, economic improvements in those communities which primarily lose workers to the United States, etc. *These positions were largely adopted by Mexican President Jose Lopez Portillo after our delegates met with him in Mexico City on July 3, 1980.*

We totally reject the manner in which the Select Commission on Immigration and Refugee policy has gathered data and reached its conclusions. While the Commission held public hearings, witnesses were carefully selected by the Commission staff. Worse is the fact that interested and experienced organizations were provided no opportunity to participate in the process of analyzing the data collected by the Commission and the formulation of positions based on this data. In fact, a review of the Commission's work indicates that they have simply ignored the public input which they did receive. *At this point we are forced to conclude that the Select Commission has wasted the time of hundreds of witnesses and millions of dollars in taxpayer's money.*

The staff of the Select Commission has recommended that an employer sanctions law be implemented in conjunction with a national ID card. Such a law would theoretically penalize employers for hiring undocumented workers thereby drying up the availability of jobs and stopping undocumented migration. Such a law already exists for farmworkers in the federal Farm Labor Contractors Act. This law has been unenforced, has had no impact on the employment of undocumented migrants, but has resulted in numerous cases of job discrimination against black and Latino U.S. migrant workers ....

The Commission also fails to understand the complexities involved in interviewing every single worker in the United States to determine whether they are entitled to receive a national ID card and work in the U.S. This task will take years to accomplish, would cost more that one billion dollars according to many experts, and in the end will be such a massive program that it will be unenforceable. *If the Commission believes that undocumented workers may be displacing some American workers in marginal jobs, which is as much as the experts claim, they should take the money that would be spent on establishing a national ID card system and employer sanctions law and instead spend the money to train workers in marginal jobs and to enforce existing labor laws which go ignored.* A real commitment to the enforcement of labor laws would promote the rights and working conditions of all workers in the U.S.....

We support a just and humane immigration policy. One that recognizes the economic realities that will continue undocumented migration well into the future and seeks to protect undocumented workers rather that institutionalize their exploitation. Random deportations of foreign workers are a waste of taxpayers money as workers will return to the U.S again and again as long as their communities suffer high unemployement and U.S. business continues to have an appetite for cheap labor. The Select Commission fails to understand the international economics involved and instead treats the immigration question as a simple law-enforcement matter. We will work hard in the coming months to educate union members and the public on both sides of the border about the regressive and repressive positions of the Select Commission ....

[**Editor's Note:** Many other organizations, including the American Committee for the Protection of the Foreign Born, National Immigration Coalition, Committee on Chicano Rights, the National Lawyers' Guild and others sent messages of concern to the Commission after the Staff report was issued and after the December 6-7 meeting. Copies of these messages should be available through the Select Commission.]

... *Right to Counsel*

(Continued from page 14)

> Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, *he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated.* See, *Aguilera-Enriquez v. INS,* 576 F.2d 565, 568-69 (6th Cir. 1975).

Most courts examine challenges to the absence of counsel due to indigency on a "case-by-case" basis, in order to determine whether "fundamental fairness" was violated by the absence of counsel to assist an indigent person in deportation proceedings. See, e.g., *Barthold v. INS,* 517 F. 2d 689, 690 (5th Cir. 1975); *Rose v. Woolwine,* 344 F 2d 993 (4th Cir. 1965); *U.S. ex rel. Castro-Louzan v. Zimmerman,* 94 F.Supp. 22 (E.D.Penn. 1950). The courts have called this a "grave" and "momentous" question. *Henriques v. INS,* 465 F. 2d 119, 121 (1972).

Maurice Roberts, one of the foremost authorities on immigration law in the United States today, has taken note of the "growing complexity and heightened technicality" of our deportation laws. *Maurice Roberts, supra,* at 91. Former General Counsel Charles Gordon has written that deportation hearings sometimes involve "complicated factual or legal questions." *Gordon, supra,* at 877. While not required by statute, the Immigration Service assigns a "trial attorney" to represent the views of the Service at *every* deportation hearing which take place today. In the context of criminal trials, which often involve the same degree of complexity as deportation hearings, the Supreme Court has recognized that

> Even the intelligent and educated layman has small and sometimes no skill in the science of law ... Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence otherwise inadmissable ... He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. See *Powell v. Alabama,* 287 U.S. 45, 68-69 (1932).

Of all persons apprehended and required to leave the country by the Immigration Service each year, only approximately 6% ever appear in deportation hearings. Of the 28,371 aliens deported or required to depart the United States in Fiscal Year 1978 (not including approximately 900,000 persons removed under "safeguards"; that is, without appearing in deportation hearings), *only 426 were lawful permanent resident aliens. See,* United

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... Right to Counsel

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States Department of Justice, Immigration and Naturalization Service, Annual Statistics for 1978, Table 28. This number is probably very close to the number of lawful permanent resident aliens who appear in deportation proceedings each year. Of this 426, no statistics are maintained concerning their indigency; however, we may assume that some portion are too indigent to be able to afford the assistance of counsel.

Permanent resident aliens face severe losses upon being deported from this country. The Supreme Court, reviewing deportation cases involving permanent resident aliens, has termed expulsion from this country a "savage penalty," a "drastic measure," a punishment "often as great if not greater than the imposition of a criminal sentence ... " *See, Jordan v. DeGeorge,* 341 U.S. 223, 243 (1893; *Fong Haw Tan v. Phelan,* 333 U.S. 6 (1948); *Bridges v. Wixon,* 326 U.S. 135 (1945). As stated by Justice Brandeis, deportation often involves the loss of "all that makes life worth living ... " *Ng Fung Ho v. White,* 259 U.S. 276, 284 (1922). Deportation of the permanent resident alien involves the break-up of the nuclear family, the loss of a business or job, and return to a country which the resident alien may have left many years before as an infant or youth. The Supreme Court has said that this is a "drastic" penalty.

Given the small number of lawful permanent resident aliens who are required to appear in deportation hearings each year, and the even smaller number who will be unable to afford the assistance of counsel, the Commission should recommend that such persons be provided with legal assistance at government expense. The fiscal impact of such a policy would be minimal. Permanent resident aliens for the most part already seek deportation hearings rather that agreeing to leave the country under voluntary departure because of their ties in this country. The government already bears the fiscal burden of preparing these cases for the deportation hearing, assigning a "trial attorney" to represent the government in the proceedings, assigning an Immigration Judge, court reporter and often a translator to implement the hearing, and often must respond to administrative appeals in these cases. Given the small number of cases in which the government initiates proceedings against permanent resident aliens each year, and the costs already involved in such proceedings, the added costs of providing representation for those who cannot otherwise afford to retain counsel would be relatively insignificant.

Fundamental fairness requires that at least lawful permanent resident aliens should be provided the assistance of counsel in deportation hearings when unable to afford private counsel or obtain free legal services from a local organization of legal services program....

Recommendation: *The Select Commission should recommend that a mechanism be established whereby indigent permanent resident aliens, required to appear in deportation proceedings and unable to retain or locate counsel, be provided with counsel at government expense. Such representation should be provided only in administrative proceedings, and should not be made available for judicial review of those proceedings. Such assignments should be made by Immigration Judges presiding over the hearing only after a determination is made that the respondent is a lawful permanent resident alien, is indigent, and has been unable to locate the assistance of counsel through a voluntary organization or legal services program.*

¡ATENCION!
¡LAS REDADAS EN LAS FABRICAS SON ILEGALES!

Comisión Internacional Coordinadora Por los Derechos Plenos de los Trabajadores Indocumentados

SI TE ARRESTAN

- NO TE IDENTIFIQUES
- NO FIRMES SALIDA VOLUNTARIA
- NO CONTESTES PREGUNTAS
- DEMANDA HABLAR CON UN ABOGADO
- DEMANDA AUDIENCIA DE DEPORTACION

NO TE DEJES RAZA
¡RESISTE!

¡atencion!

SI TE ARRESTAN
DONDE TRABAJAS, LLAMA A:

IBGW — LOCAL 301
383-7057

Comisión Internacional Coordinadora
1ra Conferencia Internacional Por Los Derechos Plenos de los Trabajadores Indocumentados

International Coordinating Committee
1st International Conference for the Full Rights of Undocumented Workers

February 25, 1981

COMPANEROS/AS:

As a result of ex-Attorney General Civiletti's January 15, 1981 decision to lift the restrictions on factory raids, the Immigration and Naturalization Services has intensified its campaign against the Latino community and is once again subjecting thousands of undocumented workers to harrassment and intimidation.

In response to this arbitrary and discriminatory practice, the International Coordinating Committee, in conjunction with the International Brotherhood of General Workers - Local 301, has launched a national campaign in defense of undocumented workers.

Literature available through the International Coordinating Committee includes: The Bill of Rights for Undocumented Workers (posters and flyers), "Atencion! Las redadas en las Fabricas son Ilegales!" (posters and flyers - see opposite side of this letter), and wallet size cards - "Conozca Sus Derechos" (explaining the right to remain silent, the right to counsel, the right to a deportation hearing, etc.)

Your support and financial contribution is essential in making this campaign a success.

For further information write:

International Coordinating Committee
3123 West Eighth Street
Los Angeles, CA 90005

or call: (213) 383-7057 or 383-0703.

IMMIGRATION LAW BULLETIN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS
1550 WEST EIGHTH STREET • LOS ANGELES, CALIFORNIA 90017 • (213) 487-2531

Select Commission Issues Final Report

Minority Members Label Report "Repressive", "Backward" and "A Sham"

The January issue of the *Immigration Law Bulletin* was exclusively dedicated to the work of the Select Commission on Immigration and Refugee Policy. On February 26, 1981, the Select Commission issued its Report of Conclusions and Recommendations to Congress and the new Administration. President Reagan refused to meet with the Commissioners and instead the report was presented to Vice-President Bush. The Select Commission has a mailing list of approximately 750 VIPS, but is only printing 250 copies of the report. It will therefore be difficult for community organizations to obtain copies of the Final Report. NCIR will make copies of the report available at our cost of reproduction and postage. If you would like to receive a copy, please telephone Patricia Vargas at NCIR.

Below we have exerpted portions of the many supplemental (minority) views which were filed by members of the Commission. *These supplemental views make clear the total failure of the Select Commission to gather and anaylze available research and to synthesize these materials into coherent policy options.* As we stated in our January *Immigration Law Bulletin*, the Select Commission represents "a lost opportunity for progress ... " Community groups and church organizations which have reviewed the work and conclusions of the Select Commission have condemned them as "short-sighted", "uninformed", "without empirical foundation", "racist", etc. We believe, as stated by former HEW Secretary Patricia Harris, that the Commission members were robbed of the opportunity to seriously evaluate policy options due to the "incompetence" of the staff in preparing materials and research studies for consideration by the Commission members.

STATEMENT OF COMMISSIONER PATRICIA ROBERTS HARRIS

I strongly oppose any national identification system to deal with a minority of the inhabitants of this country, particularly the use of the social security number or card. Such use would encourage forgery and misuse of social security numbers, thereby endangering our recordkeeping system ...

STATEMENT OF COMMISSIONER CRUZ REYNOSO

The Commission's major recommendations, I respectfully submit, are not responsive to the needs of our Country. Many of the recommendations are important improvements in present law. *However, if I had the unfortunate choice of having to recommend all the Commission proposals (as a legistative packet), or none, I would recommend leaving the law as it is*

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Updates on Recent Decisions

1. NINTH CIRCUIT DECIDES TO EXTEND SECTION 212(c) RELIEF OF ALL OTHERWISE ELIGIBLE RESPONDENTS IN DEPORTATION PROCEEDINGS

In *Tapia-Acuna v. INS*, ___ F.2d ___ (9th Cir. 1981) the Ninth Circuit decided to accept the Second Circuit's position that relief under 8 U.S.C. § 1181(c) is available in deportation proceedings to all permanent resident aliens of more than seven years regardless of whether they have recently departed the United States. *See, Francis v. INS*, 532 F2d. 268 (2nd Cir. 1976). The Court distinguished its recent decision in *Bowe V. INS*, 597 F.2d 1158 (9th Cir. 1979) on the ground that the equal protection constitutional issue had never been addressed before. The Court also rejected the prior restriction that relief under § 1182 (c) is not available to narcotics offenders. In light of the *Tapia* ruling, the

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Decisions Update *(Continued from page 1)*

Board of Immigration Appeals' decision of *Matter of Marin,* 16 I.D. 581 (1978) is now applicable nationwide. *Marin* provides that § 1182 (c) relief is available in deportation proceedings to all (1) lawful permanent resident aliens, (2) who have been lawful residents for seven or more years and (3) who are being deported under a charge which corresponds to an exclusionary provision under § 1182(a), e.g. conviction of a narcotics offense, smuggling, conviction for crimes of moral turpitude.

2. SUPREME COURT REVERSES THE NINTH CIRCUIT RULING ON MANDATORY REOPENING OF DEPORTATION PROCEEDINGS TO PRESENT SUSPENSION APPLICATIONS

The Supreme Court has reversed a recent Ninth Circuit ruling requiring the BIA to reopen deportation proceedings upon the presentation of an application for suspension of deportation which establishes a *prima facie* case of eligibility. *INS v. Wang* ___ U.S. ___ (No. 80-485 March 2, 1981). In an *en banc* decision the Ninth Circuit ruled that the BIA had abused its discretion when it rejected the Wangs' motion to reopen the deportation proceedings to present an application for suspension of deportation. *See, Wang v. INS,* 622 F.2d 1341 (9th Cir. 1980). The Wangs had resided in the U.S. since 1970. They claimed extreme hardship to their U.S. citizen children (ages 7 and 10) on the basis that they would suffer serious economic, educational and cultural difficulties if forced to leave the U.S. and return to Korea with their parents. The Wangs claimed hardship on the grounds they would be forced to sell $180,000 in assets accumulated here, including their house and dry cleaning business. The Ninth Circuit found that the Wangs had established a *prima facie* case of eligibility for suspension relief and held that they were entitled to a hearing before an immigration judge on the application. The government took an appeal to the Supreme Court contending the BIA properly denied the motion to reopen.

Without a hearing on the case the Court reversed, finding the BIA had acted properly on the suspension application. First, the Court found the Ninth Circuit had circumvented the regulations relating to the nature of evidence necessary to support motions to reopen deportation proceedings. (8 C.F.R. § 3.2) In pertinent part the regulations require material evidence to be presented to support the application. The evidence presented by the Wangs to support the motion to reopen and the suspension of deportation application consisted of an affidavit setting forth their contentions as to the hardship which would result from deportation. The Court found that the "conclusory and unsupported" affidavit was inadequate and that the Ninth Circuit's ruling requiring the reopening of the deportation proceedings circumvented the regulation "designed to permit the Board to select for hearing only those motions reliably indicating the specific recent events that would render deportation a matter of extreme hardship for the alien or his children." The Court indicated that this was an impermissible intrusion into the BIA's discretionary power to determine which motions to reopen should be granted. Secondly, and more importantly, the Court found the Ninth Circuit had intruded upon the BIA's discretionary authority to interpret the "extreme hardship" requirement. The court rejected the Ninth Circuit's test that all that was necessary to support the motion to reopen be a showing that "the hardship from deportation would be different and more severe than that suffered by the ordinary alien who is deported" because it was much broader than the test established by the BIA. The Court agreed with the BIA's findings that the Wangs would only suffer *mere* economic detriment to themselves and "that the alleged loss of educational opportunities to the young children of realtively affluent, educated Korean parents did not constitute extreme hardship within the meaning of § 244." The Court found that "nothing in the allegations indicated that this is a particularly unusual case requiring the Board to reopen the deportation proceedings." The Court was apparently impressed by the government's argument that unless the Ninth Circuit's liberal test was reversed thousands of aliens would be able to thwart deportation based upon minimal showings of hardship.

3. SUPREME COURT UPHOLDS INVESTIGATIVE STOP BY BORDER PATROL

In *U.S. v. Cortez,* 101 S.Ct. 690 (1981) the court upheld the stop of a vehicle suspected of transporting undocumented persons by border agents. The court found that the information possessed by the arresting agents was sufficient to satisfy the requirement that there be "a particularized and objective basis for suspecting the particular person stopped of criminal activity." (Id. at 695) The information possesed by the agents was primarily the method of operation of a particular smuggler in a remote border area in Southern Arizona. The agents had pieced together this information throught their investigations. The defendant was stopped on that particular night because his actions fit the smuggler's pattern. The court was apparently impressed by the complexity of the agents' account of how they developed the smuggler's pattern and of how all the factors pointed to the defendant that particular night.

4. DENATURALIZATION OF NAZI CONCENTRATION CAMP GUARD AFFIRMED BY SUPREME COURT

The Supreme Court has affirmed the denaturalization of a

(Continued on page 16)

Update:

Regulation Amendments

I. WITNESS REQUIREMENTS FOR CERTIFICATE OF CITIZENSHIP

INS has amended 8 C.F.R. § 341 eliminating the provision's requirement that each applicant for a certificate of citizenship produce as a witness the person through whom citizenship is claimed. The production of a witness is now a matter within the District Director's discretion based upon the need for and usefulness the witness' sworn statement. Effective January 21, 1981, 45 Fed. Reg. 84011 (1980).

II. CHANGE OF STATUS FOR IRANIAN NATIONALS

By amendments to 8 C.F.R. § 245.1(d) and 248.2, published April 16, 1980, the adjustment to permanent resident status and the change of non-immigrant classification of Iranian nationals were limited to those who were in specified categories:

1. Those claiming immediate relative status under section 201(b) or preference status under section 203 (a) (1), (2), (4) or (5) of the Act; and
2. Those applying for or who have been granted asylum in the United States.

The previously published amendments do not provide for the adjustment of status to permanent resident or the change of non-immigrant classification of Iranian nationals when it has been determined to be in the national interest. Therefore, the Immigration and Naturalization Service has added as a third category:

> "When it has been determined to be in the national interest by the Department of State to allow for the adjustment of status to permanent resident or the change of non-immigrant classification of Iranian nationals." Published as a final rule, effective January 15, 1981, 46 Fed. Reg. 3493 (1981).

PERSONS WHO MAY BE INCLUDED IN ONE PASSPORT

The State Department adopted a final rule amending 20 C.F.R. § 51.5, eliminating the practice of allowing the name and photograph of an American citizen child under age 13 to be included in the U.S. passport issued to the child's parent or sibling. The amended regulations require that any citizen needing passport documentation must be in possession of a valid passport issued in his or her own name. The amendment will not affect the validity of passports issued prior to the effective date of the amendment. 46 Fed. Reg. 2590 (1981).

IV. IMMIGRANT DOCUMENTARY REQUIREMENTS

In a final rule published on January 12, 1981, INS clarified the language of 8 C.F.R. § 211.1 (b)(1), to provide that immigrant aliens returning to unrelinquished lawful permanent residence in the United States may use their alien registration receipt cards in place of immigrant visas when entering the United States. The rules specifically includes civilian employees of the U.S. government. 46 Fed. Reg. 2590 (1981).

V. REPRESENTATION BY COUNSEL

To avoid possible confusion as to when the right to representation attaches, 8 C.F.R. § 292.5(b) is amended to provide that an applicant for admission processing through primary or secondary inspection does not have the right to representation "unless the applicant has become the focus of criminal investigation *and* has been taken into custody." (Emphasis added). No opportunity for public comment was provided on this regulation as INS took the position it was simply "clarifying" and "correcting" an earlier published regulation which had provided in the disjunctive that an alien's right to representation during primary or secondary inspection attached only when the alien had become "the focus of a criminal investigation *or* has been taken into custody." The effect of this "correction" of the regulation is to deny counsel to persons in primary or secondary inspection *who have been taken into custody* unless they have become the "focus of a criminal investigation." Effective January 12, 1981. 45 Fed. Reg. 86409 (1980).

VI. FOOD STAMP REGULATIONS ON "REPORTING ILLEGAL ALIENS"

Controversial new regulations requiring food stamp workers to attempt to obtain confessions from applicants for food stamps that they or their household members are "illegal" aliens and then report them to INS have been proposed by the Department of Agriculture. 46 Fed. Reg. 4642, February 16, 1981. Comments were due by March 17, 1981. The new proposed reporting requirements arises from the 1980 Amendments to the Food Stamp Act. The new statute provides that food stamp workers are to report to INS "a determination ... that any member of a household is ineligible to receive food stamps because that member is in the United States in violation of the Immigration & Nationality Act." Section 118, Pub. L. 96-249. The Committee Report House Report No. 96-788, provides that

> The Committee does not want ... to have food stamp personnel viewed as outreach officers of the INS, seeking clues pointing to the presence of illegal aliens ... The workers' role in terms of the information-gathering ... would be essentially passive ... The worker could not guess about the households members' status and then report ... The worker could not undertake to investigate the matter on his own or attempt to ferret out further facts by going beyond the ordinary verification process ... The certification worker cannot, therefore, act to gather information outside the form or interview ...

The Committee strongly recommended that the standard to be utilized in determining whether a person is in the United States "in violation of the Immigration & Nationality Act" should be whether the person is under "a final order of deportation ..."

The proposed regulations provide that a "determination that a person is an illegal alien shall be based only on (i) admissions by the applicant ... (ii) INS documents presented by the household during the application or recertification process that are determined to be forged; or (iii) formal order of deportation presented by the household during the application for recertification process."

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Select Commission *(Continued from page 1)*

today. (Emphasis added). While I entertain the strongest feelings that our national immigration statutes and practices are not working, I concluded that the recommendations, as a whole, will work less well.

1. My Overall Concern

Congress must strive to structure a cohesive and realistic immigration policy. The ultimate criteria must be whatever is in the best interest of our Country. That interest will be served domestically by continuing the humanitarian goal of family reunification and at the same time fortifying the economic growth of our Country. In the international sphere a policy which promotes peace and stability serves our needs.

International realities affect immigration. Developing countries, many of our neighbors in the Western Hemisphere, are undergoing unprecedented population growth, while the developed countries, including our own, are experiencing declining birth rates which result in projections of shortages in labor. Mexico, our immediate southern neighbor, by way of example, is expected to greatly increase its population (from 65 to over 100 million) by the end of the century. Meanwhile, continued economic factors—inflation, higher taxes, increased labor and material costs—are forcing American companies to relocate in developing countries and to join the growing number of multi-national corporations which know no national bounds...

2. Legalization (Amnesty)

My own estimate is that a program structured pursuant to our recommendations will draw as few as 2 percent of our own. The reasons are varied.

First, the Commission has stressed that tough enforcement of immigration laws must perhaps precede, but at any rate go hand-in-hand with, the legalization program. Thus if an undocumented person comes forwardin the good faith belief that eligibility exists, but guesses wrong, deportation lies in the offing. No conclusion was reached by the Commission as to the grounds for exclusion in implementing legalization. The goals of legalization manifestly would be frustrated by the application of most grounds for exclusion found in the statute. Thus, most undocumented are working people, the type who have made this country great; yet, because they are not monied an unsympathetic interpretation of the law could be made such that they are deemed persons likely to become public charges. Further, *the Commission did not reach a conclusion on the period of United States residency required for legalization purposes.* (Emphasis added.) No such residence requirement can be lengthy, nor can it ignore the migratory nature of some undocumented if the legalization program is to succeed. In short, on the crucial issues we have failed to make recommendations.

Second, the Immigration and Naturalization Service (INS) will apparently be in charge of the program. The INS, right or wrong, is viewed by the undocumented and, importantly, by the representatives of religious and other organizations which aid the undocumented as "the enemy", a hopelessly anti-alien agency. Unless there is absolute confidence in the administrative mechanism, the program will fail. *There is no trust in the INS.* (Emphasis added).

Third, the Commission report seems to disfavor the 50 percent of Mexican undocumented and favors the 50 percent non-Mexicans. The tone of its discussion is one of alarm repecting the Mexican undocumented immigrants. It offers voluntary departure as an option to amnesty and the "enforcement" programs stress border control. It approves current enforcement priorities. In fact, most of the entire enforcement budget goes to abate the flow of the 50 percent Mexican undocumented immigrants, and only a small portion to deal with the non-Mexican (much of it European) undocumented.

The effect of the Commission's proposals will be to drive the undocumented, particularly the Mexican undocumented immigrant, further underground. (Emphasis added.)

The goal should be to have every undocumented immigrant come forward. Those who are eligible should be documented. Those who are not, should be offered temporary status with the opportunity, after a few years, of qualifying for permanent residence ...

3.Political Asylum

Many undocumented aliens come from Latin America, fleeing dictatorial oppression and the chaos of civil war. Yet, our government has been reluctant to recognize their legitimate claim to asylum. Litigation, like testimony before our Commission, has pinpointed *the dual standards used by our Country which permits entry of many tens of thousands of Cubans, Russian Jews and others who are politically favored by our national administrations, but at the same time rejects Haitians and San Salvadoreans.* (Emphasis added). The former are considered documented, the latter undocumented. We, as a government, thus help create our own problems.

4. Labor Law Protections

The laws which protect United States workers should be vigorously enforced. One of the attractions of undocumented immigrants for employers is the cheapness and docility of the workers. This incentive would be markedly reduced if *all* workers had to be paid equally and treated with respect. A witness in our Los Angeles hearings, an employee of the State of California, testified that his office balanced strong enforcement of the law in the garment industry with the reality that the industry might move out or close down if enforcement were vigorous. That type of frankness is not often heard when undocumented immigrants are discussed. The reality, nonetheless, is that by actions of our government we countenance the very factors which encourage employer practices of hiring the undocumented.

5. INS Enforcement Efforts

Congress has failed to fund programs presently in place which would reduce the number of undocumented immigrants without intrusion into the lives of every American. For example, when foreign visitors arrive a paper (I-94) is given them by the United States authorities; another is turned in when the visitor leaves. The government has not monitored those documents to see who "forgot to leave the United States"—the reasons can be variously stated as "lack of money" or "priority at border control," but a program, already at hand, has not been utilized.

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Non-Citizen Eligibility for Social Services and Benefits Available to State Residents, Domiciliaries

By Carlos Holguin,
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National Center for Immigrants' Rights

On July 2, 1980, then-President Jimmy Carter issued a proclamation resuming compulsory draft registration for all males "residing" in the United States.

On January 17, 1981, the Los Angeles Times published a letter from Pete Schabarum, a conservative member of the Los Angeles County Board of Supervisors, decrying the expenditure of county funds to provide health care to "illegal aliens."

On December 8, 1980, a California court of appeal held that Francisco Cabral and Gabriel Vasquez, two long-time residents of the state, were entitled to benefits under a state program providing aid to victims of violent crimes, even though the two were unable to produce Immigration Service documents establishing the legality of the presence within the United States.

The common thread running though these three events is that important social benefits—or in the case of draft registration, social liabilities—are conditioned on whether the applicant is a "resident" of the provider jurisdiction. This article analyzes the legal ability of non-citizens present within the United States without permanent resident status to form a state residence or domicile. *Although the present discussion is cast in the context of California law, it will readily occur to the practitioner in any of the 50 states that his or her state similarly conditions eligibility for certain public benefits on applicants' residence or domicile.* The following analysis is therefore generally apposite to the statutes of many jurisdictions and to many types of public benefits.

I. CHARACTERISTICS OF IMMIGRANTS WITHIN THE UNITED STATES: AN OVERVIEW

By all credible accounts, it is impossible to accurately estimate how many persons of indeterminate immigration status are now living in the United States. *Comptroller General's Report to the State Committee on the Budget,* 95th Cong., 1st Sess., at 1 (1977). Nonetheless, xenophobic news stories in the 1980's typically cast persons who enter the country without documents in terms of "hordes," "border peril," or "invasion." California Advisory Committee to the U.S. Commission on Civil Rights, *A Study of Federal Immigration Policies and Practices in Southern California* at 2 (June 1980).

Whatever the actual extent of unauthorized immigration to the Unites States, it is clear that such immigration is created by the economic need of the immigrants for work and by the economic need of the United States employers for lowcost menial labor.

> "Every manufacturer I know needs all the help they can get. Why are these people [Mexican workers] employed? These are the people that applied for the jobs, and we called the job bank or the unemployment office and never got anybody."

Ibid. at 9 [Testimony of shoe manufacturer Arthur Sbicca].

Current federal law recognizes the pragmatic factors underlying unauthorized immigration, shielding employers of undocumented persons from criminal prosecution. *See,* 8 U.S.C. § 1324(a). Thus, readily available employment for the undocumented is ensured, thereby continuing the impetus for unauthorized immigration.

It is unlikely that the availability of social services within the United States contributes significantly to unauthorized immigration. Studies reflect the common sense conclusion that the undocumented will only resort to public agencies in those circumstances where the fear of detection and deportation is subsumed by a paramount need for vital services. Cornelius, *"The Future of Mexican Immigrants in California: A New Perspective for Public Policy,"* Working Papers in U.S.-Mexican Studies, No. 6 at 34-35 (Feb. 1980) [hereafter "Cornelius]. Nonetheless, the substandard conditions in which undocumented persons live and work can make access to certain social benefits a matter of life or death.

Although contemporary propaganda frequently laments the "drain" on scarce social services created by undocumented immigrants, scholars are virtually unanimous in concluding that undocumented immigrant workers contribute to the funding of social benefit programs at a much greater rate than do their citizen or undocumented counterparts. In 1977, it was found that 96% of undocumented immigrants in the United States had regular jobs and paid federal and state taxes, while only 2.3% had ever received welfare benefits of any kind. Those that did receive such benefits did so for the support of their children who were born in the United States. *Cornelius, supra,* at 26. Again in 1978 it was found that undocumented workers are not a burden to other taxpayers because their tax contributions exceed their use of tax-supported social services. County of Orange, California, Task Force on Medical Care for Illegal Aliens, *The Economic Impact of Undocumented Immigrants on Public Health Services in Orange County,* at 17-28 (March 1978).

A report by the Human Resources Agency of San Diego in 1978 estimated that tax contributions of undocumented workers in that county were approximately $49 million per year. In contrast, the report cites findings that only $2 million per year are expended toward providing social services to this group, including mandatory education costs. County of San Diego, California, Human Resources Agency, *A study of the Socioeconomic Impact of Illegal Aliens on the County of San Diego,* at 53-58, 173 (January 1977).

There are, of course, many persons of indeterminate immigration status who have been living in the United States for many years, and who will continue to live within this country for many years to come. Although this simple fact—indefinitely continuing presence—generally suffices to establish a residence or domicile within a given jurisdiction, state and local governments frequently assert that the undocumented are legally precluded from establishing a legally sufficient, or *lawful,* residence or domicile. In addition to being antithetical to what should be public policy, such an argument runs afoul of recent decisions that draw a clear dichotomy between federal immigration

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status and public benefit eligibility conditioned on residence or domicile.

DOMICILE AND RESIDENCE

Although frequently used interchangeably by legislatures, the terms domicile and residence imply two distinct concepts; courts are therefore often called upon to determine which of two different meanings is intended by a statute conditioning governmental benefits upon a person's "residency." The first of these meanings considers only a factual set of circumstances. It is referred to variously as "factual residence," *Smith v. Smith*, 45 Cal. 2d 235, 239 (1955), "actual residence," *Hanson v. Graham*, 82 Cal. 631, 830 (1890), or "physical residence," *In re Morelli*, 11 Cal.App. 3d 819, 830, 91 Cal. Rptr. 72 (1970).

This first meaning of residence looks solely to a factual situation, an objective reality. "[I]t involves physical presence in a place..." *Morelli, supra* at 830. Thus it is defined as "any factual place of abode of some permanency, more than a mere temporary sojourn." *Smith, supra* at 239.

Factual residence, being an entirely objective determination, does not depend upon an "intention to remain permanently." *Briggs v. Superior Court*, 81 Cal. App. 2d 252 (1947). This is what distinguishes it from the second potential meaning of residency, i.e., "constructive residence," or what is usually referred to as "domicile." The California Supreme Court has defined domicile as follows:

> "'Domicile' normally is the more comprehensive term, in that it includes both the *act* of residence and an *intention* to remain; a person may have more than one physical residence separate from his domicile, and at the same time."

Smith v. Smith, supra, at 239 (emphasis in original); *see also*, Rest. 2d, Conf. of Laws, §§ 15, 21, 22, and 23.

There is little doubt that any person who lives within a given jurisdiction is a factual resident thereof; if the term "resident" as used in a given statute is interpreted as requiring only factual residence, it is clear that a blanket exclusion of persons with an indeterminate immigration status is improper. The more usual approach of government agencies, however, is to urge domicile as the eligibility standard and to assert the incapacity of undocumented residents to form a valid domiciliary intent.

III. IS A LAWFUL FEDERAL IMMIGRATION STATUS PREREQUISITE TO A VALID STATE DOMICILE?

The threshhold analytical issue affecting eligibility for domicile-conditioned social benefits, is whether a lawful *federal* immigration status is at all apposite to whether an individual is able to form a domicile required by *state* law. Stated otherwise, this initial question is whether state legislative intent in establishing a domiciliary eligibility standard must be interpreted as requiring a lawful federal immigration status.

In *Elkins v. Moreno*, 435 U.S. 647 (1978) (discussed *infra*), the Supreme Court expressly declined to consider whether non-immigrants admitted to the United States upon the express condition that they maintain a foreign domicile are precluded from establishing a state domicile by operation of the Supremacy Clause. *Ibid.* at 663-64. In fact, much language can be found in *Elkins* to support an approach that would allow states to recognize a domicile nothwithstanding inconsistent federal law. *Ibid.* at 668; *Cf. De Canis v. Bica*, 424 U.S. 351 (1976) [enroachment of state into federally preempted area not necessarily violative of Supremacy Clause where important state interests involved].

In *Cabral v. State Board of Control*, 112 Cal. App. 3d 1012 (1980),* the court considered whether an undocumented resident could form a valid domicile so as to be eligible for benefits provided to victims of violent crimes. *See*, Cal. Gov. Code §§ 13959-13969.1. The court held that the defendant's regulations requiring possession of immigration documents authorizing benefit applicants to reside in the state improperly added a condition of eligibility not contemplated by the legislature:

> The Board appears to think that one may not be domiciled in a place where he or she may not remain *permanently*. But ... [there is no requirement of] an intent to remain permanently in order to establish a domicile in a particular place. (See Rest. 2d, § 18.) Thus, even if we assume, as we have for the purpose of this discussion, that the definitions of domicile in both [Cal. Govt. Code] section 244 and in the Restatement constitute the definition of "resident of California" as used in the Act, the Board's addition of the word "lawful" as a modifier of the term "resident" of California is clearly unwarranted.
>
> Eligibility for benefits under the Act, fixed by the Act, cannot be altered by the Board. (*See* § 11342.2; *Cooper v. Swoap* (1974) 11 Cal. 3d 856, 864; *Morris v. Williams* (1967) 67 Cal. 2d 733, *Ayala v. Unemployment Ins. Appeals Bd.* (1976) 54 Cal. App. 3d 676, 680.) Consequently, Regulation 649.12, being beyond the power of the Board to adopt, is invalid. *Ibid.* at (parenthesis in original; brack-

Ibid. at [parenthesis in original; brackets added].

In *Perez v. Health and Social Services*, 91 N.M. 334, 573 P.2d 689 (1978), an undocumented immigrant was held to have the capacity to form an intent to remain within the state for purposes of state financed medical services:

> The subjective intent of Perez to remain a resident of the state was established during the "fair hearing" on this matter.
>
> . . .
>
> [Defendant] contends that because Perez is an undocumented alien, the case becomes a matter of immigration control, the federal law (through the supremacy clause) preempts the State's application of the Special Needs Act to Perez. We disagree.
>
> . . .
>
> The Act is wholly state-funded and makes no reference that [defendant] is authorized to cooperate with the federal government in establishing and administering it.
>
> . . .
>
> [Defendants] argument indicates that Perez should be shipped out of the country or left here to die. We disagree. [Defendant's] duty to human beings in serious medical

*Editor's Note: The NCIR, in conjunction with the ACLU Foundation of Southern California, participated as *amicus curiae* in the briefing and argument of the *Cabral* case. Copies of these briefs are available from the NCIR.

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> condition cannot be thwarted by a misconstruction of the statute or a violation of its regulations.

Ibid. at 692-93.

Finally, in *Williams v. Williams,* 328 F.Supp. 1380 (D.V.I. 1971), it was held that an undocumented immigrant may be domiciled in the United States for purposes of a divorce statute even though he may be deportable:

> I see no reason to erect from the immigration laws an insuperable barrier of "constructive" intent in divorce litigation that cannot be overcome even by proof of a person's actual intent. The enforcement of immigration laws properly remains with those to whom it is entrusted by law and does not need in aid of enforcement judicially created civil disability of exclusion from our divorce courts. There is no rational ground for intermingling these two distinct areas of law — immigration and divorce courts. Moreover, any civil disability that is attached to any class of alien or citizen because of a supposed, but unproven, violation of law demands close scrutiny. Upon examination, I find no justification for the exclusion of aliens from our divorce courts on the basis of a possible technical violation of our labyrinthian immigration laws.

Ibid. at 1383; *see also, Seven v. Douglas,* Colo. App., 489 P.2d 601 (1971) (Pierce, J., specially concurring) ["federal statutes ... control only the terms of ... residency in the United States, not ... intent to reside permanently in Colorado"].

To the extent that state courts are willing to separate immigration law from issues concerning state domicile it will be unnecessary to consider the more complex question concerning the precise impact of federal law on the legal capacity of various categories of immigrants within the United States to form a state domicile. Nonetheless, it seems certain that such issues will eventually be raised and addressed by courts that decide the threshhold relevancy issue adversly to the applicant.

IV. THE LEGAL STATUS OF UNDOCUMENTED IMMIGRANTS WITHIN THE UNITED STATES

The Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101, *et seq.,* posits a comprehensive body of legislation providing for uniform federal control over the admission, exclusion, and deportation of aliens within the United States. *See generally,* Auerbach & Harper, *Immigration Laws of the United States,* 21-3 (3d Ed. 1975). Chief Judge Kaufman of the federal Court of Appeals for the Second Circuit has noted that "striking resemblance" between "King Mino's labyrinth in ancient Crete ... and the Immigration and Nationality Act." *Lok v. Immigration and Naturalization Service,* 548 F.2d 37, 38 (2d Cir. 1977). Judge Kaufman does not exaggerate when he observes that one must summon "Thesean courage" in order to undertake an understanding of the INA's complex provisions. *Id.*

§ 241(a) of the INA, 8 U.S.C. § 1251(a), sets forth nineteen classes of aliens who are subject to deportation. Deportation is therein prescribed for aliens meeting diverse criteria; thus the alien who fails to properly report his or her address becomes subject to expulsion, 8 U.S.C. § 1251(a), as does the alien who is determined to have been a party to Nazi persecution of persons because of race, religion, national origin, or political opinion. 8 U.S.C. § 1251(a) (19).

Perusal of this federal deportation scheme reveals that the lawfulness of an immigrant's presence within the United States is tested initially by reference to the deportable classes set out in § 1251(a). In the absence of a defense to deportation, there is, of course, no reason in law or logic to differentiate between persons who may be deportable for one reason as opposed to any other. That an identical consequence — deportation — flows from membership in any of the § 1251(a) classes compels the conclusion that one deportable alien cannot be considered more "illegal" than another. Significantly, immigrants who have been admitted for permanent residence may nonetheless be or become deportable. *See generally,* 1A Gordon & Rosenfield, *Immigration Law and Procedure,* § 4.5a (1979).

It is well-settled that aliens within the United States, even those who may be deportable, are entitled to the protection of the due process clauses of the fifth and fourteenth amendments. *See, e.g., Leng May Ma v. Barber,* 357 U.S. 185 (1958); *Shaughnessy v. Mezei,* 345 U.S. 206, 212 (1953). I.N.A. § 242(b), 8 U.S.C., § 1251(b), posits statutory due process standards ensuring that an individual will not be expelled without an opportunity for a hearing during which prophylactic procedures designed to protect against erroneous deportations are observed. Hence, an individual facing deportation is entitled, *inter alia,* to retain counsel, cross-examine adverse witnesses, and present evidence on his own behalf. *Id.* Importantly, a person in deportation proceedings need not prove his or her lawful presence; rather, the government must establish by clear, convincing, and unequivocal evidence that the individual is an alien within the deportable classes. *Woodby v. Immigration and Naturalization Service,* 385 U.S. 276 (1966). Provision is also made for administrative appeal from an adverse ruling in deportation proceedings, 8 C.F.R. § 3.1(b) (2), and for review in the circuit courts of appeal of final administrative determinations. 8 U.S.C. § 1105(a).

A. Deportable aliens may be entitled to remain indefinitely within the United States.

A salient feature of the I.N.A. is that, in addition to providing for the deportation of certain aliens, various relief provisions exist to allow deportable aliens to remain indefinitely within the United States. *See generally,* Mitgang, *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act,* 8 Univ. of Calif. Davis L.Rev. 323 (1975). Exegesis of these defenses to deportation illustrates that an undocumented immigrant can form a realistic expectation or intent to make the United States his domicile.

Adjustment of Status

§ 245 of the I.N.A., 8 U.S.C. § 1255, provides one method by which an alien already in the United States can achieve permanent residence status. Through § 245, a deportable alien may effectively and lawfully avoid actual removal from the country. Application for § 245 "adjustment of status" can be made before the commencement of formal deportation proceedings; however, after deportation proceedings have been initiated, § 245 may be asserted as a defense to deportation only during the administrative proceedings. 8 C.F.R. § 242.2(a) (1) (1980).

Suspension of Deportation

Under §244 of the I.N.A., 8 U.S.C. § 1254, a deportable alien

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More H-2 Workers to be Exploited

Submitted by
Texas Farmworkers Union

This year the Tobacco Growers Association of North Carolina and Virginia and the Agriculture Growers Association of Virginia brought 1,100 workers under the H-2 program from Mexico, to work in the tobacco and apple harvest. The growers in North Carolina and Virginia, and in many other states around the country, continue to use the H-2 program as a method for obtaining exploitable workers from Mexico who must work without guarantees of labor protections. These workers are maintained in a state of semi-slavery.

These growers have historically relied upon undocumented workers and H-2 workers from many other countries. In 1976 they utilized 166 Puerto Ricans, and in 1978 they used 544 Puerto Ricans, in 1978 they brought 650 H-2 workers from Mexico for the tobacco and apple harvest. In 1980 they brought 1,100 H-2 workers from Mexico.

The working conditions for these laborers are terrible. Of the 554 Puerto Rican workers brought into Virginia for the tobacco and apple harvest in 1978, 64% lasted only two days and only 19 lasted for the entire season.

The use of foreign workers is part of a labor chain which has historically served agricultural interests in the Southern States. These interests first used black slaves from Africa and other countries and then share-croppers who gave part of their harvest to the large landowners in return for use of the land. With the exodus of the share-croppers to the cities in search of better wages and working conditions, the multi-million dollar tobacco industry turned to the use of Mexicans and workers from other Latin American countries. So, in the last ten to fifteen years, the employment of foreign workers has been the answer for the tobacco industry. The local workforce has refused to work under the miserable conditions imposed by the industry. The exploitation of migrant workers leaves the growers with illicit and massive profits.

In 1980 one acre of tobacco yielded $1,200 compared to one acre of corn which yields $60 and soy beans which yield $87 per acre. The tobacco crop occupies .3% of the designated farm land and is the sixth largest crop behind corn, soy bean, hay, wheat and cotton.

In 1979 approximately 275 thousand growers in the U.S. harvested a crop of 1.5 billion pounds of tobacco valued at 2.55 billion dollars. Virginia was the sixth leading producer. North Carolina produced 621.4 million pounds of tobacco valued at 867 million dollars. In 1979 Kentucky produced 343 million pounds of tobacco valued at 490 million dollars. Virginia produced 110 million pounds valued at 153 million dollars. At this time flue cured tobacco is selling at $1.50 per pound. This tobacco ends up in the hands of trans-national corporations like Phillip Morris, Commonwealth Tobacco Company of Virginia, Chesterfield King and others.

The political clout of these companies could be seen this year when several State Representatives and national Senators opposed the Department of Labor when it tried to increase the hourly wage of H-2 workers to $4.51 per hour. DOL was forced to reduce the wage to $3.20 per hour. The collusion to extort these farmworkers is international in nature. The Mexican government as well as the U.S. government benefit the growers and themselves when they hand out temporary H-2 permits. The connection begins in Mexico, where David and Manuel Trujillo, with residents in Cuernavaca attain workers for both U.S. grower Associations. The charge the workers $1,200 pesos to sign up for the program. This year Manuel and David are alleged to have obtained $48,000 pesos from the workers. These workers are recruited from the following states in Mexico: Morelos, Michoacan, Guanajuato, Guerrero, amd Tamaulipas. From these states they go to Laredo, Texas, and from Laredo to Virginia. These H-2 workers are not provided with a contract which guarantees their work and are not even guaranteed they will receive 8 hours of work per day. Some workers must walk up to sixteen miles into town to buy their food and other necesities of life. When they are sick they are not taken to doctors because they do have qualify for public services and don't have medical insurance. They are totally isolated from all forms of assistance because their camps are located in the woods and social service workers are not provided access to the camps. Workers labor in the fields without sanitation facilities. They are forced to work at a very rapid pace. Many workers have been beaten by their supervisors.

This past summer, when organizers from the Texas Farmworkers Union visited the labor camps to inform workers of their rights and attempt to organize them, their lives were threatened unless they left the camps. Even when the H-2 workers go to church services, they are constantly under surveillance by the growers to avoid their communication with union organizers. *Many workers state that they would prefer to come to the U.S. to work as undocumented workers rather that H-2 workers.*

The exploitation of these workers through the H-2 program produces millions of dollars in profits which the growers are unwilling to abandon. The Texas Farmworkers Union presented a detailed analysis of the H-2 program prepared by the National Center for Immigrants' Rights to the Select Commission on Immigration and Refugee Policy. Because of the lobbying power of the growers with the Select Commission, the Commission refused to acknowledge the slavery conditions of H-2 workers in the United States today. The Texas Farmworkers Union has also called upon the Department of Labor to form a committee made up of unions, churches and other organizations so that the H-2 program can be monitored and supervised effectively. The Department of Labor has ignored this request to date. The TFW will continue to organize these workers in Mexico and the United States in order to protect their human and civil rights. For more information contact the Texas Farmworkers Union, P.O. Box 876, San Juan, Texas, 78589. Telephone: (512) 843-8381.

*At press time, information related to the H-2 program was received. See **Late Bulletin** on page 9.*

In Re Alien Children Litigation

Victory in Court of Appeals — Case Now Goes to Supreme Court

The Fifth Circuit Court of Appeals recently affirmed the lower court's decision in *Doe v. Plyler,* holding that undocumented immigrants were entitled to the protection of the equal protection clause of the Fourth Amendment. [*Doe. v. Plyler,* 628 F.2d 488 (5th Cir. 1980).] The *Doe* case involved the right of approximately 30 undocumented school children to attend the public schools in the Tyler Independent School District. The lower court and the Court of Appeal held that under any level of scrutiny, the Texas statute which precluded undocumented children from attending the public schools was not justified as applied in the Tyler School District.

In the case of *In Re Alien Children Litigation,* we won a statewide injunction which resulted in undocumented and documented children enrolling in public schools throughout Texas in the Fall of 1980 for the first time in five years. (That 80-page decision was analyzed in the November 1980 issue of the **Immigration Law Bulletin.**) In July 1980 the State of Texas filed an appeal to the Fifth Circuit Court of Appeal, seeking to overturn the injunction issued in *In Re Alien Children Litigation.* Both we and the United States government sought "summary affirmance" in the Fifth Circuit, arguing that the recently issued *Doe v. Plyler* decision was binding by the doctrine of *stare decisis.*

The established policy of the Fifth Circuit Court of Appeals is to recognize the binding affect of a prior decision by another panel of the Court subject only to reversal by the Court sitting *en banc.* [*See, e.g., McDaniel v. Fulton National Bank,* 543 F.2d 568, 570 (5th Cir. 1976).] The primary question to be answered in response to a *stare decisis* claim concerns whether the legal and factual issues are similar in each case. Given that the *Doe v. Plyler* case involved approximately thirty children, as compared with the *In Re Alien Children Litigation* case, which involved tens of thousands of children, we were not optimistic about our chances of winning the motion for summary affirmance. The State of Texas obviously felt the same way as they failed to file a brief opposing our motion and instead *wrote a one-page letter to the Court stating their opposition.*

However, the State of Texas badly misstated the record in their opposition letter and this may have spelled their downfall, at least in the Fifth Circuit Court of Appeals. The State claimed that the *stare decisis* doctrine should not apply because they did not become a party to the *Doe v. Plyler* case "until late in its history." As pointed out in a response brief, "the record indicates otherwise ... " The published decision in *Doe v. Plyler,* and the record, indicate that the State of Texas was advised of the pendency of the *Doe* case "on the same day" that it was filed, and, as pointed out in a brief filed with the *Doe* court, the State of Texas "took the lead from that date on ... " In the State of Texas' brief to the Fifth Circuit in *Doe,* they admitted that they became a party to that lawsuit "on September 9, 1977", two days after the complaint was filed, "for the purpose of presenting evidence and argument ... " It was patently absurd for the State of Texas to advise the Fifth Circuit panel in *In Re Alien Children Litigation* that they not entered the *Doe* action "until late in its history."

Secondly, the State of Texas claimed that *stare decisis* should not apply because in *Doe* they were "not able to present evidence of statewide impact" in that case, Again, the record clearly contradicted this assertion. In fact, the State of Texas stated in their opening argument in the trial of *Doe v. Plyler* that "we will show the impact [of admitting undocumented children] on the education system ... particularly in the border areas, and the areas in which you find large Mexican-American enclaves, which Tyler is not one of those areas ... " Throughout the three-day trial in *Doe,* the State put on evidence concerning the large urban areas and the border regions. While they presented far more testimony in the trial of *In Re Alien Children Litigation,* they clearly were misrepresenting the record in *Doe* when they opposed our motion for summary affirmance claiming they had not had an opportunity to put on state-wide evidence in *Doe.* The blatant misrepresentations may well have pushed the Fifth Circuit Court of Appeal into our camp.

On February 23, 1981, the Fifth Circuit Court of Appeals issued a one line Order as follows: "It is ordered that the motions of appellees for Summary Affirmance is granted." With that one-sentence order the Court of Appeal upheld District Court Judge Woodrow Seal's controversial 80-page opinion and permanent injunction putting tens of thousands of children back into the public schools.

Four days later, on February 27, 1981, the State of Texas filed a notice of appeal in *In Re Alien Children Litigation* in the United States Supreme Court. Briefs will probably be filed during the early part of the summer and the case will be heard in the next term.

The lawyers working on *In Re Alien Children Litigation* are Al Campos and Larry Mealer (Dallas Legal Services Foundation), Luis Wilmot (Centro de Inmigracion de Houston, Gulf Coast Legal Aid), Jane Swanson and Virginia Schram (East Texas Legal Services), Isaias Torres (Lopez, Medina, Ramirez, Torres & Velasquez—Houston), Antonio Guajardo (formerly with the Centro de Inmigracion de Houston and now with the U.S. Attorney's Office in Houston) and Peter A. Schey (National Center for Immigrants' Rights).

Any persons who wish to assist with research or amicus curiae briefs before the U.S. Supreme Court, should contact Peter A. Schey at NCIR.

LATE BULLETIN ...

NCIR has learned that the Department of Labor in Mexico City is recommending that President Jose Lopez Portillo discuss a new temporary worker program with President Reagan at their forthcoming San Diego meeting. NCIR staff and members of certain client groups have been invited to meet with government officials, including President Lopez Portillo, to discuss how a new temporary worker progran would impact on rural/migrant workers in the U.S. For more information on these developments contact Peter A, Schey, Director, NCIR.

Eligibility *(Continued from page 7)*

who has been physically present within the United States for a requisite period, usually seven years, may obtain "suspension of deportation" and thus become lawfully entitled to remain permanently within the United States. Suspension of deportation is available only in deportation proceedings after deportability is established or conceded. 8 C.F.R. § 244.1 (1980).

Political Asylum

Pursuant to §§ 208 and 209 of the I.N.A., *as added,* Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, deportable aliens within the United States may apply for political asylum; if asylum is granted, deportation will not be executed, and asylees may eventually adjust their status to that of a permanent resident. *Id.; see also,* 45 F.R. 37392 (interim federal regulations providing, *inter alia,* for adjudication of asylum applications during deportation proceedings).

Deferred Action

Internal Immigration Service Operations Instructions ("O.I.") establish further means by which a deportable alien may remain indefinitely in the United States. O.I. § 103.1a(1) (ii) provides that "[i]n every case where the district director (of an Immigration Service office) determines that adverse action would be unconscionable or result in undue hardship because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category." (Parenthetical added) If a regional commissioner approves the district director's recommendation, the Immigration Service will notify the individual that "his departure from the United States has been deferred indefinitely ..." *Id.* Particularly apposite to statutes involving health care is that deferred action is indicated for a deportable alien who has a "physical or mental condition requiring care or treatment in the United States." O.I. 103.1a(1) (ii). Thus, physical or emotional disabilities requiring public health care may result in the victim's remaining in the United States indefinitely as a matter of federal law.

Voluntary Departure Pending Issuance of an Immigrant Visa

Still another means by which an undocumented immigrant can remain within the United States indefinitely is by operation of I.N.A. § 244(e), 8 U.S.C. § 1254(e).

Persons ineligible for adjustment of status under 8 U.S.C. § 1255, *supra,* are generally required to return to their country of origin to receive an immigrant visa from an American consulate in order to obtain permanent resident status. *See,* 8 U.S.C. § 1154. However, this temporary sojourn need not involve a lengthy stay without the United States. In the case of an immigrant from an contiguous country such as Mexico, an immigrant visa is usually issued in one day by the American consulate in Tijuana. Certan aliens from more distant countries may apply for an immigrant visa at the United States consulate in Canada, again involving only a brief sojourn to a contiguous country. *See,* 1A Gordon & Rosenfield, *Immigration Law and Procedure, supra,* § 3.7d.

Pursuant to 8 U.S.C. § 1254(e), an alien may be allowed to remain within the United States pending the issuance of an immigrant visa by the United States consulate. O.I. § 242.10(a) provides that an undocumented alien who is eligible to receive an immigrant visa (allowing entry to the United States for permanent residence) within 60 days will not be deported, but will be allowed to remain in the United States pending the temporary sojourn abroad to obtain the immigrant visa.

Administrative Abstention

As a matter of administrative policy, the Immigration Service will generally not move to deport the undocumented alien spouse or other close relative of a United States citizen so long as a preliminary application to immigrate has been submitted. O.I. § 242.1a (25). There is no requirement that the prelimiary petition be approved. *Id.* Inasmuch as the workload of the Immigration Service often creates delays of up to two years before an undocumented immigrant protected from deportation by O.I. § 242.1a(25) will be able to obtain permanent residence, *see* Association of Immigration and Nationality Lawyers, *Report of New York Chapter Immigration Liaison Committee of 61st Monthly Meeting with the District Director of the New York District,* May 27, 1976, at 1, many undocumented immigrants who will never be deported must nonetheless remain without documents and in an uncertain legal status within the United States for extended periods of time.

Judicial Orders

Still other deportable immigrants are protected from actual deportation by various court orders. The most widely known of these decisions is *Silva v. Levi,* No. 76 C 4268 (N.D.Ill.), which continues to prevent the deportation of hundreds of otherwise deportable immigrants.

B. Apposite case law does not render undocumented aliens legally incapable of forming state domicile.

From the foregoing, it can readily be appreciated that nothing in federal law foreordains expulsion for an undocumented or deportable immigrant. As the following decisions illustrate, the many defenses to deportation and the requirement that expulsion cannot take place without affording a prior due process hearing at which the government bears the burden of establishing deportability belie the conclusion the undocumented immigrants are a homogeneous group absolutely incapable of forming valid, domiciliary intent.

In *Elkins v. Moreno, supra,* 435 U.S. 647 (1978), the Supreme Court considered the effect of federal immigration law on the capacity of "G-4" alien — a status granted to "officers, or employees of... international organizations, and the members of their immediate families," 8 U.S.C. § 1101(a) (15) (G) (iv) — to form an intent to establish a state domicile for purposes of reduced university tuition rates. Although the University's policy, as interpreted by the Court, was to allow all domiciliaries the benefits of the lower tuition rates, aliens possessing federal "non-immigrant" classifications were conclusively presumed unable to form the required intent. *Ibid.* at 658-59. Although the Court noted that the capacity of a G-4 alien to form a valid domiciliary intent was primarily an issue of state law, *Ibid.* at 668, it proceeded to hold that although most nonimmigrants* must agree to maintain an unrelinquished domicile abroad as a condition of obtaining admission to the United States, Congress has imposed no requirement that G-4 aliens intend to depart the United States by a date certain; therefore, federal law imposes no disability upon G-4 aliens to form a valid domiciliary intent: "Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States, he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa." *Ibid.* at 666.

Importantly, the Court concluded that even if a G-4 alien

*Every alien within the United States is presumed to be an immigrant unless s/he can establish that s/he is entitled to one of the specified nonimmigrant classifications. 8 U.S.C. §1101 (a) (15). Generally nonimmigrants are persons who seek to come to this country for a temporary purpose. *See generally,* 1 Gordon & Rosenfield, *Immigration Law and Procedure, supra* § 2.6a.

(Continued on page 11)

Eligibility (Continued from page 10)

were to violate his nonimmigrant status — and thereby become deportable — the availability of the § 245 adjustment of status defense to actual deportation (discussed above) allows formation of a valid domiciliary intent:

> Of course, should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their G-4 status... Nonetheless, such an alien would not necessarily be subject to deportation nor would he have to leave and re-enter the country in order to become an immigrant. Beginning with the 1952 Act, Congress created a mechanism, "adjustment of status," through which an alien already in the United States could apply for permanent resident status.
>
> . . .
>
> For the reasons stated above, the question whether G-4 aliens can become domiciliaries of Maryland is purely a matter of state law.

Ibid. at 667-68.

In *Seren v. Douglas, supra,* Colo. App., 489 P.2d 601 (1971), it was held that a nonimmigrant student who abandoned his nonimmigrant status could form a valid domiciliary intent notwithstanding his initial agreement to maintain a domicile abroad and the possibility that he would be deported: "Seren (was) incapable of forming the intent required by state statute so long as he, in compliance with federal law, was here on a legal basis which bound him to his homeland. However, that disability could, as a matter of fact and law, have dissolved upon the expiration of his student visa." 489 P.2d at 603; *see also, United States v. Otherson,* 480 F.Supp. 1369, 1371 n.4 (S.D.Ca. 1979) [collecting cases re undocumented immigrants' capacity to establish a state domicile]; *Cf. Neuberger v. United States,* 13 F.2d 541, 542 (2d Cir. 1926) [domicile unaffected by forced presence outside of jurisdiction by external constraint].

V. THE CONSTITUTIONAL CASE AGAINST AGENCY DETERMINATIONS THAT THE UNDOCUMENTED LACK DOMICILIARY CAPACITY: THE IRREBUTABLE PRESUMPTION DOCTRINE

Modern constitutional law has largely abandoned the once familiar "irrebutable presumption" doctrine; nonetheless, it remains the law that a government body bound by a statutory standard of eligibility — domicile — may not conclusively presume an applicant ineligible under that standard simply because he or she possesses a given characteristic — indeterminate immigration status — unless such characteristic uniformly prevents its possessors from satisfying the statutory standard.

In *Elkins v. Moreno, supra,* 435 U.S. 647, the Court upheld the continuing validity of the "irrebutable presumption" doctrine as applied to a state university policy that conclusively presumed all nonimmigrants incapable of establishing a valid state domicile. Because such a presumption was not a conclusion universally mandated by federal law, the Court concluded that the preseumption could not be sustained under current constitutional doctrine:

> The gravamen of the dispute is unquestionably whether G-4 (nonimmigrant) aliens can form the intent necessary to allow them to become domiciliaries of Maryland. The University has consistently maintained throughout this litigation that ... its "paramount" and controlling concern is with domicile as defined by the courts of Maryland ... Because (the University) makes domicile the "paramount" policy consideration, and, because respondents' contention is that they may be domiciled in Maryland but are conclusively presumed unable to do so, this case is squarely within *Vlandis* [*v. Kline,* 412 U.S. 441 (1977)] as limited by [*Weinberger v.*] *Salfi* [422 U.S. 749 (19779] to those situations in which a state purports to be concerned with (domicile) but denies the opportunity to show factors clearly bearing on that issue.

Ibid. at 660 [parentheticals in original; brackets added].

> If G-4 aliens cannot become domiciliaries, the respondents have no due process claim ... for any "irrebuttable presumption" would be universally true. On the other hand, the University apparently has no interest in continuing to deny [reduced tuition] to G-4 aliens as a class if they can become Maryland domiciliaries...

Ibid. at 661 [brackets added].

As in *Vlandis* and *Elkins,* the typical agency's conclusion that *all* undocumented immigrants are foreclosed from establishing a state domicile does not uniformly follow from federal — or, in the usual case, state — law. To conclusively presume all persons without documents ineligible under an independent domicile standard is to deny such persons (including some who as a matter of fact and law have established a valid domicile) any opportunity to establish their eligibility for benefits to which *all domiciliaries* are statutorily eligible. This across the board approach cannot withstand constitutional scrutiny.

VI. CONCLUSION

The foregoing has presented an analytical framework for determining the eligibility of persons with an indeterminate immigration status for public benefits conditioned upon residence or domicile. It is apparent that advocates of immigrants' rights should strive to ensure that benefit eligibility be continued for all those who have sufficient contact with the provider jurisdiction. This is usually determined by requiring a showing of residence or domicile. Given the tax and other economic contributions to local economies made by undocumented workers, the state purpose in limiting public benefits to those with something more than a casual relationship with the provider jurisdiction, i.e., residents and domiciliaries, is well served through continued eligibility regardless of federal immigration status. Generally, courts have been willing to lend their authority toward this purpose.

Amendments (Continued from page 3)

As is apparent, the proposed regulations go well beyond the necessary determination of whether the applicant or a member of the household is under an order of deportation. The full scope of the proposed regulations is addressed in an NCIR memorandum dated February 27, 1981. We would encourage persons to submit comments even if forwarded subsequent to the due date of March 17, 1981. Copies of NCIR's analysis of this regulation are available through NCIR.

Select Commission *(Continued from page 11)*

I reject the notion that "sensor systems, light planes, helicopters, night-viewing devices, a mobile task force, and increased border personnel" will do the job. This sounds like a militarized zone. The best approach is to reduce the pressure to cross the border or "forget to leave."

6. Employer Sanctions

The final Commission response to the undocumented is the proposal that legislation make it illegal for employers to hire undocumented immigrants. My objection is several-fold: (1) Such legislation would create a large number of employer lawbreakers. The recordkeeping and reporting requirements are extreme. (2) To minimize costly business disruption and to protect themselves from liability, employers will employ only "safe hires," those who appear to be citizens; the result will be that *those who appear "foreign" in color, language or customs will suffer discrimination.* It is they who will be called upon to display their badges of citizenship to be admitted to work. (3) Any system of universal identification, whether by card or presently existing documents, intrudes deeply into the American tradition. Unlike most European countries, we no not have a national police force or any other device which permits our national government to keep close tabs of each citizen or foreigner and their movements. The suggestions would be, in my view, a step towards the creation of such a system.

While employer sanctions and employee identification can be utilized to assist in the control of the undocumented, the cost of this nation's democratic traditions, the cost of discrimination against its minorities, the intrusion into the business sector, is too high a cost. We should not even consider such a step at this juncture in our history. The less intrusive steps, which we have not implemented, some of which I mention above, may be sufficient to reduce the number of undocumented to manageable proportions ...

7. Citizenship: English Language Requirement

The last concern I want to express deals with naturalization. It illustrates, I believe, the easy but erroneous, road this Commission has traveled. The Commission report quotes favorably from Webster's notion of language—that it is a unifier of national bonds—and recommends continued use of the English-language requirement for citizenship. The Commission, unknowingly, misinterprets the character of our national union, the reality of our history, and the diversity of our people. Americans are not now, and never have been, *one* people linguistically or ethnically. American Indians (natives) are not now, and never have been like Europeans. By the treaty which closed the Mexican American war our Country recognized its obligations to protect the property, liberty and religion of the new Americans. In short, America is a *political* union—not a cultural, linguistic, religious or racial union. It is acceptance of our constitutional ideals of democracy, equality and freedom which acts as the unifier for us as Americans ...

Resident aliens (lawful immigrants) pay taxes, obey the laws our legislature pass, and are called upon (by the military draft) to give their lives for our Country in time of war (whether they speak English or not). They have all the obligations even though the do not speak English, yet we deny them full participation in our democratic decision-making, casting a *vote*, without a knowledge of English ...

Every study I have read concludes that language requirements have been used to discriminate. Our early naturalization laws had no language requirement. We should do today as was done before the "nativism" (an early nice word to describe ethnic and racial prejudice) of the 19th Century set in; we should welcome the new arrivals with open arms, to all the obligations *and* the privileges of being full Americans.

The other requirements of naturalization—that applicants study the Constitution, be of good character and be in this Country five years—strike me as sound.

STATEMENT OF COMMISSIONER ROSE MATSUI OCHI

Immigration and refugee policy has become one of the most significant domestic and international issues confronting this nation and will remain so throughout the remainder of the century. As we seek to consider immigration policies in light of the national interest, it is important to take a lesson from history in order to avoid repeating the shameful mistakes of the past.

A review of the history of immigration to America reveals that each new group of migrants was subjected to cruel treatment and harsh injustices; and that during times of economic recession they were made scapegoats for the nation's socio-economic problems. The anti-alien sentiment manifested itself in discriminatory restrictive immigration laws and in arbitrary practices that disregarded constitutional protections. Despite the several revisions to the Act, intended to make the system fairer by abolishing racial and national origin restrictions, *the present laws with their numerical limitations and quotas have a disproportionate impact, i.e., a discriminatory effect on Asian and Latin American countries, particularly Mexico.* (Emphasis added). Paradoxically, although this nation embraces the principle of anti-discrimination and constitutional safeguards, in the area of immigration law enforcement and administration, there still exist blatant contradictions with the basic values of our democracy that are widely acknowledged and yet benignly ignored ...

When viewed in the context of this historical framework, *the Commission's Report of Conclusions and Recommendations will shed little new light on a subject riddles with much nonsense, myths and hypocracy, and will represent a backward step in the evolution of progressive national policy...* (Emphasis added).

1. International Issues

To moderate migration pressures will require an examination of U.S. foreign policies which contribute to the "push." Specifically, *the study of the correlation between foreign aid and military intervention and migration to America of both refugees and immigrants should be undertaken.* (Emphasis added).

2. Illegal Aliens

Illegal immigration is a complex phenomenon which must be analyzed on two related but divergent levels: The reality and

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Select Commission *(Continued from page 12)*

the perception people have about the phenomenon. The research on the subject does not provide a profile of the illegal population, but the accepted reality is, to a large extent, illegal immigration is a creature of the limitations of our current policies and oversubscribed quotas, and of the failure to retard the continuing demands of our secondary labor market for cheap laborers. Current laws have been critized for causing illegal immigration because they are restrictive in not allowing access from certain countries, and in their failure to be tailored to meet migration pressures; because they are ineffectively administered which exacerbates the large backlogs and because they bring in nonimmigrant foreign laborers. Public perception of immigration closely mirrors the state of our economy. *During periods of unemployment, the undocumented worker becomes a scapegoat who is blamed for unemployment and is subjected to deportation. When the economy recovers, concern about immigration again fades into the background...* (Emphasis added).

The fact of the matter is Mexican undocumented workers are a boon to the U.S. economy because they typically take jobs which Americans will not accept, and their labor costs are much lower. (Emphasis added). It is not simply a coincidence that areas with the greatest number of undocumented workers have a correspondingly high economic productivity level ... Instead of temporary workers and new costly enforcement programs, hard-working unskilled immigrants should also be provided legal entry via our immigration goals with flexibility in the system to better accomodate varying migration pressures.

3. Border and Interior Enforcement

I am concerned that *the enforcement tenor of the report may create a climate to encourage practices which violate the civil rights of aliens and residents alike and which promote the use of abusive tactics and excessive force and violence in enforcement.* (Emphasis added). Current immigration enforcement programs have a disparate impact on "foreign looking" U.S. citizens and lawfully admitted resident aliens who possess ethnic characteristics similar to major immigration groups. Certain ethnic groups have disproportionately been the target of anti-alien activities. In the 19th Century the Asians bore the brunt of the attacks which today are focused on Mexicans. I have urged the need for the Commission to take a position against interior enforcement programs directed at individuals based soley on one's national origin ...

4. Economic Deterrents in the Workplace

I emphatically reject the Commission's employer sanction proposal. In addressing this question it is imperative that we not separate the principle of employer sanctions from a consideration of the means of objective verification and of the enforcement ramifications. *The Commission has failed to evaluate the cost of implementing an employer sanctions law through issuance of a "secure" ID card; the burden it places on employers; and the difficulty workers in the marginal sector of the secondary labor market, the very workers that this law is meant to protect, will have in establishing their eligibility for "secure" ID Cards.* (Emphasis added). The Commission ignored the evidence that nowhere have such laws been shown to be effective in stemming illegal immigration; the concern that it will spawn fraudulently established non-conterfeitable IDs; the problem created by the unlikelihood that adequate resources will be allocated resulting in spotty enforcement; the low priority given by U.S. prosecutors of white collar crimes; the record of courts in sentencing in the area of economic crimes; the public cynicism that will drive the unscrupulous employer underground possibly exacerbating exploitation; and the probability of accelerating run-away industry to developing countries at the expense of native workers ...

5. Temporary Workers

I applaud the Commission for expressly rejecting a guest-worker program and for providing that the current H-2 program be streamlined, and cooperation to end dependence of any industry of H-2 workers be accomplished. I am uncomfortable that *these decisions may not bring an end to the exploitation of foreign workers if Congress holds a proxy for certain industries. I am afraid that a streamlined H-2 program may create a politically expedient "backdoor" for a substantial broadening of the scope of the program and creating an increase in the use of H-2 workers, with a lessened requirement for labor certification creating higher unemployment of domestic workers, and without protection of the rights of H-2 workers for lack of provision of standards, oversight and sanctions.* (Emphasis added). ...

6. Legalization

The Commission approved a liberal amnesty program in principle only. *The proposal failed to follow-through its promise of being generous, fair and fail-safe. It is a sham.* (Emphasis added). Out of an apparent concern over political palatability the amnesty program became so unattractive that it will likely get no takers. I urged that the proposal include flexibility in the determination of "continuous residency" because this requirement would tend to disqualify a substantial number of Mexicans ...

I believe, after once deciding the threshold question of allowing an adjustment of status of illegal aliens, it is deceptively unfair to set a trap for the unwary by providing deportation of those who are found ineligible. Many undocumented are simply undocumentable ... A program to assure maximum participation should provide those who fail to qualify a temporary status with the opportunity to, after a few years, qualify for permanent resident having demonstrated to be responsible contributing members of society based on a good work record and payment of taxes ...

7. Refugees

While the 1980 Refugee Act took a major step toward seriously addressing how our asylum and refugee laws can be made more non-discriminatory, *ideological and geographic discrimination continues to pervade the implementation of the laws.* (Emphasis added).

8. Legal Issues

I am extremely disappointed that all the recommendations developed by the Commission's Legal Task Force included in

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Select Commission

the Appendix were not considered by the full body. The Commission did make some inroads into bringing immigration laws involving procedural rights from the Stone Age into the 20th Century. However, essentially the Commission dropped the ball on the INA revision package and treated certain legal issues like a "hot potato" ...

STATEMENT OF CHAIRMAN THEODORE HESBURGH

1. Family Reunification

While I favor the priority given to family reunification, I cannot agree with the dilution of the emphasis on the reunification of immediate families—spouses and unmarried children—reflected in the decision to continue a preference for brothers and sisters of U.S. citizens ... The inclusion of a preference for brothers and sisters of adult U.S. citizens creates a runaway demand for visas ... The situation is rapidly worsening. In 1978, there were fewer that a quarter of a million brothers and sisters with numbers waiting for visas. One year later, the number had more than doubled to over a half a million. The reason is simple. Once any person enters the country under any preference and becomes naturalized, the demand for admission of brothers and sisters increases geometrically.

I do not believe we should continue a preference in which there will be an ever-multiplying demand to immigrate totally disproportionate to the number of visas available, creating tremendous political pressures for periodic backlog clearance, and which, in the meantime, take scarce visas away from those trying to reunify their immediate families ....

[**Editor's Note:** *Chairman Hesburgh incorrectly believes that visas for brothers and sisters "take scarce visas away from" immediate families. This does not happen. Regardless of how large the backlog is for visas for brothers and sisters, immediate relatives and family preferences still get the same number of visas.*]

2. Employer Sanctions

I came to the conclusion early in our deliberations that it is wrong to exempt employers from hiring illegal aliens whent it is unlawful for others to harbor them, especially when the main reason that illegal aliens come to the United States is to work. Once having concluded that an employer sanctions law is necessary, the essential question is how to make such a law work without having it discriminate against minority groups, disrupting the workplace or placing too great a burden on employers and eligible employees. The answer lies in some reliable method of employee identification which all of us who are eligible would have to produce when we applied for a new job ...

'My own preference is for an upgraded, counterfeit resistant social security card.

Since the only way an employer could incur a penalty would be if they failed to ask for and see such a card, all eligible employees—including the minorities who are often discrminated against not—would have better protection than ever before against unfair competition and against discrimination. I am also confident that criteria can be established which would protect us all against the social security card being used to unfairly invade privacy.

An important element in having a reliable system which must be addressed has to do with improving the process by which eligible persons can obtain such a card. I believe that both the card and an improved, more secure process for obtaining it are well within the reach of American technology and organizational ability.

[**Editor's Note:** *Chairman Hesburgh never explains what "criteria" can be established to protect invasions of privacy with the implementation of a national ID card; nor does he explain how to overcome the complexities in insuring that poor and minority persons won't be discriminated against in obtaining ID cards; nor does he explain why, contrary to the testimony of most witnesses, he believes minorities "would have better protection than ever ... against discrimination."*]

STATEMENT OF COMMISSIONER ELIZABETH HOLTZMAN

1. Staff Research

At the onset I would note that I have serious reservations about the research on which the Commission's recommendations with respect to undocumented/illegal aliens was based... We still do not know with any certainty how many illegal aliens are in the United States, nor do we have reliable information on their impact on the economy, or whether they displace American workers and, if so, in what sectors ... *In short, I believe the Commission's decision-making process itself was flawed.* (Emphasis added). Although its conclusions may well be valid, the Commission's judgments on the most significant issue—undocumented illegal aliens—were made without the benefit of much essential information ...

2. Employer Sanctions

... I have little confidence, however, that in and of themselves sanctions will be effective, and I would note that the Commission was offered little in the way of information on the feasibility of implementing such sanctions despite the fact that they have been ineffective at best in states where they have been imposed.

On a practical level, I see little likelihood that adequate resources will be made available to assure that sanctions would be enforced to any appreciable extent ... Likewise, the Occupational Health and Safety Administration and the Wage and Hour Division at the Department of Labor, supposed guardians of employee working conditions and the minimum wage, are scandously understaffed ...

On a more fundamental level, *I vigorously oppose a national identifier to be imposed with employer sanctions—whether it is a work permit system or a uniform identity card.* (Emphasis added). While for some inexplicable reason the issue of a national identity card was never directly voted upon, the Commission did recommend—by a narrow 8-7 majority—that "some more secure method of identification" beyond existing forms be utilized. I certainly cannot subscribe to this vague precept,

(Continued on page 15)

Select Commission *(Continued from page 14)*

particularly when some will no doubt interpret this recommendation as a call for a national identity card ...

3. Grounds for Exclusion

Finally, I am disturbed by the Commission's "recommendation" with respect to the atiquated and unworkable grounds of exclusion set forth in the Immigration and Nationality Act, a subject of particular importance to many Americans, on which we received extensive testimony during our public hearings, and about which this country has been justifiably criticized by our friends and allies abroad. Despite voting 13-3 at its December 7 meeting not to retain the current 33 grounds of exclusion, the Commission went no further, and, on January 6, decided (without my participation) simply to "recommend" that "Congress should reexamine the grounds for exclusion presently set forth in the INA." I consider this to be nothing less that an abdication of the Commission's mandate as set forth in P.L. 95-412, its enabling statute, which directed it to "conduct a comprehensive review of the provisions of the Immigration and Nationality Act and make legislative recommendations to simplify and clarify such provisions" ...

STATEMENT OF COMMISSIONER ALAN K. SIMPSON

1. Standard of Value: The National Interest

The process for developing an immigration and refugee policy for the United States of America should begin with a clear decision about the standard of value to be applied in choosing among alternative policies and courses of action ...

An elected or other federal official must not attempt to impose his own humanitarian or other moral values on the American people. Immigration policy should be based on what would actually promote the happiness of the American people, not as federal officials might wish they were or think they ought to be, but as they are now and are likely to be in the future ...

The impact of immigration on the national interest depends on the number and characteristics of immigrants and on how well they assimilate the values and way of life of the American people. (Emphasis added). Some of the potential impacts are economic and could be expressed in dollars. Others are not economic but may relate even more importantly to the well-being of the American people ...

Immigrants can still greatly benefit America, but only if they are limited to an appropriate number and selected within that number on the basis of traits which would truly benefit America. (Emphasis added) ...

2. Ethnic Patterns

I realize that I am about to enter into a very senstitive area and there is some risk that what I will say may be misunderstood ...

As previously stated, the Bouvier study found that, given a total annual immigration of 750,000, at least one-third of the U.S. population in the year 2080 will consist of post 1979 immigrants and their descendents. This finding has profound implications because current immigration flows to the United States are substantially different from past flows (which, of course, produced the present population) in two significant ways, ethnicity and language concentration ...

The present immigration flow differs from past flows in one other significant way. Immigration to the United States is now dominated to a high degree by persons speaking a single foreign language, Spanish, when illegal immigration is considered. The assimilation of the English language and other aspects of American culture by Spanish-speaking immigrants appears to be less rapid and complete than for other groups. A desire to assimilate is often reflected by the rate at which an immigrant completes the naturalization process necessary to become a U.S. citizen. A study by the Select Commission staff indicates that immigranst from Latin America naturalize to a lesser degree than those from other regions ...

Under existing law and policies such patterns are likely to continue or be accentuated since the pressures for international migration are likely to increase over the coming decades, especially from regions which already dominate U.S. immigration flows.

3. Assimilation

Although the subject of the immediate economic impact of immigration receives great attention, assimilation to fundamental American public values and institutions may be of far more importance to the future of the United States. If immigration is continued at a high level and yet a substantial portion of the newcomers and their descendents do not assimilate, they may create in America some of the same social, political and economic problems which existed in the country which they have chosen to depart. Furthermore, as previously mentioned, a community with a large number os immigrants who do not assimilate will to some degree seem unfamiliar to longtime residents. Finally, if linguistic and cultural separation rise above a certain level, the unity and political stability of the nation will in time be seriously eroded ...

[Editor's Note: Other Commissioners also submitted "supplemental views" for the Final Report. We have reprinted here, in edited form, examples which we believe show continuing confusion on fundamental questions and the inability to reach a consensus.]

Decisions Update *(Continued from page 2)*

person who failed to disclose on his immigrant visa application that he had been a guard in a Nazi concentration camp during World War II. *Fedorenko v. United States,* 101 S.Ct. 737 (1981). Fedorenko immigrated to the United States under the Displaced Person's Act of 1948. The Act specifically excluded persons who had "assisted the enemy in persecuting civil[ians]" or had "voluntarily assisted the enemy forces ... in their operations ... " Fedorenko had falsified his visa application by concealing the fact that he was an armed guard at the notorious Treblinka extermination camp.

In 1970 Fedorenko became a naturalized U.S. citizen. After Fedorenko's true identity became known the government moved to have him denaturalized on the ground that his citizenship was "illegally procured" under 8 U.S.C. § 1451. The theory of the government's case was that Fedorenko had made a material ommission on his visa application which made it invalid and therefore he was ineligible for naturalization. The district court ruled in Fedorenko's favor finding his omission not "material" under the test set forth in *Chaunt v. U.S.,* 364 U.S. 350 (1960) which requires the government to prove "either (1) that facts were suppressed 'which if known, would have warranted a denial of citizenship' or (2) that their 'disclosure might have been useful in an invesitgation possibly leading to the discovery of other facts warranting denial of citizenship." *U.S. v. Fedorenko,* 455 F.Supp. 893, 915 (S.D.Fla. 1978) (quoting 364 U.S. at 355) The district court concluded that Fedorenko was not in fact ineligible for a visa since his service as guard at Treblinka was involuntary. Second, the court concluded that although the disclosure of the true facts would have led to an invesitgation the government had failed to prove the inquiry would have uncovered any additional facts warranting the denial of the visa petition. The district court went on to say that even if the misrepresentations were "material" the court would order the denaturalization proceedings terminated as a matter of equity.

The district court's decision was reversed by the Fifth Circuit on the ground that the omission was "material" under the second part of the *Chaunt* test because there would have been an investigation of Fedorenko if the true facts had been known and the investigation "might" have resulted in the denial of the visa application. *U.S. v. Fedorenko,* 597 F.2d 946 (5th Cir. 1979). The court also held that there was no equity power to terminate the denaturalization proceedings.

The Supreme Court affirmed the court of appeals' decision, although on a different ground. The Court found that the omission was "material" under the first part of the *Chaunt* test because if the true facts were revealed to the government at the time of the visa application Fedorenko would have been denied a visa as a matter of law. Since a prerequisite for naturalization is the *lawful* admission for permanent residence Fedorenko's naturalization was "illegally procured" because his immigrant visa was in fact invalid. Accordingly, the denaturalization order was correct. Additionally, the court ruled that the district court did not have the equitable power to refrain from entering a denaturalization judgment against a person whose citizenship was illegally procured.

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Late Bulletin

House Votes Restriction on LSC Immigration Representation

Today, June 18, 1981, the full House of Representatives voted to further restrict LSC representation of immigrants living in the United States. The House Subcommittee on Courts, Civil Liberties and the Administration of Justice had previously marked-up a bill which would have adopted the O'Brien restriction into the Legal Services Corporation Act. This language was also adopted by the House Judiciary Committee.

However, when H.R. 3480 came to the floor of the House, Congressman McCollum (R. Fla.) offered more restrictive language which was approved. The new language will restrict representation to (1) U.S. citizens; (2) permanent resident aliens; (3) "an alien who is either married to a United States citizen or is a parent of an unmarried child under the age of 21 years of such a citizen and who has filed an application for adjustment of status to permanent residence under the Immigration & Nationality Act . . ."; (4) refugees and persons granted political asylum; and (5) persons granted withholding of deportation under Section 243(h) of the Act.

Hispanic and church organizations are outraged at this new restriction and have vowed to lobby the Senate against inclusion of similar language when they take up LSC's authorization bill. They have pointed out that LSC spends only about .05% of its resources on immigration matters, that this language will facilitate the exploitation of immigrant communities, and will cause family separations.

For more information please contact Amit Pandya, NCIR's staff attorney in Washington, D.C., at (202) 624-8390, or Peter A. Schey, at (213) 487-2531.

NCIR Opens Washington, D.C. Office

The National Center for Immigrants' Rights has hired Mr. Amit Pandya to staff a new office in Washington, D.C. Mr. Pandya was chosen after NCIR reviewed approximately fifty applications for the position of staff attorney.

Mr. Pandya obtained his Bachelor of Arts degree at Oxford University in 1972 and his law degree at Yale Law School in 1980. He has most recently worked as a fellow at the Institute for Public Representation in Washington, D.C. He has been involved in immigration matters for some time, and authored the most extensive analysis submitted to the Select Commission on Immigration and Refugee Policy opposing the implementation of an employer sanction law.

Mr. Pandya began his employment with NCIR on June 15, 1981. He will be working at the offices of the Institute for Public Representation until permanent offices are located. His address and phone number are as follows: Mr. Amit Pandya, National Center for Immigrants' Rights, c/o Institute for Public Representation, 600 New Jersey Avenue, N.W. Washington, D.C. 20001, (202) 624-8390. Please feel free to contact Mr. Pandya if you have any immigration matters which need to be resolved in Washington, D.C.

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CONTENTS

Texas Fishermen v. Vietnamese Refugees

During the past four years approximately 1,500 Vietnamese refugees have settled in the fishing towns along the Texas Gulf Coast, with approximately one-third of this number seeking to enter the Texas shipping industry. An increasing number of Vietnamese refugees have purchased or leased shrimping boats and it is now estimated that about 200 of the 550 shrimping boats in the area are operated by Vietnamese.

These Vietnamese refugees are entering an industry already suffering from a number of problems. The pollution from nearby chemical plants and refineries has negatively affected the breeding conditions for shrimp. Additionally, bad weather and hurricanes have reduced shrimp harvest in recent years, while few costs have increased and Mexican shrimpers have increased competition.

Sheriff Bill Kerber of Seabrook, one of the larger bay fishing communities on the Gulf Coast, states that coastal residents have become hostile towards the federal government and its refugee policy: "as they see it, an uncontrolled influx of refugees into the U.S. will pose a threat to jobs as more refugees eventually choose to migrate into the bay communities." In August 1979, a Vietnamese refugee was accused of killing a Texas fisherman in Seadrift, and Vietnamese boats were burnt and families threatened in the ensuing weeks and months. Following threats of bodily harm, many Vietnamese families voluntarily evacuated the fishing villages.

Recently the President of the Seabrook Fishermen's Association, Gene Fisher, invited the Knights of Ku Klux Klan (KKK) to assist local fishermen in their battle with the Vietnamese refugees. The KKK held a rally in February in Santa Fe, Texas and gave Texas Governor William Clemens until May 14 to see that fishing regulations were effectively enforced against the Vietnamese fishermen. John Galt, Exalted Cyclops of the Knights of the KKK stated that the Vietnamese refugees "are breaking laws and the government isn't doing anything about it. If demands are not met, it will be up to the Grand Dragon and his Council of Hydras to take further action . . . and we don't rule out strong measures to enforce the law." In response to the KKK's activities, the Vietnamese Fishermen's Association and various Vietnamese fishermen have brought suit in the U.S. District Court in Houston, Texas, charging violations of anti-trust, civil rights, and anti-racketeering laws. The lawsuit seeks increased law enforcement and a preliminary injunction restraining further civil rights violations against the Vietnamese. The case alleges that members of the KKK have threatened Vietnamese refugees, brandished weapons, burned boats, and interferred with business relations between Vietnamese refugees and others.

Meanwhile, State Senator J.E. Brown has introduced legislation in the Texas Senate which seeks to place a two-year moratorium on the issuance of shrimping licenses so that Parks and Wildlife Department can evaluate the ecological situation. The bill has been approved by the Texas Senate and is now before the Texas House. Another plan calls for the relocation of Vietnamese refugees who are willing to sell their boats and move out of the area. However, Paul Doyle, Resettlement Director for the United States Catholic Conference in Houston, estimates that only about 15 families might seek assistance from voluntary agencies in locating employment and housing away from the Gulf Coast. The Texas Governor's Task Force has urged voluntary agencies and refugee groups to discourage secondary migration to the Gulf Coast.

With no clear solution in sight, Col. Nguyen Van Nam, President of the Vietnamese Fishermen's Association, has said that "I encourage people to get out. We don't want to see violence, so its better to leave this area."

For further information please contact Peter A. Schey at NCIR (213) 487-2531.

The National Center for Immigrants' Rights
will sponsor the
National Immigration and Refugee Consultation
Trinity College, Washington, D.C.
August 3 — 5, 1981

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The National Center for Immigrants' Rights is actively soliciting articles from immigration attorneys for publication in the Immigration Law Bulletin. Please send all material for consideration to:

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The Theory of "Substantial Compliance"

by Lory Rosenberg

The return of the fifty-two American hostages may have reduced tensions between Iran and the United States; it will not necessarily have the same effect on the tensions between Iranian students and the INS. Numerous regulation changes and internal policy memos enacted in response to the "hostage crisis" have resulted in greater scrutiny, increased enforcement, reluctance or refusal to exercise discretion, and differential treatment for Iranian students in immigration proceedings.

Despite the return of the hostages, and the end to the crisis prompting those more restrictive terms and sanctions on maintenance of student status by Iranians, the regulations and policies remain. Arguments which may have been advanced all along concerning the unequal application of the immigration laws to Iranian students may now be bolstered by the fact that the rationale supporting the original enactments no longer exists. Such arguments should be developed and used to challenge the continued discrimination in terms of compliance with the law and relief available to these students, but that is another article.

This article covers the issue of restoration or reinstatement to student status, as a form of relief for the Iranian student who has lapsed out of status,[1] transferred without permission, worked without permission or is charged with being out of status due to a combination of these circumstances. Discussion will focus on the analysis and practice of asserting factors in mitigation of such violations before Travel Control, where the actual relief of reinstatement may be granted. It will also address the defense of these violations in the context of a deportation proceeding before an immigration judge. While the judge admittedly has no authority to reinstate, he must terminate proceedings on finding that the standard establishing a violation of status has not been satisfied and the government's burden has not been met. This may have the same practical effect as reinstatement or provide the basis for a motion to reconsider reinstatement before Travel Control.

I

The issue of reinstatement may arise in one of two basic ways. First, the student may wish to apply for transfer of schools or extension of status. If the student is already "out of status," meaning s/he did not attend or enroll fulltime, didn't obtain prior permission to transfer to the student's current school, failed to report, or failed to obtain a timely extension of status previously, INS will consider the student in violation of the terms and conditions of maintaining non-immigrant student status. The remedy for this situation is an application or motion to reinstate, submitted to the District Director through the Travel Control branch, where it will be adjudicated by an immigration examiner responsible for student cases.

In the second situation, the issue of reinstatement arises after the student has been arrested or after an unsuccessful application for extension of status or permission to transfer. In this instance, the student already will be facing deportation proceedings. According to the practice in the Boston District, it is possible to adjourn a deportation hearing temporarily in order to submit a motion for reinstatement to the District Director through Travel Control. The examiner in that capacity considers the motion and indicates whether it is the intention of the District Director to reinstate. If the District Director does not oppose reinstatement, representation is made before the immigration judge that the student will be reinstated to status, and the proceedings are terminated on the basis of this determination. The actual jurisdiction of the matter then is transferred back to the District Director and reinstatement is completed in the Travel Control branch (the I-94 is endorsed and returned to the student, authorizing her/his continued pursuit of studies in the United States). If the District Director declines to reinstate the matter continues before the immigration judge (see discussion below, II).

The motion or application itself should be fairly extensive and should include the factual circumstances surrounding the violation, as well as, *especially,* the explanation for the violation, mitigating circumstances, and all relevant factors concerning the student's educational goals, and academic status.

The preparation and presentation of this argument is not only significant in establishing a convincing argument for the exercise of discretion by the INS. It will also be useful if the motion is denied, and should be introduced before the immigration judge and Board of Immigration Appeals (BIA) on the issue of deportability.

An affidavit, and supporting documentation, such as letters from professors, or any other evidence bearing on the violation itself or favorable factors outweighing the violation should also be included. In addition, it is my practice to include at least a brief legal argument in the context of the motion including citations to cases or policy memoranda which should be attached.

INS should be pressed to respond with a statement of reasons why discretion is not being exercised if the motion is denied, and this discretion may in addition provide useful evidence in favor of the student. For example, often the practice of the District Director has been to say that the student violated his status, so reinstatement is not in order. In fact, since much of the regulations concerning compliance with status include provisions for extending status when there is good cause or explanation for the failure to remain in compliance, this is insufficient.[2] Rather, a denial to reinstatement, particularly where affirmative considerations have been advanced, must include a statement indicating why the affirmative reasons were found not to constitute good cause or reasonable excuse for the violation.

To illustrate how mitigating or affirmative factors should be used in the motion to offset an undisputed violation, the example of an application to transfer is effective. In one recent case, an Iranian student was admitted to attend a particular university, where he did enroll and study for two semesters. This school was especially expensive relative to others in the same geographic area. The student, whose father was a retired

(Continued on page 6)

Court Rules in Favor of Returning Residents

On April 10, 1981 a final judgment was entered in the United States District Court for the Southern District of Texas in favor of returning permanent residents who have been denied re-entry to the United States by INS inspectors. In *Leticia S. Hernandez vs. Richard M. Casillas,* C.A. No: L-78-42, plaintiffs challenged the practice of immigrant inspectors within the San Antonio, Texas INS district who have solicited waivers of exclusion hearings and affidavits of relinquishment of resident status from permanent residents seeking re-entry but suspected of abandonment of their resident status. Plaintiffs argued that such solicitation of waivers without prior service or written notice of the right to an exclusion hearing and right to counsel and without referral of the applicant's case to immigration court violated the Immigration and Nationality Act [8 U.S.C. 1225(b)], the regulations (8 C.F.R. 235.6) and the Fifth Amendment.

Prior to trial, the court had certified a class of residents believed to be excludable for abandonment of status and who have signed or will sign waivers of hearings without prior service of INS from I-122 (Notice to Alien Detained for Hearing by an Immigration Judge). Since 1976, an estimated 500 persons have executed the waiver while trying to enter the United States through the Laredo, Texas port of entry, and have then been forced to return to Mexico.

INS contended that was proper for for immigrant inspectors to orally advise applicants of the right to a hearing as well as the availability of a waiver, and that since the applicants had elected to sign the waivers and return to Mexico, there was no need to serve them with written notice of the charge, the right to a hearing and counsel, and the list of free available legal services. The two named plaintiffs and other witnesses testified that they were told by INS inspectors that they had no choice but to sign the waivers and that they were either not fully advised of their rights or not advised at all. During the trial, the judge stated he found it hard to believe that permanent residents would so readily give up all their rights to reside and work in the United States.

In a detailed decision, Judge George Kazen held that there was a strong presumption against waiver of one's right to a hearing and since the Act and regulations mandated referral to an immigration court, a waiver could only properly be taken before the immigration judge. The District Court judge went on to criticize the challenged practice whereby a uniformed INS inspector confronts the applicant, and takes an English language affidavit and waiver from a Spanish speaking applicant. INS had contended that lack of funds to hire sufficient immigration judges warranted the waiver practice, but the court considered the argument without merit.

INS was permanently enjoined from further use of the waivers and affidavits of relinquishment by immigrant inspectors. The court further ordered INS to provide class members with hearings. INS has filed their Notice of Appeal in the Fifth Circuit Court of Appeals.

For more information please contact Lee J. Teran, TRLA, (512) 727-5191, or Peter A. Schey. NCIR, (213) 487-2581.

INS Considering New "Deferred Action" O.I.'s

The following is the text of an operation instruction which INS is currently considering for distribution to the field concerning "deferred action":

"OPERATIONS INSTRUCTIONS § 103.1(a) (1) (ii): *Deferred actions.* The District Director may, in his discretion, recommend consideration of deferred action, an act of administrative choice to give some cases lower priority and in no way an entitlement, in appropriate cases. (Revised).

The deferred action category recognizes that the Service has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws. In making deferred action determinations, the following factors, among others, should be considered:

(A) the likelihood of ultimately removing the alien including:

(1) likelihood that the alien will depart without formal proceedings (e.g. minor child who will accompany deportable parents);

(2) age or physical condition affecting ability to travel;

(3) likelihood that another country will accept the alien;

(4) the likelihood that the alien will be able to qualify for some of relief which would prevent or indefinitely delay deportation;

(B) The presence of sympathetic factors which, while not legally precluding deportation, could lead to unduly protracted deportation proceedings, and which, because of a desire on the part of the administrative authorities were the courts to reach a favorable result, could result in a distortion of the law with unfavorable implications for future case;

(C) The likelihood that because of the sympathetic factors in the case, a large amount of adverse publicity will be generated which will result in a disportionate amount of Service time being spent in responding to such publicity or justifying actions;

(D) Whether or not the individual is a member of a class of deportable aliens whose removal has been given a high enforcement priority (e.g. dangerous criminals, large-scale alien smugglers, narcotic drug traffickers, war criminals, habitual immigration violaters). *(Revised.)*

(Continued on page 8)

Immigration Bills Pending in Congress

The following is a partial list of immigration bills introduced to date in the House and Senate., Additional bills are being introduced on an almost daily basis and will be reported upon in a future issue of the *Immigration Law Bulletin:*

(1) H.B.-34 — Frank Annunzio (D.-Ill.): Seeks to make additional immigrant visas available for immigrants from certain countries and for other purposes.

(2) H.B.-156 — Clair W. Burgener (R.-Ca.): To amend the Immigration & Nationality Act to prevent the illegal entry and employment of immigrants in the United States, to facilitate the admission of temporary workers, to regulate the issuance and use of social security account cards, and for other purposes.

(3) H.B.-185 — George E. Danielson (D.-Ca.): To amend the Immigration & Nationality Act to provide that any person who employs an undocumented immigrant shall be guilty of a petty offense and subject to a fine.

(4) H.B.-186 — George E. Danielson (D.-Ca.): To amend the Internal Revenue Code by disallowing a deduction for salaries paid to undocumented immigrants.

(5) H.B.-619 — Norman D. Schumway (R.-Ca.): To amend the Immigration & Nationality Act to facilitate the admission of temporary agricultural workers.

(6) H.B.-620 — Norman D. Schumway (R.-Ca.): To amend the Immigration & Nationality Act to provide for labor certification on an area wide, rather than nation-wide basis for admittance of temporary agricultural labor.

(7) H.B.-724 — Cardiss R. Collins (D.-Ill.): To amend the Immigration & Nationality Act to require that any alien who has been detained for further inquiry or who has been temporarily excluded shall have the right to be represented by counsel from the time of such detention or exclusion.

(8) H.B.-1650 — Dan Lungren (R.-Ca.): To amend the Immigration & Nationality Act to establish a program to permit nationals of Mexico to enter the United States and perform temporary services or labor.

(9) H.B.-1680 — C.W. Bill Young (R.-Fla.): To amend Title XVI of the Social Security Act to provide that certain immigrants may not qualify for supplemental security income benefits unless they have continuously resided in the United States for a period of five years as lawful permanent residents, and to provide that a lawful immigrant may not be admitted to the United States unless a citizen of the United States agrees to provide support to such immigrant for a period of five years subsequent to admission.

(10) H.B.-2490 — Don L. Bonker (D.-Wa.): To amend the Social Security Act to require the issuance of Social Security Cards designated to reveal any unauthorized alteration to require that employment restrictions based on alienage be marked on such card, a ceiling of 350,000 for lawful immigration, and increased by prospective employees.

(11) H.B.-2782 — Robbin Beard (R.-Tn.), Tony Coelho (D.-Ca.): To establish an employers sanction law, a national work I.D. card a ceiling of 350,000 for lawful immigration, and increased border enforcement.

(12) H.B.-1643 — Wayne Grishan (R.-Ca.): To prohibit the use of federal housing assistance with respect to undocumented immigrants.

(13) .S.B-592 — Walter D. Huddleston (D.-Ky.): Same as H.B.-2782 (sanctions, national I.D. card, ceiling of 350,000, increased border enforcement).

(14) S.B.-47 — Harrison H. Schmitt (R.-N.M.): A bill to introduce a new guestworker program.

Haitian Migrant Workers Say Farm Violated Labor Law

Thirty-six migrant farmworkers filed suit in federal court on April 15, 1981 in the Middle District of Florida against the farm labor contractor in whose agricultural labor crew they worked during 1980 and against their employers, Fulwood Farms, Inc., during the same period. The action seeks money damages, declaratory relief and injunctive relief to vindicate rights afford by the Farm Labor Contractor Registration Act and the Fair Labor Standards Act.

The statement of facts alleges that in 1980, agents of Fulwood Farms, Inc., engaged the services of a farm labor contractor to recruit, hire and transport migrant workers for work on the farming operations of Fulwood Farms. It is alleged that the person engaged as the contractor did not possess a certificate of registration as a farm labor contractor from the United States Secretary of Labor. The contractor allegedly recruited approximately 120 Haitian refugees to perform farm labor on the strawberry farm of Fulwood Farms. These workers were transported to the premises of Fulwood Farms by the contractor who had never received authorization from the United States Secretary of Labor to transport migrant workers.

Upon arrival at the migrant labor camp, the plaintiffs and other refugees were assigned to living quarters in a migrant camp. The contractor has allegedly never received authorization from the United States Secretary of Labor to house migrant workers. It is alleged that the camp, which housed over 150 individuals, was authorized by the County Health Department for a maximum occupancy of 82 persons. It is also alleged that the contractor failed to post in a conspicuous place a written statement of the terms and conditions of occupancy in a language which the plaintiffs and other refugees could understand.

The complaint further states that the contractor and employer failed to post in a conspicuous place at the site of employment of written statement of the terms and conditions of employment as is required by federal law. The plaintiffs further claim that

(Continued on Page 11)

"Substantial Compliance" *(Continued from page 3)*

military officer in Iran, was receiving money from home to pay for his education.

At the time of the revolution in Iran, military pensions were suspended while the recipients' position and participation in their capacity of the military forces under the Shah was investigated. During the suspension of pensions, the student's finances were diminished, and he sought to enroll in another school to continue his educational goals at a lesser tuition which he could afford. He was unable to apply to the day program in the college to which he wished to transfer, due to the timing of his application. However, he applied to and was accepted in the night program at this school. Because the day program was certified to issue I-20s and the night program was not, he was unable to obtain an I-20 and apply for official permission to transfer, and thus he entered the program without having obtained this permission.

His action constituted a violation of 8 CFR 214.2 (f)(4) in that he transferred without INS permission and was furthermore attending a school/program not certified to admit and enroll non-immigrant students. After one semester he was able to apply for transfer to the day program, which was certified. He obtained an I-20 and applied to transfer to this college. His application was denied under the above-cited regulation, on the basis that he had not been a full time student at the last institution he had been previously authorized to attend preceding his application to transfer. That is, he was not attending the first school which he was authorized to attend, and he did not have permission to enroll as a student at the school which he actually did attend.

In a motion to reinstate him to student status, with permission to transfer schools, it was argued that while he had technically violated the regulation, surrounding facts and circumstances existed which satisfied the language in the regulation. This section of 8 CFR 214.2 (f) states that no transfer shall be allowed in circumstances where the student has not attended the last authorized school, unless his failure to do so was *for good cause or otherwise justified.*

The fact this student continued to attend classes in the same major area of study is a positive factor. In fact, the credits which he earned in the night program were transferable to his record once he transferred to the day program. Thus the practical effect of his not being enrolled in an authorized program was minimal and did not interrupt pursuit of his educational goal.

Further, consideration must be given to the situation which brought about his transfer from the first university. The interruption experienced by most Iranians in the U.S. following the overthrow of the Shah and the taking of the US hostages is well known. This student's father relied on a military pension. The fact that it was interrupted would not really jeopardize this student's ability to demonstrate sufficient financial resources to maintain student status, as the pension was restored, and the student's financial status at the school he is presently attending was good. As soon as these financial difficulties arose, this student did all he could do to effectuate a transfer that would not interrupt his progress towards his educational objective. Having no control over the application deadline, he was forced to enroll in a program not authorized to issue I-20s. He took and satisfactorily completed a full course load. Good cause for his failure to obtain permission to transfer is clearly established. Nothing in his actions or the circumstances offends the spirit of the regulations pertaining to student status. Rather this student complied to the best of his ability, and as soon as he was able to transfer to the day program and receive an I-20 he attempted to transfer.

While it may appear that this example is straightforward and represents a clear cut, easy case for reinstatement, that was not the case. First, the student in these circumstances was issued an Order to Show Cause; had the policy memo, CO. 243.90 C from the then Acting Commissioner (Crosland) been applied in a proper exercise of discretion, proceedings would never have been instituted, and consideration of the factors favoring reinstatement would have been taken into account from the outset. Even after the original motion was filed, with deportation proceedings temporarily adjourned to allow the District Director to consider the substance of the motion and make a recommendation regarding reinstatement, it was denied without any statement or reasons for the denial. Only after a motion to reopen and reconsider, arguing the facts (including one new fact in that transfer of the credits earned in the night program now appeared on the student's official transcript) and arguing an erroneous application of the law,[3] was submitted did the District Director indicate that INS would be inclined to reinstate this student if the deportation proceedings terminated and jurisdiction referred back to Travel Control.

In another instance concerning an Iranian student's application for reinstatement (extension and permission to transfer) in light of the circumstances forcing him to attend a high school different than the one indicated on the visa issued to him by the visa officer in Tehran,[4] it took considerable legal persuasion to bring about a favorable decision. In that case, one officer had originally recommended reinstatement and the case was terminated by the immigration judge on that basis. One remaining issue was whether reinstatement would be granted for *duration of status,* for which the student was eligible at the time of the recommendation to reinstate. The file was lost twice: once between the time of the recommendation to reinstate and the actual termination of deportation proceedings by the immigration judge (4 months), and a second time following the termination of the deportation proceedings, when it was laid to rest in Records for nearly six months. After it was finally retrieved for the supposed purpose of endorsing the student's I-94, "reinstated to status," the officer then reviewing the file decided it did not merit reinstatement and issued a *denial.*

Significant in this situation is not only the disparate exercise of discretion *on the same case,* but the fact that the favorable exercise of discretion was clearly merited. The student had come to a high school/prep school of questionable repute in the Boston area, accompanied by his father. When they learned there was no provision for dormitory or other supervised housing accomodations, the father was understandably concerned about leaving his sixteen year old son in one of the adult rooming houses listed on the school's "housing" bulletin. Iranian friends in the area informed them of the possibility of the student attending a different high school which participated in a program of housing foreign students with local families in their homes. The son enrolled and then applied for transfer to this school. Clearly the reason for not attending the original school was not for mere convenience[5] and was in fact due to circumstances which arose subsequent to the student's entry (discovering the lack of any formal housing arrangements,

(Continued from page 6)

which he had assumed would be provided by the school).

The student was ultimately successful in that we were able to convince INS to stand by their original representation that status would be restored and transfer permission granted. However, the student was not granted duration of status, despite arguments that he was eligible at the time the original determination was made and should have been granted "d/s" but for delays caused by INS's own inaction. A decision has been made to await possible action by INS granting extensions to high school graduates admitted to college programs as was done in 1980 for those accepted to further programs. If this provision for extension is not enacted this year, this student will face a deportation proceeding in which the affirmative misconduct of INS in not adjudicating his motion must be raised as an estoppel defense.

The development of the administrative and federal case law in this area (maintenance of student status) supports the favorable exercise of discretion in such cases. The regulatory language itself as well as recent policy memos concerning Iranians suggest that mitigating and surrounding circumstances must be taken into account.[6] The standard for determing whether student status has been violated is not merely whether, as a matter of fact, the student has failed to enroll for the proper number of credits, or dropped below the acceptable number. It is not merely whether the student has transferred without permission, or even arguably, whether the student has accepted employment without authorization.

Rather the standard that has developed to determine whether status has been violated (and for which counsel should steadfastly argue) is whether the violation alleged has meaningfully interrupted the student's purpose in the United States — studying towards an education objective.[7] In considering infractions of the regulations, the overall impact of an adverse decision on the student's status and ability to pursue those goals must be weighed.[8] The violation should be treated in light of the spirit of the law and regulations, and not merely by its letter. Such an interpretation is too narrow and does not carry out the legislative intent behind regulations governing students.[9]

II

The case law described above continues to be quite relevant once the motion has been denied and the case stands before the immigration judge. There the question becomes whether or not the student is deportable for having failed to maintain non-immigrant status, Section 241 (a) (9), INA. The advocate should note that INS has used the overstay charge 241 (a) (2), and attempted to avoid consideration of the incidents of the student's performance or pursuit of his/her education in the United States, by claiming the student to be simply charged with having overstayed the time allotted. This attempt to avoid full consideration of the facts and circumstances surrounding the overstay should be challenged in the hearing. The government should not be allowed to avoid application of the legal standard which has developed in student cases (substantial compliance with, or conversely, meaningful interruption of, status), by choosing to charge under Section 241 (a) (2), INA.

As a practical matter where the charge is Section 241 (a) (9), INA, the understanding of the immigration judge that he cannot reinstate students to status, while correct, often leads to denial of the respondent's right to present testimony and evidence on the issue of deportability.[10] The judge must consider such evidence, and furthermore cannot make a sustainable determination of deportability where the respondent admits the allegations, denies deportability, and is then prevented from introducing evidence on the issue. It has been the erroneous custom of the trial attorneys and immigration judges in the Boston District to conclude that when allegations are admitted, and the government rests, deportability is established by clear, unequivocal and convincing evidence.[11]

In a situation where the respondent attempts unsuccessfully to present mitigating evidence on the question of whether or not s/he has failed to maintain (student) status, it is both absurd and a denial of due process to find the respondent deportable without even considering that evidence. In light of the case law based on legislative intent requiring adjudication of the student's overall performance and compliance with student status, the government's burden cannot be satisfied where it rests on the respondent's admission, for example, that s/he failed to obtain prior permission to transfer.[12] Why, under what circumstances, did this occur? How did it affect the student's pursuit of her/his educational goal? A finding according to the proper standard cannot be made unless this information is heard and taken into account by the immigration judge.

An important aspect of seeking termination of proceedings before the immigration judge, on the basis that deportability has not been proven by clear, unequivocal and convincing, evidence in a student case, concerns the posture in which such a successful student stands following termination of the hearing. While the INS is fond of deeming that every student infraction requires formal reinstatement, this is not actually the case. Where a student with "d/s" is alleged to have violated status without permission, it is not really necessary to win reinstatement from the District Director. In fact, if the government cannot meet its burden of proof before the immigration judge, or conversely if the student establishes substantial compliance/no meaningful interruption, the proceedings are terminated. To a student holding duration of status entitlement to remain in the United States, termination of all charges against that student is all that is necessary. The fact that the District Director may not be inclined to forgive the student's infraction is irrelevant if the immigration judge or the BIA later determines that no substantial violation of status and Section 241 (a) (9), INA, has occured or been proven.

FOOTNOTES

1. Section 101 (a) (15), Immigration and Nationality Act (INA); 8 CFR 214.1; 8 bCFR 214.2(F)(2)-(6a); 8 VFR 214.5.
2. See also, in Iranian cases, Iranian Project #42 Telegram, Jan. 4, 1980, CO 243.09-C (*Interpreter Releases*, V. 57, p. 60 (c), requiring humanitarian circumstances considered and reasonable excuse taken into account for "failure to report", See also, *In the Matter of Anoonshban Ebrahimi Massihi*, A 23 278 893 (unreported, BIA 1980), available from Brief Bank.
3. 8CFR 103.5.
4. 8CFR 214.2(f) (2).
5. See Operations Instructions, OI 214.5(f) (2).
6. *Mashi v INS*, 585 F. 2d 1309 (5th Cir. 1978); *In Re Dezfuli*, A22 373 603 (unreported, BIA 1980); and *Matter of Neely and Whylie*, 11 I&N Dec. 864 (BIA, 1964).
7. *Mashi, Dezfuli, supra.*

EL RESCATE

New Salvadoreño Project

NCIR in conjunction with the Southern California Interfaith Task Force has established "El Rescate," a Salvadorean refugee relief project. El Rescate is providing legal assistance and social services to Salvadorean refugees in the Los Angeles area. NCIR, and El Rescate in conjunction with Church and community organizations throughout the country are gathering information to present to the administration and Congress to rebut the position taken by the State Department concerning the situation in El Salvador. Additionally, we are gathering information about the treatment of refugees in the U.S. by INS, e.g. coercion to sign voluntary departures, excessive bonds, refusal to advise or accept asylum petitions. If you can be of assistance please contact Tim Barker or Bruce Bowman (El Rescate supervising attorney) at (213) 487-2531.

The following information was issued through the INS outreach Project regarding Salvadorean refugees on May 29, 1981. The text of the memo is as follows:

Because of the numerous inquiries the Outreach Office has received concerning Salvadoran asylum requests and whether the INS is considering granting voluntary departure status for illegal Salvadorans presently in the United States, we have obtained the following information:

— The State Department has advised INS that at this time it is not in a position to recommend to the Service the blanket granting of voluntary departure status for illegal Salvadorans presently in the United States.

According to the State Department, civil strife and violence in El Salvador continue at distressing levels, but conditions there do not warrant the granting of blanket voluntary departure to Salvadorans in the United States.

The State Department has noted that while fighting in some areas has been severe, El Salvador has not suffered the same level of wide-spread fighting, destruction and breakdown of public services and order as did for example, Nicaragua, Lebanon or Uganda at the time when voluntary departure was recommended by the State Department and granted by INS for nationals of those countries. Public order and public services, while under a serious attack, are still maintained, expecially in San Salvador and the larger cities.

The State Department has pointed out that many Salvadorans now present in the United States — whose numbers may be as high as 50,000 and who were not involved in political or military activities before their departure — would not face, upon their return, any more danger than is faced by their compatriots who never left the country.

The State Department finds it difficult to accept the thesis that the majority of Salvadorans now in the United States departed their country only to seek safehaven. State notes that most traveled through third countries before entering the United States and many of those who are believed in this country entered quite some time ago. Other countries closer to El Salvador have been generous in offering safehaven to fleeing Salvadorans, suggesting that it is not true that only the United States is a possible refuge.

— On April 15, 1981 the State Department resumed the case-by-case review of Salvadoran political asylum requests and is in the process of providing INS with advisory opinions on pending cases which were suspended last January. For those who can establish a well-founded fear of persecution upon return to El Salvador, the State Department will so inform the appropriate INS District Office.

State indicated that it will continue to assess Salvadoran developments closely and will promptly inform the Service should developments indicate a change in State's position regarding voluntary departure status for Salvadorans.

"Deferred Action" *(Continued from page 4)*

Former military deserters at-large who participated in the Discharge Review Program during the period April 5, 1977 to October 31, 1977, should be placed in deferred action category if at the time of last entry they were exempt from immigration inspection under the provisions of § 284 of the Act. (Revised.)

If the District Director determines that a recommendation for deferred action should be made, it shall be made to the Regional Commissioner concerned on Form G-312, which shall be signed personally by the District Director, and the basis for his recommendation shall be set forth therein specifically. Interim or biennial reviews should be conducted to determine whether those approved should be continued or removed from deferred action category. (Revised.)

Each Regional Commissioner shall maintain statistics on deferred action cases on a current basis, maintained so that data can be readily extracted upon request. The statistics should be maintained in the following categories: (1) number of cases in the deferred action categories at the beginning of the fiscal year; (2) number of recommendations received fiscal year to date; (3) number of recommendations approved; (4) number of recommendations denied; (5) number of cases removed from deferred action categories; (6) number of deferred action cases pending at the end of the fiscal year."

This proposed new Operations Instructions seems to be carefully drafted in response to Nicolas v. INS, *590 F.2d 802 (9th Cir. 1979).*

INS Allows "Deferred Action" Pending Seven Years Residence

In *Hernandez-Rivera v. INS*, (9th Cir., October 23, 1980), the Ninth Circuit Court of Appeal held that if there has been official misleading as to the time within which to file a notice of appeal, the late notice may be deemed to have been constructively filed within the jurisdictional time limits. The Court thus held that the Board of Immigration Appeals erred in dismissing as untimely filed an appeal filed within a fifteen-day extension of the ten-day deadline if the extension was granted by the Immigration Judge.

The Court also ruled, however, that the BIA had no jurisdiction either (1) to consider an appeal from an order granting voluntary departure if the sole ground of appeal is that a greater period of departure time should have been fixed, or (2) to adjudicate the constitutional issues raised by petitioners. The Court summarily rejected the petitioner's contention that the immigration judge abused his discretion in setting the period for voluntary departure, that not allowing minor United States citizens the right to petition for their parents' admission to the United States is a denial of equal protection, that deportation is cruel and unusual punishment, and that deportation would result in the *de facto* exclusion of their children despite the fact that they are United States citizens. The Court stressed that the immigration laws seek to prevent circumvention by those who enter the country illegally and promptly have children to avoid deportation.

For further information contact the San Francisco Legal Assistance Foundation, (415) 648-7580.

Ten Day Deadline for Filing Immigration Appeals is Extendable

Oregon Legal Services Corporation has uncovered a 1976 INS document during discovery proceedings in the case of *Portillo v. INS*, a case involving a challenge to a denial of "deferred action" on the grounds that the denial was arbritary and deviated from the agency's normal practice in adjudicating "deferred action" applications. The INS memo, dated September 22, 1976, was initiated by former INS Commissioner L. F. Chapman, and addressed to Philip Wilena, Chief, Government Regulations and Labor Section, Criminal Division of the Justice Department. The memorandum is designated as "CO 212.29-P" the memo reads as follows:

> "Remand of cases pending in Courts of Appeal for consideration of Section 212(c) relief; *Frances v. INS*, 532 F.2d 268 (2nd Cir. 1976).
>
> Several cases presently pending before the Courts of Appeal have been referred by you to the Service for consideration of whether a remand would appropriate in light of *Frances v. INS*. In light of the decision by the Board of Immigration Appeals in *Matter of Silva-Ovalle*, I.D. _____, A8 745 827 (BIA September 10, 1975) copy attached to apply *Frances* nation-wide, the following will be the Service policy regarding pending litigation presenting a possible *Frances* issue.
>
> *In cases where the respondent has resided in the United States as a lawful permanent resident for at least seven years, and a waiver under the Frances rule would preclude deportation, the Service consents to a remand.* Cases in this category need not be referred to the Service.
>
> *In cases where the respondent has resided in the United States as a lawful permanent resident for a substantial period of time, but less than seven years, the Service is willing to consider on a case-by-case basis whether to place the respondent in a "deferred action" category until seven years have elapsed, at which time the respondent will be given an opportunity to apply for Section 212 (c) relief.* When in the opinion of the Government attorney handling the court litigation such action may be desirable, the case should be referred to the General Counsel." (Emphasis added.)

For further information please contact Dick Ginsburg, Oregon Legal Services Corporation, Farmworker Office, (503) 640-4770.

Update: Transfer of Iranian Funds

According to the Iranian Ministery of Higher Education, the requirements for transfer of funds to those students who have already established a file in Iran are as follows:

(1) An official 1980-81 school transcript;

(2) The original copy of a letter certifying that the student is attending school in semester for which the funds are requested. The letter should include all the following information: first name, family name, program of study, name of institution, passport number, major, the date the student began studies, credits taken for the current semester, and credits already passed. The letter should be affixed with the official seal of a recognized university or institute, and the date of issuances must be recent; and,

(3) A photocopy of both sides of INS Form I-94, officially certified. The sources of certification is not specified in the announcement. Furthermore, those students who were not able to transfer funds due to unacceptable academic performance (below 2.5 GPA), may be eligibile to receive funds upon their school's certification of their attainment of an acceptable GPA (2.5 or above). F-1 students may receive $1,000 monthly, and permanent residents $250 monthly.

For further information contact the Iranian Students Counseling Center, (212) 489-9129.

Congressmen Blast INS

Attorney General William French Smith recently appeared before the House Judiciary Committee to defend the Reagan Administration's proposal to slash the proposed $385 million INS budget by $21,663,000 and cut it $10,281-person workforce by 750 positions.

Representative Henry J. Hyde (R.-Ill.), rated INS as "the worst agency of government . . . INS is literally the pits."

Representative George E. Danielson (D.-Cal.), said the agency is "truly a disaster area."

Defending the proposed budget cuts, Attorney General Smith said there is "reasonable cause to believe that any immigration problems will not respond simply to increased resources."

Mexican "Guest Workers": A Permanent Subclass

by Michael Semler, Migrant Legal Action Program
Domingo Gonzalez, American Friends Service Committee

(This article is reprinted from the Washington Post of June 8, 1981)

High on the agenda when President Lopez Portillo of Mexico meets with President Reagan today will be discussion of a "guest worker" program for Mexican workers. The White House domestic policy staff is developing a plan to admit up to 500,000 Mexican laborers each year for temporary work in the United States. Unless Lopez Portillo is wholly unreceptive, the White House will almost certainly ask Congress to create at least a pilot program. We believe that a guest worker program would do little or nothing to control illegal immigration while legitimizing the maintenance of a permanent, disenfranchised "subclass" within our society.

The United States has already tried and rejected a large-scale temporary labor program with Mexico. During World War II and for almost 20 years thereafter, the United States admitted Mexican "braceros" (agricultural workers) in large numbers — more than 400,000 annually during the peak years. This program was ended in 1964 after it was shown to displace U.S. workers and depress U.S. wages and working conditions. In the words of a 1963 House Agriculture Committee report, the bracero program proved to be "simply a means of providing cheap, easily exploitable and docile labor."

Germany, France and Switzerland and most of the other northern European nations have also had unsuccessful and troubling experiences with guest worker programs.

A Reagan administration guest worker program would similarly fail to serve our long-term national interests. First, it would not eliminate or control illegal immigration. Temporary foreign worker programs are vehicles for admission, not exclusion. Mexican nationals now coming to this country illegally constitute only a fraction of the rural and urban poor potentially interested in employment in the United States. A government-sponsored program offering the opportunity to enter legally, eligible for any type of employment in any section of the country, would attract many workers who had not previously crossed the border. Likewise, U.S. employers who have not hired undocumented workers because of their status would feel free to use Mexican guest workers. Over time, these factors would multiply the number of Mexicans experienced in traveling north. Unless the temporary labor program were constantly expanded, creating an "open border" situation, workers unable to secure guest worker visas would enter illegally.

Much of our current illegal immigration from Mexico is in fact due to patterns set under the bracero program. Approximately 4.5 million Mexican workers were introduced to the U.S. economy and to the ease of illegal entry during the height of the program.

Further, 40 to 50 percent of the aliens illegally in this country are not from Mexico. A guest worker program limited solely to Mexico would do nothing to deal with migration from other countries.

Second, guest workers tend to remain permanently, regardless of the intent of the program. The assumption underlying most guest worker proposals is that foreign workers can be admitted in times of labor shortage and removed or excluded in periods of recession. But 50 percent of all guest workers admitted under the European programs remained more than five years, despite strenuous efforts to encourage them to depart. The guest workers remain in the host society, form families and become de facto immigrants.

Many undocumented Mexican workers perform farm labor or other seasonal work and return to Mexico after the season has ended. If admitted as guest workers eligible to accept year-round positions, many of them would remain in the United States permanently either through repeated visa extensions or by overstaying their visas. Thus a guest worker system would offer no greater control over the duration of the worker's stay in the United States than exists in the case of an illegal alien.

Finally, guest worker programs produce an internal "subclass" which is legally present but denied a full place in the host society. While it is impossible now to foresee the specific restrictions that would be imposed, the proposal being reviewed in the White House expressly provides that guest workers and their families would be denied access to "welfare, food stamps and unemployment insurance." Guest workers would, of course, also be barred from voting. The legislative creation of this type of "second class" legal status runs contrary to our most fundamental political and social values and would threaten the progress we have recently made in eliminating invidious ethnic, racial and class distinctions. The practical effects of this type of legislation would be to sanction exploitation and to foster an isolated and powerless subculture. While these problems already exist for many undocumented aliens, a large-scale guest worker program would legitimize, perpetuate and expand this situation.

Real progress in this area must begin with the recognition that the United States and Mexico share a special relationship based on proximity, family ties, economic interdependence and the flow of labor. There is no immediate solution to illegal immigration and certainly no legislative remedy for what is essentially an economic problem. We can, however, act now to use immigration law and policy to ameliorate this problem and build a relationship with Mexico that owuld allow the necessary comprehensive economic cooperation.

This can best be done by significantly increasing the number of Mexicans admitted permanently, under expanded immigration quotas, for family reunification and to meet specific labor needs. If admitted as permanent resident aliens, with the prospect of eventual citizenship, Mexican workers can fill any demonstrated labor need in or economy, thus gradually reducing the factors contributing to illegal immigration, without depressing U.S. employment standards. Equally important, as permanent residents these workers can share fully in or social, cultural and political life, avoiding further stratification of our society.

National Council of Churches of Christ in [illegible]

Introduction to Policy Statement on Immigrants, Refugees and Migrants

Adopted May 14, 1981

The National Council of the Churces of Christ in the United States (NCCC), when it first addressed matters related to immigration and naturalization policies in 1952, stated: "The plight of the world's uprooted peoples creates for the United States . . . a moral as well as an economic and political problem of vast proportions."

Some of these "uprooted peoples" have been persons displaced by war, or are refugees from tyrannical regimes, and expellees and escapees from a variety of conditions. Others have been identified as "surplus populations" — those who cannot be supported by the economies of their respective countries.

Today more than 16 million men, women and children are refugees or have fled or been displaced from their homelands. There has been an appalling increase in the numbers of those who, despite changes in the world economic situation, have little hope for economic survival or well-being in their own countries. Nevertheless, the task of serving the immediate human needs of refugees, immigrants and migrants, as well as of changing basic social, economic and political structures in order to alleviate the conditions that promote migraton — and of doing these things without abusing power — is a challenge that must be addressed.

The National Council of Churches in 1962 identified the "source of responsibility" of nations as well as persons for the welfare of such peoples: "God's sovereign claim upon all people has been proclaimed by the advent and example of His Son, Jesus Christ, in human society. Under God, persons and nations are responsible to each other and for the welfare of all humanity." (1962)

On that occasion, as well as on numerous others, the National Council of Churches affirmed that all persons, including migrants, immigrants and refugees, are endowed with "God-given dignity and worth," and that all in need must be viewed through the eyes of Christ. Christians have a unique motivation to participate, both corporately and individually, in the struggle for justice, human rights, and the alleviation of suffering. As people redeemed by the Cross and Resurrection of Jesus Christ and incorporated into Christ's Body, the Church, Christians are freed and called to serve their neighbors in the world-wide human family. The Bible has been and continues to be one of the primary sources of inspiration for the struggle for human rights.

The violation of human rights — civil, political, social, economic, cultural — often impels people to leave their homes and seek new ones. In a sinful world the quest for human rights frequently involves a conflict between rights.

People who are suffering the deprivation of their rights should be able to move to another land where they can pursue economic well-being, freedom and dignity. But those who already live in that land — especially the working poor and the unemployed — have a right to employment and to social and eocnomic security. The tension among these rights should be resolved in the context of the stewardship of God's gifts, the knowledge that all resources come from God and are not the unqualified property of those holding them, and the recognition that all possessions are held in trust for the benefit of the human community today and in future generations.

The National Council of the Churches of Christ, through its Governing Board, reaffirms its commitment to those who are identified as the world's uprooted, pledging to minister to these sojourners and strangers and to champion their welfare. It reaffirms its commitment to work for a world in which the conditions of life for all are made more abundant, equitable and just, recognizing that Christians under God link arms with other people of good faith and join with secular institutions and organizations of good will in a common search for justice, dignity and the well-being of refugees, immigrants and migrants.

El Otro Lado

For many undocumented workers from Mexico, *El Otro Lado* means the United States. It's the other side of the border where Mexican workers come to look for jobs in this country's fields and factories.

The New Mexico People and Energy Coalition has prepared an easy-to-read guide concerning

- the operations of the Border Patrol
- legal ways to immigrate
- rights when arrested
- rights to organize
- Social Security, income taxes, the U.S. monetary system
- minimum wage laws
- sending telegrams and making telephone calls
- finding medical services and legal help

El Otro Lado also provides immigrant workers with a national list of supportive organizations that can provide assistance: labor organizations, legal services, church groups, and community groups.

Copies of this booklet are available in Spanish from New Mexico People and Energy, Box 4726, Albuquerque, NM 87196. The pamphlet costs $.25 each (without postage costs); $.50 each for 1-15 pamphlets (including postage); $.37 each for 16-50 pamphlets (including postage).

Haiti *(Continued from page 5)*

they were paid by checks and provided receipts but that many deductions taken from their salaries were not itemized as required by law. On information and belief the lawsuit alleges that deductions were made from the plaintiffs' wages for housing in excess of their reasonable or actual cost. It is also alleged that defendants failed to pay the Haitian plaintiffs a salary equaling or exceeding the minimum wage established by the Fair Labor Standards Act. Some of the named plaintiffs claim that the contractor directly misappropriated paychecks which they had received from Fulwood Farms. These individuals were never otherwise compensated for their labor. A few weeks after beginning work at Fulwood Farms, the plaintiffs were summarily evicted from the labor camp after being told that they complained top much about their low wages.

For additional information please contact Gregory S. Schell, Florida Rural Legal Services, (813) 657-3681.

Notes Jurisdiction in *In Re Alien Children Education Litigation*

On June 15, 1981, the United States Supreme Court noted jurisdiction in the state-wide class action case of *In Re Alien Children Education Litigation.* A few weeks earlier the Supreme Court noted jurisdiction in the case of *Doe v. Plyler.* Both cases involved challenges to Texas Education Code Section 21.031, which precludes the enrollment of undocumented children in the Texas public schools.

On May 29, 1981, the plaintiff children in *In Re Alien Children Education Litigation* filed a motion in the Supreme Court seeking summary affirmance of the district court's decision holding Section 21.031 unconstitutional. In filing this motion we recognized that the chances of success were slim in as much as the Supreme Court had already noted jurisdiction in the *Doe v. Plyler* case. Copies of the motion are available through the Los Angeles offices of NCIR.

The plaintiffs in *In Re Alien Children Education Litigation* have been granted *in forma pauperis* status in the Supreme Court. Both cases have been consolidated for hearing in the Supreme Court. The Court will schedule the oral argument sometime in the Fall of 1981.

Persons or organizations interested in filing an *amicus curiae* brief should please contact Isaias Torres, 2990 Richmond, Suite 205, Houston, Texas 77098, (713) 524-4801, one of the co-counsel in *In Re Alien Children Educaton Litigation.* NCIR is serving as lead counsel in this case. For further information please contact Peter A. Schey at NCIR.

Haiti Aid Restriction

On May 7, 1981, the House Foreign Affairs Committee adopted an amendment to the foreign aid bill offered by Dante Fascell (D-Fla.) and Dan Mica (D-Fla.) which conditions aid to the Haitian government upon that country's enforcement of its emigration laws. Under Haitian law it is illegal to leave the country without the permission of the government and smuggling persons out of the country is also prohibited. Haitian government officials have in the past been implicated in smuggling operations. On the other hand, Haitian boatpeople, leaving the island without the collaboration of government officials, have been shot and killed while trying to escape.

Haitian supporters in the United States have condemned the Fascell-Mica amendment, stating that it will drive the smuggling business further underground and make the conditions of escape even more perilous than it already is. Haitian leaders in the United States further point out that the amendment will serve as a justification for an escalation in the Haitian government's policy of shooting at boatpeople attempting to leave the island.

For further information contact either Sue Sullivan, Haitian Refugee Project, (202) 544-2350 or 544-7475 or Rev. Jean Juste, Haitian Refugee Center, Inc., at (305) 757-8538.

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IMMIGRATION LAW BULLETIN

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS

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Analysis of the Reagan Immigration/ Refugee Plan

by: Amit Pandya & Peter A. Schey
(Attorneys, NCIR)

A brief statement released by the White House on July 30, 1981, followed by testimony the same day by Attorney General William French Smith at a joint hearing before the Senate and House Immigration Subcommittees, announced the broad outlines of the Reagan Administration's immigration policies.

The Administration's approach seems to be the now familiar formula that "America is a nation of immigrants, but times have changed and we must now control immigration drastically." The guiding principle of the Administration's approach is an emphasis on acquiring *control* over immigration. This goal is seen as an end in itself. "No great nation", says the Attorney General, "—and especially a great democratic nation—can long countenance ineffective and unenforced laws." The Attorney General's testimony also refers to pervasive public opinion in favor of drastic measures to stem immigration and refugee flows, and particularly illegal immigration.

The importance of these cosmetic elements of the package should be fully appreciated. Indeed, an internal memorandum of the Reagan Task Force explicitly commends employer sanctions for establishing "an image of control", while recognizing that they will do little to deter illegal immigration, their supposed purpose. Senator Alan Simpson, Chairman of the Senate Immigration Subcommittee, has likewise conceded that employer sanctions, while they may be unenforceable, will "send a message" to the world that the United States cares about its immigration laws.

It is precisely the cosmetic aspects of the package which have drawn the ire of the restrictionists in and out of Congress. These elements criticize the Administration Package on the grounds that it will not effectively control illegal immigration. Criticism is focussed upon the large (50,000 a year for a two year experimental period) temporary worker program for Mexicans, and the ineffectiveness of the proposal to fine employers of undocumented workers (employer sanctions). Many groups committed to significant curbs upon immigration have publicly criticized the Administration's package for answering the desire for cheap and intimidable workers of Western growers and other large-scale employers of Mexican workers, but failing to tackle the immigration issue itself.

It is important, however, that those committed to an enlightened immigration policy and the preservation of civil rights recognize that the Administration's recommendations are not merely cosmetic sops to public opinion, but rather represent *significant and effective attacks upon the interests of immigants and refugees, and also of all poor and moderate income workers in this country, especially in Latino communities.*

REFUGEE/ASYLUM PROPOSALS

The Administration's contempt for civil rights is perhaps most clearly reflected in its proposals regarding refugees. It proposes to stop and turn back vessels on the high seas which it suspects are carrying undocumented persons to the United States. Such a proposal was rejected earlier when the Coast Guard indicated that such procedures could not be carried out without great danger to the interdicted vessel. The Administration's proposal on this score has been widely condemned by international human rights organizations as identical to the treatment of Indochinese "boatpeople" by Southeast Asian governments, which was itself condemned by the U.S. government in 1979 and 1980.

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The Administration also proposes to create "asylum officers" within the INS who would hear political asylum claims. The only review available to the applicant would be discretionary review by the Attorney General. The Administration will also request that $35 million be made available in FY 1982 for the development of permanent facilities for detaining persons pending exclusion or the grant of asylum. The Administration's internal memorandi on this point evince a recognition on its part that these will be *concentration camps* for all practical purposes, and that the presence of black Haitians thus intrned could cause significant political problems.

The refugee/asylum proposals totally fail to deal with the root causes precipitating refugee flows from the Carribean and Central America to the United States. The role of U.S. foreign policy in helping to create the social and political conditions which cause refugee flows is ignored. Instead, the proposals aim at even greater discrimination against these "unfavored" refugees. These repressive measures will do nothing to stop or decrease the flow. They will mean that more people will be incarcerated at tax-payers' expense while their asylum claims are adjudicated, the courts will be kept busier with legal challenges, and implementation of a fair and impartial U.S. refugee/asylum policy will be again deferred well into the future.

PROPOSAL FOR INCREASE ENFORCEMENT

The Administration's contempt for civil rights is equally reflected in its proposal to increase traditional immigration enforcement funds and personnel. It explicitly states its intention to purchase more quasi-military equipment and to target its enforcement efforts in cities with significant Latino communities. Nowhere in its statements does the Administration recognize or address the problem that immigration enforcement is synonymous with massive violations of the civil rights of all Hispanic persons. Nor does the proposal recognize that as enforcement is presently structured, it is the primary factor promoting exploitation of undocumented immigrants.

The exploitation of undocumented immigrants should be our primary concern. Removal of the exploitation factor will decrease the other negative factors associated with undocumented migration. Exploitation is to some extent caused by lack of familiarity with protective labor laws and with our legal system for redress of grievances. However, the single biggest factor contributing to the ability to exploit undocumented workers is the *viable threat of deportation.* It is the employer's ability to tell workers "if you complain I will call the Immigration Service." Given that 95% of all INS arrests are targetted against Mexican nationals (compared with the 1980 Department of Census finding that only 45% of all undocumented immigrants are Mexican nationals), the employer's threat is particularly serious when made to Mexican workers.

Unlike European undocumented immigrants, normally given two or three months "voluntary departure" to leave the country, Mexican and Latino persons arrested by INS are generally deported within five to six hours. Under these circumstances the forced removal from the country totally cuts off any ability by the workers to fight labor (i.e. exploitation) issues. Rather than emphasizing the need to clear INS visa backlogs (i.e. service work), or the need to modify arrest and deportation practices to reduce exploitation of Mexican and other Latino workers, the Reagan proposal will simply increase the militarization of INS and increase exploitability at the same time.

THE "LEGALIZATION" PROPOSAL

The so-called "Amnesty", ostensibly designed to eliminate the second-class status of undocumented workers, in fact merely institutionalizes that second-class status.

Undocumented immigrants now in the U.S. and here since before January 1, 1980 could apply for a new temporary status, "renewable term temporary resident," which would permit employment. They would pay Social Security, income and other taxes, but would not have access to welfare, Federally assisted housing, food stamps, or unemployment insurance and could not bring in their spouses and minor children. This status could be renewed every 3 years. After 10 years residence (which could include residence here before acquiring renewable term temporary residence) the immigrant could apply for permanent resident status, if not otherwise inadmissible and capable in the

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N.C.I.R. WASHINGTON OFFICE

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The National Center for Immigrants' Rights is actively soliciting articles from immigration attorneys for publication in the Immigration Law Bulletin. Please send all material for consideration to:

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Description and Analysis of Pending Immigration Legislation

The following is a list of legislation pending in the Congress as of early August. Except where otherwise indicated, the bills have been referred to the House or Senate Judiciary Subcommittees on Immigration.

The summary listing of pending legislation is followed by a fuller description of certain critical bills.

HOUSE BILLS PENDING

H.R. 53 — Ashbrook (R-Ohio)
To amend the National Labor Relations Act to exclude undocumented workers from coverage under the act. (Education and Labor)

H.R. 74 — Ashbrook (R-Ohio)
To amend the Fair Labor Standards Act of 1938, as amended, to exclude undocumented workers from coverage under the act. (Education and Labor)

H.R. 123 — Bennett (D-Fla.)
To amend Title XVI of the Social Security Act to provide that an immigrant may not qualify for supplemental security income benefits unless he not only is a permanent resident of the United States but has also continuously resided in the U.S. for at least 5 years. (Ways and Means)

H.R. 156 — Burgener (R-Cal.)
To amend the INA to prevent the illegal entry and employment of aliens in the U.S., to facilitate the admission of aliens for temporary employment, to regulate the issuance and use of social security and account cards, and for other purposes. (Judiciary, Education and Labor, and Ways and Means)

H.R. 185 — Danielson (D-Cal.)
To amend the INA to provide that any person who pays any compensation to an undocumented immigrant shall be guilty of a petty offense and subject to a fine.

H.R. 186 — Danielson (D-Cal.)
To amend the Internal Revenue Code of 1954 to disallow deductions from gross income for salary paid to immigrants illegally employed in the U.S. (Ways and Means).

H.R. 317 — Hightower (D-Tex.) and others
To amend the INA to provide for the deportation of nonimmigrant students who knowingly participated in activities inconsistent with the terms of their admittance to the United States.

H.R. 352 — Hyde (R-Ill.)
To amend the Federal Criminal Code to establish penalties for the use or supply of false documentation or birth or immigration documents of another, for purposes of obtaining a Federal document containing an element of identification.

H.R. 378 — Luken (D-Ohio)
To require adjustments in census population figures for immigrants in the United States illegally so as to prevent distortions in the reapportionment of the House of Representatives, the legislative apportionment and districting of the States and the allocation of funds under Federal assistance programs.

H.R. 442 — Quillen (R-Tenn.)
To provide a three-year residency requirement for immigrants receiving supplemental security income benefits and to require every person admitted for permenent residence to have a sponsor who will contract to support him for three years, or to have other means of support. (Judiciary and Ways and Means)

H.R. 451 — Robinson (S-N.Y.)
To provide for the exclusion from the United States of persons affiliated with terrorist organizations, to require investigations of registered agents, and for other purposes.

H.R. 582 — Roybal (D.-Cal.)
To amend the INA, and for other purposes.

H.R. 619 — Shumway (R-Cal.)
To amend the INA to facilitate the admission of temporary workers for temporary agricultural employment.

H.R. 620 — Shumway (R-Cal.)
To amend the INA to provide for labor certification on an area-wide, rather than on a countrywide, basis for admittance of temporary agricultural laborers.

H.R. 724 — Collins (R-Tex.)
To amend the INA to require that any person who has been temporarily excluded shall have the right to be represented by counsel from the time of such detention or exclusion; and for other purposes.

H.R. 755 — Kazen (D-Tex.)
To amend the Public Works and Economic Development Act of 1965 to direct the Southwest Border Regional Commission to make grants to eligible local education agencies for school facilities construction to assist such agencies in providing education to immigrant children. (Education and Labor and Public Works and Transportation)

H.R. 793 — Chappell (D-Fla.)
To amend the INA to provide for the deportation of certain nonimmigrants who knowingly participated in unlawful or violent acts in connection with a political demonstration.

H.R. 808 — McKinney (R-Conn.)
To amend the INA to provide preferential treatment in the admission of certain children of U.S. Armed Forces personnel.

H.R. 944 — White (D-Tex.)
To amend the INA to provide for the issuance of nonimmigrant visas to certain persons entering the United States to perform services or labor of a temporary or seasonal nature under specific contracts of employment and fair employment conditions; to require an immigrant to maintain a permanent residence as a condition for entering and remaining as an immigrant of the U.S., and for other purposes.

H.R. 1073 — Hinson (R-Miss.)
To amend the INA to prevent the illegal entry and employment of persons in the U.S., to facilitate the admission of workers for temporary employment, and for other purposes.

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Immigration Legislation *(Continued from page 3)*

H.R. 1215 — Whitehurst (R-Va.)
To provide for the deportation from the U.S. of certain persons who engage in demonstrations in support of acts of anti-American terrorism.

H.R. 1216 — Whitehurst (R-Va.)
To provide for the cancellation of nonimmigrant visas of Iranian students and for the prompt departure of such students from the U.S.

H.R. 1370 — Danielson (D-Cal.)
To provide that no relocation payments made under the Uniform Relocation Assistance Act shall be paid to persons who are unlawfully present in the U.S. (Public Works and Transportation)

H.R. 1643 — Grisham (R-Cal.) and others
To prohibit the use of Federal housing assistance with respect to certain non-citizens. (Banking, Finance and Urban Affairs)

H.R. 1650 — Lungren (R-Cal.) and others
To amend the INA to establish a program to permit nationals of Mexico to enter the United States to perform temporary services or labor.

H.R. 1680 — Young (D-Mo.)
To amend Title XVI of the Social Security Act to provide that certain immigrants may not qualify for supplemental security income benefits unless they not only are permanent residents of the U.S. but have also continuously resided in the U.S. for a period of 5 years. (Ways and Means and Judiciary)

H.R. 1965 — Hughes (D-Cal.)
To amend the INA to provide criminal penalties for the knowing employment of undocumented workers.

H.R. 1980 — Burton (D.-Cal.)
To amend the INA to permit more persons to immigrate from colonies of foreign states.

H.R. 2142 — Lungren (R-Cal.) and Danielson (D-Cal.)
To amend the Refugee Act of 1980 to extend the period for payment of child welfare services and cash and medical assistance for certain refugees.

H.R. 2293 — De la Garza (D-Tex.)
To provide general assistance and special impact aid to local educational agencies for the provision of educational services to undocumented children to whom State and local educational agencies are required, by order of any Federal court, to provide educational services or who are permitted under any such order to receive the benefits of State funds available for educational purposes. (Education and Labor)

H.R. 2458 — Lowery (R-Cal.)
To amend Title 10, United States Code, to eliminate the requirement that students in Junior Reserve Officer Training Corps be citizens or Nationals of the United States. (Armed Services)

H.R. 2490 — Bonker (D-WAsh.)
To require that non-citizen employment restrictions be marked on work ID cards and that such cards be presented to employers by prospective employees and to limit the use of such cards as ID cards.

H.R. 2556 — Shelby (D-Ala.) and others
To amend the INA to authorize the President, in the case of acts of terrorism or other hostile acts committed with the participation or acquiescence of a foreign state, to exclude and deport from the United States nonimmigrants who are nationals of that State.

H.R. 2782 (same as S. 776) — Beard (R-Tenn.) and Coelho (D-Cal.)
To amend the INA to more fully limit and control immigration in the U.S., and for other purposes.

H.R. 2954 — de la Garza (D-Tex.)
To provide general assistance and special impact aid to local educational agencies for the provision of educational services to undocumented children to whom State or local educational agencies provide educational services. (Education and Labor)

H.R. 2984 — Daniel (D-Va.)
To amend the INA to repeal the authority under section 212 of that act to establish an adverse wage rate for nonimmigrants brough into the United States for agricultural labor.

H.R. 3052 — Blanchard (D-Mich.)
To amend Title XVI of the Social Security Act to provide for a more complete exchange of information between the Secretary of Health and Human Services and the INS with respect to all immigrants who are applicants for or recipients of supplemental security income benefits, and to amend section 212 of the INA to provide for the exclusion from the U.S. of persons who are determined by the Attorney General to be likely to receive such benefits within six months of their entry. (Ways and Means)

H.R. 3076 — Goodling (R-Pa.)
To consolidate educational assistance programs for refugees. (Education and Labor)

H.R. 3206 — Pepper (D-Fla.)
To provide for grants to localities for their reasonable humanitarian and administrative expenses related to the presence of undocumented immigrants within their jurisdiction.

H.R. 3405 — Frank (D-Mass.)
Amends the Immigration and Nationality Act, Section 101(b)(1)(D), to allow relationship of illegitimate child to a natural father to constitute parent-child relationship; to equalize the position of natural fathers and natural mothers.

H.R. 3524 — Dixon and others
To remove "sexual deviation" as a bar to entry under Section 212 (a) (4), 8 U.S.C. § 1182 (a) (4).

H.R. 3517 — Delugo
The Virgin Islands Alien Adjustment Act, which has broad support among all sectors of Virgin Islands society. Would allow certain temporary workers to adjust status to permeanent residents.

H.R. 4162 — Sensenbrenner (R-Wis.)
To provide "a tougher national policy regarding immigration and refugee matters." 1) 350,000 — 420,000 total immigration, including refugees and immediate family; 2) restrictions on exercise of Attorney General's parole authority; 3) eliminates suspension of deportation except under narrow circumstances; 4) cooperation between INS and state and local law enforcement efforts; 5) increase in Border Patrol to 6,000; 6) makes deportable all non-citizens aiding illegal entry (removing the "for gain" requirement for liability under present law); 7) undocumented

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National Immigration and Refugee Network: Opposition to Reagan Immigration Plan

The National Immigration and Refugee Network is a coalition of organizations directly involved in protecting and promoting the rights of immigrants and refugees, formed at the National Consultation held in Washington, D.C. on August 3 through 5, 1981. 150 participants attended the consultation representing more than 90 community-based organizations. The following position paper was written and adopted by the National Network:

The National Immigration and Refugee Network, a recently formed coalition of over 90 organizations active in immigration and refugee defense work, expresses its *total and unequivocal opposition* the Reagan immigration plan announced on July 30, 1981.

The Reagan immigration and refugee proposals entirely fail to address the fundamental social and economic causes of migration into the United States. Instead, the proposals serve to further the administration's economic policies targeted against poor and working people living in the United States. Implementation of the Reagan immigration and refugee plan will institutionalize the disruption of nuclear families, the exploitation of immigrant workers and will promote negative international opinion against the United States and its people.

For many years undocumented communities in this country have expected and have worked for a just and humane legalization program which would recognize and accept their full participation in the economic and social life of this nation. During this period these immigrants have significantly contributed to the economic, social and cultural development of this country, while concurrently suffering family separations, threats of deportation, extreme vulnerability at the hands of employers and lack of access to basic health, education and social services.

THE LEGALIZATION PROGRAM

Rather than proposing a full and expeditious legalization program for persons currently living in the Untied States without lawful immigration status, the Reagan Administration's plan would create a ten-year waiting period during which time immigrant workers would only be guaranteed temporary status, would not be eligible for family reunification and would be required to pay taxes without gaining eligibility for many basic social services. In addition, the Reagan plan calls for the importation of at least 50,000 temporary workers, most of whom would be Mexican nationals. Rather than being the legalization program for which immigrant communities have waited for many years, the Reagan plan would simply legitimize and perpetuate the exploitation of immigrant and refugee workers:

1. Implementation of the Administration's "legalization" plan would force the long term division of nuclear families;

2. The ability of workers involved in the "legalization" program to improve their wages and working conditions would be severely curtailed by the threat of losing jobs (putting into jeopardy the workers' ability to renew his/her immigration status), the inability to lawfully immigrate family members whose incomes could be united to support the family, and their lack of access to unemployment compensation and other social services;

3. Under the "legalization" program, workers would be required to renew temporary status visas every three years. The need for this institutional review will increase rather than decrease the fear of deportation and will therefore perpetuate the economic and social vulnerability caused by the threat of deportation;

4. While workers involved in the "legalization" program would be required to pay taxes, they would not be eligible for most public services resulting in a windfall to U.S. citizens;

5. No guarantee is provided that after ten (10) years the "legalization" program applicant will be granted permanent residency. Exclusion laws which would be applied at the end of the ten years residency period will result in hundreds of thousands of persons being denied permanent resident status;

6. The imposition of an English-speaking ability requirement for permanent residency at the end of the ten year period places an additional burden on program applicants not required of any other applicants for immigrant status. This requirement will strongly discriminate against program applicants from Asia, Central and South America.

The planned "legalization" program leaves many questions unanswered, such as:

1. Does the ten year period require continued physical presence in the United States?

2. If a continuous physical presence is not required, precisely how will absences from the United States be measured?

3. Would undocumented children and unemployed spouses now living in the United States be eligible for a renewable temporary visa?

4. Would undocumented persons with seven (7) years continuous residence remain eligible to apply for suspension of deportation under exising law?

5. What would the rights be of an undocumented worker with nine (9) years residence who loses an arm while on the job and becomes unable to accept employment in order to complete the (10) year residency requirement?

The program offered by the new Administration provides no incentive for workers to register but rather serves as a deterrent to their full and meaningful participation in society. The "legalization" program, taken with the proposed 50,000 "pilot" guestworker program, would, if implemented, create the largest temporary worker program in the history of this country. The power of employers over their employees would be increased rather than decreased and immigrant communities will experience a growth in exploitation.

EMPLOYER SANCTIONS

The Reagan plan's proposal for an employer sanctions law will only serve as a toll for spreading anti-immigrant attitudes and perceptions. The sanctions will be borne by the workers

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Resolutions Adopted by the National Immigration and Refugee Network

August, 1981

1. The National Immigration and Refugee Network is totally and unequivocally opposed to the Reagan immigration and refugee plan announced on July 30, 1981 in its entirety.

2. The National Immigration and Refugee Network resolves to work at local, state and national levels to explain its opposition to the Reagan immigration and refugee plan to community organizations, church groups, independent unions and affiliated unions. The Network further resolves to build a massive national coalition opposed to implementation of the Reagan immigration and refugee plan.

3. The National Immigration and Refugee Network resolves to make special efforts to explain our opposition to the Reagan immigration and refugee plan to representatives of affiliated labor at local, regional and national levels.

4. The National Immigration and Refugee Network resolves to meet with as many members of Congress as possible during the months of August and September, 1981, to explain our opposition to the Reagan immigration and refugee plan.

5. The National Immigration and Refugee Network resolves to support the All-Peoples Congress.

6. The National Immigration and Refugee Network resolves to support the AFL-CIO sponsored "March for Jobs" to be held in Washington, D.C. on September 18, 1981.

7. The National Immigration and Refugee Network resolves to advise immigrant communities throughout the United States to not surrender to the Immigration and Naturalization Service in anticipation of a "legalization" program.

8. The National Immigration and Refugee Network resolves to establish a National Coordinating Committee which will serve as an interim body to provide direction and coordination for the Network.

9. The National Immigration and Refugee Network resolves to call upon the United States government to adhere to current U.S. laws and regulations concerning the treatment of refugees and asylees and the United Nations Protocol on Refugees and to halt all deportations to Haiti and El Salvador and to grant refugee status to all Haitians and Salvadorans currently residing in the United States.

10. The National Immigration and Refugee Network resolves to call upon the United States Government for a fair and humane application of the Refugee Act of 1980 in accordance with the United Nations Protocol on Refugees and all international treaties to which it is a signator.

11. The National Immigration and Refugee Network resolves to call upon the United States Government to end its repressive application of domestic and international refugee obligations currently applied on the basis of foreign policy considerations totally extraneous to the merits of individual refugee and asylum applications.

12. The National Immigration and Refugee Network resolves to join with the National Center for Immigrants' Rights and other interested organizations in initiating national and local litigation challenging the United States' Government treatment of Salvadorean refugee currently residing in the United States.

13. The National Immigration and Refugee Network resolves to defeat the Reagan plan to initiate interdiction in the open seas of Haitian boatpeople.

Network Opposition *(Continued from page 5)*

rather than the employers. The proposal would create a legal basis for employment discrimination against minority workers, who will seldom have meaningful access to an already overworked Department of Labor. The superficial nature of the proposal with regards the process for determining worker eligibility will, in almost every case, remove any liability on the part of the employers. Historically, employer sanction laws already enacted by several states and local jurisdictions have never been inforced. Neither the inclination nor the resources will be available to achieve a level of enforcement which would begin to deter employers who use undocumented labor. While the proposed law would be largely unenforceable from the standpoint of achieving employer compliance, it would provide yet a further excuse for businesses to close factories, terminate minority workers and disrupt the organization of labor.

ENFORCEMENT

The Administration's policy calling for increased enforcement of immigration laws through expansion of the U.S. Border Patrol would further perpetuate the historical role of the Patrol as a repressive police force which militarisitically and in a racially discriminatory manner serves as the primary tool for the exploitation of undocumented workers. Recent Government figures indicate that the Mexican component of the undocumented population is approximately 45%, while some 95% of those detained, arrested and deported by the Border Patrol are of Mexican origin. It is this precise targeting of Latino communities for deportation which more than any other factor ultimately allows for their exploitation by employers. As such, the National Immigration and Refugee Network rejects any efforts to further militarize the U.S.-Mexico border as a supposed solution to the complex issue of international migration.

FOREIGN POLICY IMPLICATIONS

Specific elements of the Administration's immigration and refugee proposals also contain grave implications for U.S. foreign policies. In relation to Mexican and Haiti, the proposals

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Freedom of Information Request for INS Salvadorean Documents

The following letter was sent to INS on August 16, 1981, seeking access to certain information in the possession of the agency concerning Salvadoran refugees:

Doris Meissner
Acting Commissioner of the
Immigration and Naturalization Service (INS)
425 Eye Ave., N.W.
Washington, D.C. 20536

Dear Ms. Meissner:

This letter is written in behalf of El Rescate, a church-funded project providing social and legal assistance to Salvadoran refugees in the United States, the Southern California Conference of Churchs, the United Methodist General Board of Church and Society, the Southern California Interfaith Task Force on Central America, Lutheran Council in the U.S.A., the American Friends Service Committee and the American Committee for the Protection of the Foreign Born.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended by* Pub.L. 93-502, 88 Stat. 1561, they wish to gain access to, and the opportunity to copy, or be provided copies of the following:

1. The names of all persons required to return to El Salvador under INS safeguards whether pursuant to 8 C.F.R. §§ 242.5 or 244, or under final order of deportation, between March 1, 1981 and August 1, 1981, and the El Salvador addresses listed for such persons and dates of removal;

2. All directives, memoranda, letters or other records which relate to the establishment, modification, explanation, suspension, implementation or termination of any INS policy and/or practice with regards nationals from El Salvador.

With regards the second request for directives, etc., the abovementioned organizations would include in, but not limit to, the following directives, memoranda, letters or other records: Communications between *(i.e. from or to)* the Central Office of INS and INS District or Regional Offices, the White House, Justice Department and State Department, and communications from one INS employee to another INS employee within the Central Office, concerning (i) bond settings or conditions of release from custody, (ii) places and conditions of detention, (iii) arrest and processing procedures, (iv) processing of asylum claims, (v) predeportation hearing voluntary departure procedures, (vi) access to counsel procedures, (vii) procedures for transportation under safeguards to El Salvador, and (viii) training of INS employees and Immigration Judges for the handling of Salvadoran asylum applications. These documents are sought only to the extent that they concern Salvadoran nationals.

We note that with regards request number 1, for names and addresses of persons returned to El Salvador, similar information was sought and obtained for persons returned to Haiti by INS. *See, The National Council of Churches, et al., v. Immigration and Naturalization Service, et al.,* Case No. 78-5163-Civ-JLK (United States District Court, Southern District of Florida). The organizations listed in the first paragraph of this letter are all involved in providing assistance to Salvadoran nationals seeking political asylum in the United States. The information sought in request number 1 is critical for at least two reasons: (1) Numerous news media reports assert that refugees leaving El Salvador and those returned by INS have been arrested and/or killed *(see, e.g., Washington Post,* January 7, 198, p. A-24; *new York Times,* June 8, 1981, p.6; *New York Times,* February 2, 1981, p. 1; *Los angeles Times,* July 15, 1981, p.1; and (2) Hundreds of families have sought assistance from the requesting organizations attempting to locate relatives arrested by INS agents and who cannot be located by the organizations. With access to the requested information the safety of those returned to El Salvador could be investigated and families in the United States could obtain more precise information on the whereabouts of close relatives arrested by INS agents.

The documents sought in request number 2 are critically important to those organizations assisting Salvadoran nationals with the processing of political asylum applications. For example, a top INS official was recently quoted as stating that

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Network Opposition *(Continued from page 6)*

seek to directly dictate the actions of sovereign nations:

1. The attempt to enlist the assistance of Mexico in restraining third countries' nationals from migrating to the United States through Mexico:

— will disrupt unity efforts between Latin American and Caribean countries;

— Violates Mexico's sovereignty;

— Runs counter to internationally acceptable practices.

2. The attempt to enlist the Haitian government's cooperation in preventing the exodus of Haitian people:

— Endorses the repressive character of the Duvalier regime in Haiti;

— Serves to defeat domestic and international obligations concerning the plight of refugees;

— Will result in even more perilous forms of escape from Haiti.

The proposal to "interdict" boats in the high seas sets a dangerous precedent for international relations. It is a practice that has been rejected by most of the world, and was specifically rejected by the United States government when other governments attempted to interdict Vietnamese and Cambodian boatpeople. Implementation of this proposal will violate international obligations entered into by the United States government with regards to the treatment of refugees.

IN CONCLUSION, the National Immigration and Refugee Network condemns the Reagan immigration and refugee plan. Taken in its totality, the plan is a logical extension of previous efforts to institutionalize the subjugation of undocumented workers and drive a wedge between the working people of this country. The plan represents more than anything else a capitulation to those forces which wish to continue and expand their exploitation of foreign-born workers in this country. The Network opposes the plan and rather supports full labor and social rights for undocumented workers residing in this country and the full reunification of families without regard to quotas, backlogs and age limitations.

NCIR Challenges INS Deportations of Minor Children

by: Timothy S. Barker
(Attorney, NCIR, Los Angeles)

The arrest and summary removal of unaccompanied children under INS' voluntary departure procedure is the subject of a class-action challenge brought in *Jose Funez-Perez, et al., v. District Director, et al.*, No. 81-1457-CBM (Central District of California). The action was filed on behalf of all children under the age of eighteen who at the time of their arrest by INS agents are unaccompanied by either of their parents. The lawsuit seeks declaratory and injunctive relief requiring INS to appoint either an attorney or other qualified person under 8 C.F.R. § 292 to represent the child and to bring him/her before an Immigration Judge before any voluntary departure agreement can be executed. Motions for class certification and preliminary injunction are now pending before the federal district court.

THE CASE OF JOSE PEREZ-FUNEZ

Jose Perez-Funez, a fifteen year old Salvadoran, fled the spreading violence in that country intending to join his parents who were living in New York. His father is a lawfully admitted permanent resident and his step-mother is a United States citizen. His hopes for reunion with his family were almost dashed when he was arrested by U.S. Border Patrol agents near San Diego, California.

Upon his arrest Jose Perez-Funez was taken to the Chula Vista Border Patrol office for processing. He told the agent that his father and step-mother were living in New York and that he did not want to return to El Salvador. Apparently unimpressed, the Border Patrol agent presented him with a voluntary departure agreement telling Jose if he did not sign the form he would "go to jail." The agent also told him a similar fate would befall him if he applied for political asylum. Jose was not even given an opportunity to read the form. Thinking he had no alternative, he signed it. He was then transported to Los Angeles to be sent by air back to El Salvador.

On the same afternoon that Jose was to be deported, NCIR received a call from a relative in New York telling of his plight and asking for assistance. An NCIR staff attorney went to the INS detention center to interview Jose and to obtain a retraction of the voluntary departure. The interview lasted only a few minutes when it was cut short by INS agents who pulled Jose out of the interview room. He was taken into a backroom and coerced into again signing the voluntary departure form by threats of long imprisonment. He was then put on a bus bound for Los Angeles International Airport for an airplane back to a very uncertain fate in El Salvador. The NCIR staff attorney immediately filed a habeas corpus action in federal district court and, minutes before the airplane was about to depart, obtained a retraining order requiring that Jose Funez-Perez not be deported.

The habeas corpus petition has now been amended incorporating a class action complaint for declaratory and injunctive relief. In support of the motion for the preliminary injunction more than ten (10) cases have been documented of children subjected to similar treatment, including three in which habeas corpus actions were necessary to prevent summary removals and another where the children were removed to Salvador while their parents were desperately trying to locate them.

THE " VOLUNTARY DEPARTURE" PROCEDURE

The "voluntary departure" procedure authorized under 8

(Continued on page 9)

FOIA Request *(Continued from page 7)*

"Salvadoran [asylum] applicants would have to show written proof" in support of their asylum claims. *Los Angeles Times*, July 15, 1981, p. 1. No similar requirement has ever been announced by INS for asylum applicants from any other country. The requesting organizations have received numerous reports from attorneys, legal workers, community and church organizations representing Salvadoran nationals in asylum proceedings indicating that extraordinarily high bonds are set in these cases, threats and physical abuse are used to convince Salvadoran nationals to waive their right to apply for political asylum, Salvadoran nationls are involuntarily removed from the United States without noice being provided to attorneys of record, and children are being removed to El Salvador without being provided the assistance of counsel, parents or guardians when waiving their rights to due process deportation hearings.

In short, compliance with this request will provide the requesting organizations with information which will be used to assist Salvadoran nationals and which may, in some cases, involve life and death matters for those assisted.

Since none of the statutory exemptions from the Infomation Act's mandatory disclosure provisions applies, access to the requested records should be granted within ten (10) working days. Please contact me by calling *collect* at (213) 487-2531 indicating the exact time and place at which access will be granted or the requested materials can be obtained.

In the unlikely event however that access is denied to any portion of the requested materials, please describe the deleted material(s) in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged

(Continued on page 9)

Salvadorean Children *(Continued from page 8)*

U.S.C. § 1252(b) essentially entails obtaining a waiver from the non-citizen of his/her constitutional and statutory right to a deportation hearing before being removed from the country. *See, Chew v. Colding,* 433 U.S. 590 (1953). INS agents generally obtain this waiver during incommunicado interrogations shortly after arrest. Clients consistently report that the pressures to sign the waiver are enormous, including misstatements of the law and overt threats if it is not signed. These threats typically include long-term incarceration, high bails, arguments that a lawyer can be of no help, and that if they go to a hearing they will never be able to return to the U.S., and that the Immigration Judge "will throw the book at you."

Once the person executes the waiver, s/he is subject to immediate removal from the country. The practice of INS is to apply this procedure to adults and children alike.

LEGAL PROTECTIONS FOR MINORS

In contrast to INS procedures, state and federal law are replete with special provisions designed to protect minors because of their lack of fully developed capacities. Under California law, a minor is not considered "sui juris" or his own master in the broad sense of the term until s/he attains the age of majority. *Todd v. Orcutt,* 42 Cal. App. 687 (1919). Minors are presumed by law to be incapable of exercising sound discretion over their affairs. *De Levillain v. Evans,* 39 Cal. 120 (1870). Under law they cannot make binding contracts like adults (Civil Code §§ 33, 34, 35, 1556, 3103; Labor Code § 300) except for necessities, and even then only to the extent of their reasonable value. Civil Code § 1722. A minor cannot appear in civil court without a guardian. Civil Code § 42. The doctrine of estoppel cannot be asserted against minors. *Lackman v. Wood,* 25 Cal. 147, 153 (1864). *Lee v. Hibernia Savings and Loan,* 177 Cal. 656, 660 (1918). Their claims cannot be compromised without court approval. Probate Code § 1431. They cannot appoint an agent. 3 Cal. Jur., Agecy § 10. They cannot marry without consent of a parent and court approval. Civil Code § 4101(b)(2).

Under Federal law children under 18 cannot sue in court unless represented by a guardian or next friend. Federal Rules of Civil Procedure 17(c); Court of Claims Rule 61. They are protected by special labor laws. (E.g. 29 U.S.C. § 212 which prohibits interstate commerce in goods made by children under eighteen in oppressive conditions(. They are not subject to the draft until they are eighteen. 50 U.S.c. App. § 453. They are not immediately subject to the adult courts while they are under eighteen. 18 U.S.C. § 3050.

These cases and statutory provisions evidence a judicial and legislative presumption that children under the age of eighteen are not fully capable of acting as rational *adults* and as such are deserving of special protections to insure that their best interests are preserved. As such, procedures involving children must take into account the special nature of the child. INS procedure fails to do this.

It is evident that the voluntary departure procedure is totally inadequate to insure that "voluntary, intelligent and knowing" waivers are obtained from unaccompanied children. The complexity of the immigration laws, the fact that the children cannot adequately comprehend the nature of the proceedings due to their age, their lack of familiarity with our institutions, and the inherent as well as over coercion in the voluntary departure procedure combine to make valid waivers by unaccompanied children impossible. Current INS procedure violates the Due Process Clause of the Fifth Amendment.

Jose Perez-Funez's case and the ten (10) additional cases submitted to the federal district court for consideration highlight the fundamental unfairness of the voluntary departure procedure. Jose, as the step-son of a U.S. citizen, is eligible for immdiate permanent residence status. 8 U.S.C. § 1151(b). He has the right to remain in this country pending adjudication of his immigration petition. 8 C.F.R. § 242.5. In this case INS tried to deport a *documentable* child. He was also eligible to apply for political asylum and remain in the country pending its adjudication. 8 U.S.C. § 1158. If he had been represented by counsel after being arrested, Jose would not have signed the voluntary departure form waiving these important rights entitling him to remain in the United States.

The procedure proposed in this litigation will adequately safeguard the interests of unaccompanied children who are arrested by INS. And it will prevent the continued summary deportation procedures from being applied to children in violation of basic due process principles.

For further information contact Timothy S. Barker, NCIR, Los Angeles at (213) 487-2531.

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statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful to my clients in deciding whether to appeal an adverse determination, and in formulating their arguments in case they do appeal. Your written justifications might also help to avoid unnecessary litigation.

Anticipating release of the requested documents, we also request that you waive any applicable fees in that it would clearly be "in the public interest" to investigate the safety of those returned to El Salvador and to understand INS policies with regards the processing of Salvadoran nationals seeking refuge in this country. *See* Conference Report, 93-1380, p. 8. The Senate Bill approved unanimously by the Judiciary Committee contained the language finally approved. The Senate Committee Report (93-854) states that "[t]his public interest standard should be liberally construed by the agencies . . ." [At p. 12.] The public interest clearly supports a fee waiver with regards this request which is meant to benefit tens of thousands of largely indigent Salvadoran refugees. In any event, those making this request do not wish to delay your response with regards access to the requested materials on the grounds of the fee waiver question. If the fee waiver is not granted, that issue will in all likelihood be appealed.

We await your prompt reply.

Yours truly,

PETER A. SCHEY
Directing Attorney

ccs: U.S. Attorney (Los Angeles)
U.S. Attorney (Washington, D.C.)

Analysis: Reagan Plan *(Continued from page 2)*

English language. *It is clear, therefore, that the "amnesty" is in fact a thinly disguised temporary worker program which will satisfy the desire of exploitative employers for cheap labor which will be discouraged from asserting basic rights by the threat of termination of status.*

Similar defects plague the proposal for a large "experimental" temporary worker program for Mexicans. Indeed, this population will be even more easily intimidated by virtue of the fact that these workers would be admitted annually for stays of a maximum of twelve months.

The creation of a population of workers without labor and/or social rights is objectionable not only on humanitarian grounds, but also to the pragmatic self-interest of all workers in this country. Major labor and minority organizations have consistently opposed temporary worker programs on the grounds that the existence of a "second-class" population allows employers to avoid the struggles of *all* workers for improvement of wages and working conditions.

Some organizations which have thus opposed temporary worker programs have also supported proposals for employer sanctions, on the grounds that undocumented workers are workers without rights, and should be excluded from the workforce. The Administration's proposals on employer sanctions offer a valuable opportunity to reveal employer sanctions as the anti-worker proposal that they are and to convince the natural allies of immigrant workers, including blacks and organized labor, that sanctions must be rejected.

EMPLOYER SANCTIONS PROPOSAL

The Administration ostensibly proposes that employers of undocumented workers be fined. However, employers who go through the formality of checking identification (easily forged) and filling out a form will have an absolute defense. Thus, there is no effective penalty against the employer. Moreover, the Department of Labor will never have sufficient resources to pursue a large enough number of employers with sufficiently tough penalties to serve as a general deterrent to the hiring of undocumented labor. Many critics of the proposal have already pointed out that fines against employers will merely be passed on to the workers in the form of lower wages, depressed working conditions, production speed-ups, etc.

However, the institution of an employer sanction system will confer an appalling degree of power upon the employer, a power he may use to discriminate against minorities, union activists and women. (The duty to screen will provide a perfect excuse.) Well-meaning and cautious employers may discriminate against Latinos, Asians and other foreigners to protect themselves from liability.

Employer sanctions were originally proposed so as to remove an employer's power to call INS in to deport his undocumented employees when faced with a unionization drive. Now it is clear that sanctions will only provide an extra reason for the issuance of search warrants for factory raids, thus increasing rather than diminishing the intimidation of labor organizing efforts. This is obviously also harmful to documented employees interested in organizing their work places.

It is expected that there will be significant congressional attempts to attach to the sanctions proposal a supposedly "counterfeit-proof" national identification "work card." This would be of little use in making sanctions effective or non-discriminatory, but would have significant implications for civil liberties. Those supporting creation of a national work ID card (e.g. Senator Simpson) fail to explain how minority workers (e.g. unemployed black youth) will be induced to appear at a federal agency for an interview to determine their eligibility for a work card, how the system would deal with those who do not have proof of birth in the United States (many minorities will be in this position), how an appeals process would work for those denied a work card, etc. Perhaps more importantly, unions may well question imposition of a new federal system which delivers awesome power to the government over *all* workers through information which will be held in computers concerning *every* worker in this country.

Support for employer sanctions invites imposition of a national "work-card" ID system, something this country has done without for two hundred years. Unions must begin to understand that an employer sanctions law is not the panecea they have seen it as in terms of solving the question of undocumented migration. *In our view protecting and promoting the labor and social rights of undocumented workers is the solution that organized labor should be exploring.*

OTHER ADMINISTRATION PROPOSALS

Other salient features of the Administration's proposals are as follows:

Numerical limitations. The worldwide annual numerical limit would be raised to 310,00 and the ceiling for Canada and Mexico would be raised to 40,000 each, with allotments unused by one transferable to the other.

Labor certifications. In non-family cases, individual labor certifications on a case-by-case basis would be eliminated, being replaced by lists of occupations for which adequate domestic workers are in short supply.

Refugees. The existing provisions of the Refugee Act of 1980 would be largely continued, including categorical benefit programs, but levels of cash assistance payments would be reduced.

Cuban/Haitian Program. The Cuban Adjustment Act of 1966 would be repealed. Cubans and Haitians here before January 1, 1981 could apply for a renewable term entry card, which could be renewed every 3 years. After 5 years, they could apply for permanent resident status if otherwise admissible and capable in the English language.

CONCLUSION

A conference of refugee and immigration advocates, held in Washington, D.C. August 3-5, 1981, formed the National Immigration and Refugee Network to oppose the Administration's proposal and to promote an enlightened immigration and refugee policy. This network is preparing a substantial analysis of selected features of the Administration's package. For further information about the Administration's proposals, copies of the Attorney General's testimony, or information about the legislative prospect for the Administration's proposals, contact Amit Pandya, NCIR, Washington, D.C. Counsel, 1511 K Street, N.W., Suite 931, Washington, D.C. 20005, or telephone (202) 737-1444.

The Case Against Employer Sanctions

by Amit Pandya
NCIR Washington, D.C. Counsel

The Administration's proposal of an "employer sanctions" law inevitably furthers its overall offensive against the working and living standards of all working and poor people. In this respect, it is entirely consistent with the Administration's other proposals on immigration policy. Both social research and common sense suggest that employer sanctions will not stem unemployment or raise wages and working or living standards. Nor will they effectively penalize employers who violate the law. They will, however, contribute to the enlargement of the underground population of super-exploitable workers in U.S. society; inhibit efforts at labor organization amongst all workers, documented or undocumented; allow employers to refuse employment to persons on the basis of union sympathies, political belief, personal appearance or life-style; encourage widespread employment discrimination against minority workers by cautious, well-meaning and law-abiding employers; provide a cover for racially prejudiced employers to practice, with impunity, their prejudices against foreigners and ethnic minorities; and provide an inscrutible cover for discrimination on the basis of sex.

The proposal of employer sanctions is but one further instance of the now familiar attempt by those who wield wealth and power to divide poor and working people on the basis of national status. Earlier in this century all foreign workers were made scapegoats for the inability of economic and social policies to provide jobs and a tolerable living standard to American workers. Today we are presented with the undocumented workers in the role of scapegoat for the decline in the living standards of American and legally resident immigrant workers. Undocumented workers, according to the Department of Justice's Problem Statement, can strain community services and create potential problems for some American job seekers. Furthermore, so the argument runs, since they are afraid to seek the protection of U.S. laws, many will work in "sweatshop" conditions for less than legal minimum wages. Consequently, we are told, it must be made illegal for undocumented workers to obtain jobs, so that their supposed negative effect on the job market and on workplace conditions will be eliminated, and so that, in the future, would-be illegal entrants will be discouraged from coming to this country.

DO WE NEED EMPLOYER SANCTIONS?

Do Undocumented Workers Burden Social Services?

Studies conducted by Los Angeles and San Diego Counties, The U.S. Department of Labor and by the Mexican Government's National Survey on Migration to the Northern Border and the United States (CENIET) all demonstrate that undocumented workers/immigrants contribute more to social services in the form of taxes than they take out in the form of services.

Will Employer Sanctions Reduce Unemployment?

Unemployment in America today is not caused simply by a shortage in the total number of jobs. While many workers are out of work, many jobs go begging either because there is a shortage of workers willing to do menial or casual jobs, or because other jobs require new skills not possessed by unemployed workers who have been thrown out of work by automation, plant-closings, run-away shops, etc. Such "structural unemployment" is made worse by the role racial discrimination plays in hiring decisions. Vice-president Mondale's task force on youth unemployment found that the unemployment rate for black high school *graduates* under 24 is *higher* than the unemployment rate for white high school *dropouts* in the same age bracket.

It seems self-evident therefore, that denying jobs to undocumented workers can have only a limited short-term effect, if any, on job-availability. Such a potential and limited effect is not worth the substantial immediate dangers that employer sanctions pose to worker autonomy, labor organization and equal employment opportunity for minorities. *These dangers are also likely, in the long term, to contribute to* greater *unemployment as the power of labor organizations is diminished, thus hampering their ability to struggle for negotiated automation and retraining programs.* They will also contribute to the phenomenon of structural unemployment caused by racial discrimination since both intentional and self-protective discrimination will certainly increase under an employer sanctions program.

It is obviously preferable to attack the basic causes of unemployment by providing for retraining, equal employment opportunity, collective worker takeovers, etc., than to pursue the illusory promises for employer sanctions.

Will Employer Sanctions Eliminate "Sweatshop" Conditions?

It is argued that the presence of an easily intimidated workforce encourages employers to engage in exploitative behavior, and thus depressed wages and working conditions in certain sectors of the economy. It is argued that denying employment to these easily exploited workers will eliminate this particular social ill.

This argument is false because:

1) it ascribes to the *employment* of undocumented workers ill-effects which in fact result from their *exploitability;* and
2) it assumes that making their employment illegal will in fact eliminate their employment by unscrupulous employers.

In fact, since sweatshop proprietors already daily break laws relating to wages and working conditions, the addition of an extra penalty (for hiring) will have little effect on their decision to continue exploiting their employees. *Indeed, one may expect this exploitation to increase, as employers compensate themselves for the risk of being fined by passing on the cost of liability to their workers.*

It is clearly more rational to attack the exploitability which occasions these social ills than to engage in manifestly futile attempts to impose additional penalities upon inveterate lawbreakers. This suggests that *the answer to the sweatshop problem is a serious and all-out effort to 1) organize all workers, regardless of status, so that they may themselves struggle for*

(Continued on page 12)

Employer Sanctions *(Continued from page 11)*

decent wages and working conditions, and 2) vigorously enforce all labor-protective laws relating to wages and working conditions. Such an approach will protect the economic and social interests of all workers, regardless of status. In contrast, the proposal of employer sanctions threatens labor organization efforts.

The administration's proposal to increase by $6 million the resources allocated to the Department of Labor's Wages and Hour Division is not only totally inadequate but, when placed alongside its proposal to increase INS enforcement resources by *$75 million,* reveals the hypocritical and cosmetic proposal that it is. It is precisely the threat of deportation which prevents undocumented workers from organizing or complaining about inadequate wages and working conditions. The Administration proposes to increase this threat by $75 million; increasing labor-protective enforcement efforts by a mere $6 million over a proposed budget under which it had already totally eliminated the Wage and Hour enforcement program designed to reach exploiters of undocumented workers.

Will Employer Sanctions Stem Illegal Immigration?

People enter this country for many reasons. It is not at all clear that making it more difficult for them to find jobs will deter their entry. People who take the many risks now entailed by illegal entry do so for a series of complex reasons. Experts vary widely on what these reasons are. Included in suggested theories are "Westernization," "fleeing poverty," "fleeing violence," "fleeing political repression," etc. For someone fleeing destitution, even the possibility of only occasional or illegal jobs in this country will seem appealing. Furthermore, many persons who enter without papers do so because they wish to be united with family members who live here. These too are likely to come despite additional difficulties in obtaining a job. Research on migration from underdeveloped to developed nations suggests that many factors other than job-availability, such as superior living standards or less political repression, will attract people to migrate.

It is far preferable to examine and resolve the basic economic contradictions in their home countries which in many cases force people to migrate here. The role of the U.S. in creating these contradictions must also be examined.

It is important to realize that such a commitment is in the practical interests of all American workers. *The elevation of the standard of life in the source countries of migration will simultaneously make them progressively less attractive as labor pools for runaway capital in search of more exploitable workforces.*

It is necessary to recognize that family ties will inevitably cause persons to migrate, legally or illegally. We must provide for rapid and orderly regularization of status for immediate relatives of U.S. citizens and lawful residents.

ILL-EFFECTS OF EMPLOYER SANCTIONS

They Will Increase the Underclass in Our Society

Since it is highly unlikely that people will stop entering this country, regardless of some small change in job opportunities, the denial of "official" jobs to these persons will drive them into an underground labor market formed by undocumented workers and unscrupulous, exploitative and law-breaking employers.

The existence of this underclass will provide a source of cheap labor, easily intimidated, which will drive *down* wages and working conditions in entry-level jobs. This will in fact *reduce* employment opportunities for poor people, black people and other minorities. This effectively refutes any contention that sanctions promise to benefit these groups.

Employer Sanctions Will Intensify Exploitation and Inhibit Organization of All Workers, Regardless of Status

The "employer sanctions" proposed by the administration are in fact *employee* sanctions. The employer is off the hook once he goes through the merely formal procedure of checking I.D. and signing a form. This leaves him free to hire undocumented workers and still call in INS or the responsible agency to deport his employees when they organize or complain about wages and working conditions. Indeed, employer sanctions will provide one *more* pretext or warrant for the factory raid by INS or other agents looking for undocumented workers: a new departure, since they will define undocumented workers as persons specifically without rights *as workers.* The exploitability of the undocumented workers is thus assured and increased.

This is supremely ironic. The original rationale for the support offered "employer sanctions" by influential opinion in organized labor was that they would *remove* an employer's power to use immigration law to police his workforce by making him equally liable for its violation.

It is for this reason that the hypocrisy of the Administration's proposal of employer sanctions must be clearly recognized. Its proposal is quite ineffective to penalize employers. On the contrary, it increases an employer's power to intimidate employees who might complain or organize. This makes a mockery of the Attorney General's pious statement, in testimoney presenting the proposals to Congress, that "no great nation . . . can long countenance ineffective and unenforced laws," and reflects the Administration's inclination to use immigration laws as a further vehicle for implementing economic policies aimed at reducing wages and depressing working conditions.

Undocumented workers should enjoy the human and civil rights enjoyed by all persons. There is no excuse for permitting and aiding their exploitation. They are already among the most exploited members of our society. Justice for undocumented workers ultimately means justice for all workers.

Several important black and labor organizatons have supported employer sanctions on the same grounds that they have opposed Temporary Worker programs. These grounds are that the presence of workers *with limited rights* harms U.S. labor markets, depressing wages and working conditions. The Administraton's sactions proposals in fact reflect its *apparent positive intention to create and enlarge such a labor pool.* Thus, the employer himself is free from liability. In the same legislative package, the Administration proposes to create a huge labor pool of workers without rights in the guise of an "amnesty" and a temporary "guest-worker" program.

In sum, no one but unscrupulous, exploitative and law-breaking employers will benefit from employer sanctions. All workers will lose.

(Continued on page 13)

Employer Sanctions *(Continued from page 12)*

Employer Sanctions Will Inhibit Labor Organization Efforts

It is argued above that the Administration's employer sanctions proposal is an additional tool of intimidation in the employer's hands. It is easy to imagine how this tool would be used against organization drives. A union may win a certification election and then find its new membership disappear into INS custody as a result of employer complaints to the responsible agency.

Union activists and sympathisers may be fired by the employer on the spurious ground that they are undocumented, regardless of their actual status. *The employer sanctions law will provide the employer with a defense or cover to a charge of unfair labor practices.*

It is also highly likely that essential labor union functions will be burdened with corollary duties arising from employer sanctions legislation. Such legislation may explicitly or implicitly impose upon labor unions and their officers a legal duty to screen the immigration status both of applicants for membership in the union and of members whom the union refers for employment. Even if the legislation does not explicitly require such screening, the danger of being held liable as an accessory to a hiring violation will inevitably make it highly advisable. Thus, *"employer sanctions" will effectively result in "union sanctions" and impose upon unions uncertainties and costs of compliance similar (or perhaps not so similar) to those imposed upon employers.* Conscientious attempts to comply will place labor unions in the untenable position of being forced to discriminate aganst their own members or potential members, including in many instances documented minority workers. This will add great practical difficulties to the pursuit of organizing the unorganized and solidarity in the pursuit of improving wages and working conditions.

Employer Sanctions Will Create Inscrutible Employer Discretion to Discriminate Against Minorities, Women and Union Sympathizers

The existence of employer sanctions legislation will provide an employer with a perfect excuse for hiring decisions which in fact are based on racial, sexual or anti-union prejudices. *Though briefly stated, this effect will be widespread and unavoidable.* This corresponds with a move by the Administration to "re-examine" the EEOC guidelines which provide for scrutiny of hiring criteria which an employer uses, a happy coincidence for prejudiced employers.

Employer Sanctions Will Encourage Well-Meaning and Law-Abiding Employers to Discriminate Against Minority Workers

A Georgetown University study concludes that no sanctions law can effectively impose liability on an employer without being so severe as to encourage widespread discrimination by cautious employers against ethnically distinct persons.

If an employer is particularly cautious or sanctions are effectively enforced to a limited extent and s/he fears some likelihood of liability, employer sanctions will encourage employers to protect themselves against accidental liability by refusing to employ any workers who "might be undocumented" — i.e. persons of foreign appearance, speech, name, or other ethnic characterisitic. This will clearly result in widespread hardship for members of certain ethnic minorities. This is intolerable

It is for this reason that the fundamental and fatal defects of *any* employer sanctions system must be recognized. The more effectively a sanctions system is enforceable against an employer, the less leeway it must leave for honest mistakes. If employers were actually penalized under another employer sanctions system, this would foster broadly self-protective discrimination by employers afraid of liability for honest mistakes.

No I.D. System Can Cure These Fundamental Defects

In view of the many severe dangers of abuse of privacy and civil rights in establishing a national system of work identification, it is surprising that such a system is even under consideration. Its supporters argue that such a system, probably an I.D. card to be carried by *all* workers, will relieve employers of difficult judgments about a worker, and will reassure them about the status of a job applicant, thus preventing the discrimination born of caution described above.

However, it is obvious that no such thing as a truly "secure" I.D. system is possible. This is because the documents which will entitle a person to such I.D. remain as susceptible as ever to forgery. Thus an employer can never be sure that the I.D. presented to him is indeed reliable. A "secure" I.D. will soon be perfected by inventive forgers, and a "black market" in such I.D. may be expected to develop.

Futhermore, there is a very real danger that minority workers will be more closely scrutinized and have geater difficulty obtaining the I.D.. This is a particular danger of the I.D. mechanisms suggested by the Administration. *The use of drivers licenses, social security cards, etc. for work identification purposes will create extra scrutiny of and discrimination against all minority applicants for these lesser documents.* Moreover, employment fraud will pollute the social security system, already frail in other respects.

However secure an I.D., there is of course no protection that it can provide against prejudiced employers who may claim that a proferred I.D. is suspicious, and may therefore reject it.

CONCLUSION

The Administration proposes to enact an employment law in the guise of an immigration law. This law will do nothing to effect immigration policy, but will have severe negative effects on all workers and poor people, especially minorities, women and union sympathizers. *In view of the massive financial and social cost of such a law and its obvious ineffectiveness, it is clear that the proposal fails even to meet the cost-benefit standards so frequently promoted by the Administration and embodied in President's Reagan's Executive Order 12291 and Senator Laxalt's Regulatory Reform Act.*

One must conclude either that the social, individual and political costs of such legislation are *intended* by the Administration, or that the Administration is proposing it as a "emage of enforcement" (rather than the substance, presumably) as stated in one of its recent internal memoranda, in order to give public opinion the illusion that something is being done.

In either case, public opinion must respond by showing that:

1) it will not accept the negative effects that employer sanctions will inevitably impose, and 2) the Administration does *not* have public support for a proposal which *in fact* benefits only the employers, particularly those who exploit undocumented workers.

Legislative Analysis *(Continued from page 4)*

workers may not claim Earned Income Tax Credit on tax returns; 8) undocumented workers not eligible for AFDC or Medical benefits; 9) no unauthorized work may be counted in establishing preference as a skilled, professional or experienced worker; 10) employers subject to fine for employing undocumented workers, and 11) may not claim tax deduction of salary paid to undocumented workers; 12) federal offense to forge immigration documents; 13) burden of proof in deportation cases, "preponderance of the evidence." (Judiciary, Ways and Means, Rules & Energy and Commerce)

H.R. 4327 — Mazzoli (D-Ky.), Hall (D-Tex.), Schroeder (D-Colo.), Frank (D-Mass.), Fish (R-N.Y.), Hungren (R-Calif.) and McCollum (R-Fla.)

Subcommittee has finished work on this bill and it awaits action by the full Judiciary Committee. H.R. 4327 is a clean version of H.R. 2043 introduced in February. It is the current version of the "Efficiency Package" which, as H.R. 7273, narrowly missed enactment at the close of the 96th Congress.

SENATE BILLS PENDING

S. 47 — Schmitt (R-N.Mex.) and others

To establish temporary worker's visa program between the United States and Mexico.

S. 130 — Inouye (D-Ha.) and Matsunaga (D-Ha.)

To amend the INA with respect to the granting of U.S. citizenship to certain mentally retarded adults.

S. 386 — Inouye (D-Ha.) and Matsunaga (D-Ha.)

To direct the Secretary of Education to identify and address the unique needs of immigrants in the U.S. taking into account that immigrants are concentrated in a select number of identifiable cities, and for other purposes.

S. 387 Inouye (D-Ha.) and Matsunaga (D-Ha.)

To direct the Secretary of Labor to identify and address the unique needs of immigrants in the U.S. taking into account that immigrants are concentrated in a select number of identifiable cities. (Labor and Human Resources)

S. 776 (same as H.R. 2782) Huddleston (D-Ky.) and others

To amend the INA to more fully limit and control immigration to the United States, and for other purposes. (Hearings in September)

S. 780 — Exon (D-Nev.) and Zorinsky (D-Nev.)

To prohibit the use of Federal housing assistance with respect to certain non-citizens. (Banking)

S. 930 — Hayakawa (R-Cal.)

To amend the INA to establish a program providing for the issuance of visas to nationals of Mexico seeking temporary employment in the U.S.

S. 1076 — Warner (R-Va.)

To exempt agricultural labor from requirements under the temprorary worker provisions that adverse effect wage rates b temporary worker provisions that adverse effect wage rates be established and certified.

S. 1471 — Huddleston (D-Ky.)

To amend the Internal Revenue Code to restrict the Earned Income Tax Credit to citizens and permanemt residents. (Finance)

BRIEF ANALYSIS OF PENDING BILLS

Please note the variety of bills of narrow scope which would require discrimination against undocumented workers in their attempts to enjoy the legal protections and social services which are enjoyed by all others. Note particularly that H.R. 1680 requires not only that permenent residents *must have resided in the country continuously for 5 years* in order to be eligible for supplemental security income benefits, but also requires that *all immigrants* must be sponsored by a U.S. citizen. The bill would also make such sponsorship agreements enforceable in civil suits brought either by the immigrant or the Attorney General.

The bills introduced by Ashbrook (H.R. 53, H.R. 74), depriving undocumented workers of the protections of the National Labor Relations Act and the Fair Labor Standards Act, are an immediate response to the National Labor Relations Board's position that undocumented workers *are* entitled to reinstatement and back pay under the NLRA. Ashbrook's office now indicates that there is little likelihood of any action on these bills until the Immigration Subcommittee has considered comprehensive legislation. In the event that this is not so, such legislation would be opposed on the grounds that rendering undocumented workers more exploitable merely exacerbates their negatives effects on U.S. society, which arise precisely from the fact that employers can exploit them with relative impunity.

H.R. 724 would extend the right to counsel (at no expense to the Government) to situations where a person is detained for further inquiry under Section 235(b) of the INA, is temporarily excluded under Section 235(c), or is arrested and held in custody under Section 242(a).

H.R. 4327, the "Efficiency Package," is a thorough attempt to update the Immigration and Nationality Act. While many of its provisions deal with classification and certification of students and medical personnel, other provisions constitute a significant liberalization of the present law. H.R. 4327 removes adultery and narcotics and marihuana *possession* from the list of conduct which will prevent a finding of good character [INA Section 101 (f) (2)], and raises the age up to which a person may be adopted and considered a child for purposes of the immigration law from fourteen to sixteen [INA 101(b) (1) (E), (F)]. The bill makes persons convicted of narcotics and marihuana *possession* eligible for the Attorney General's discretion to waive excludability. The bill also expands the choice of countries to which an excludable person can be deported.

H.R. 156 seeks to increase the Border Patrol to 3,800 officers, provides for procedures for issuance of secure (counterfeitproof) social security cards, prohibits employment and provision of public assistance to undocumented workers, requires employers and public assistance officials to collect and transmit to the Secretary of HHS a record and statement of eligibility, denies CETA benefits to undocumented workers, and tax deductions for salaries to their employers

With regards H.R. 4162, little need be added to the extensive description above, except that the bill provides, as well as an absolute ceiling, percentage ranges for refugees, asylees, immediate family members and other immigrants. Fifth preference would

(Continued on page 15)

Legislative Analysis *(Continued from page 14)*

be limited to *unmarried* siblings. This bill is one of number which seek to provide draconian controls against illegal immigration and also to limit legal immigration to an absolute ceiling.

Typical is S. 776, introduced on March 24, 1981, by Senator Huddleston (D-Ky.) for himself and 7 other Senators and entitled, "Immigration and National Security Act of 1981." After reciting findings to support a more restrictive immigration policy, the bill contains the following provisions: (1) A Border Patrol of at least 6,000 officers would be maintained, with appropriate support services; (2) A system of machine-readable ID cards for all non-citizens would be set up; (3) An annual limit of 350,000 would be fixed (exclusive of special immigrants, such as returning residents) for immigrants admitted for permanent residence or paroled in under Section 212(d) (5); (4) This limit would also include immediate relatives, who would be given first priority; (5) Also charged against the 350,000 annual limit would be refugees and asylees; (6) In emergency situations, after consultation with Congress the President could order admissions in excess of the 350,000 limit, *but the excess number would be charged against the limit for the next year*; (7) Asylum procedures under Section 208 would be available only where the refugee status is based on *facts existing before the Refugee's departure from his home country*; (8) Reception centers outside the U.S. would be set up, to which asylum applicants would be sent for processing; (9) Parole would be exercised only on a case-by-case basis; (10) The June 30, 1948 date in INA Section 249 would be moved up to January 1, 1978, *an undue hardship requirement would be added*, and the immigrant would have to register under special provisions relating to employer sanctions; (11) A civil penalty of not more than $1,000 would be provided against an employer who knowingly employed a person not lawfully admitted to the U.S. for permanent residence, unless the employment is authorized by this Act or the Attorney General; (12) The penalty could be imposed only after a hearing before an immigration officer conducted in accordance with the APA; (13) Collection of any unpaid civil penalty could be enforced in a civil action in the District Court; (14) A criminal penalty for a first offense is also provided, with a fine not to exceed $500 or imprisonment not to exceed one year, or both. For a second offense, which is made a felony, the penalty is a fine not to exceed $20,000 or imprisonment not to exceed 3 years, or both; (15) A complex system of registration and revision of Social Security cards would be set up, to make the latter a unique ID card. Reliance by an employer on such an ID card would be a complete defense.

A number of bills have been introduced which would provide new programs for temporary workers in the U.S. Typical is S. 47, introduced on January 5, 1981 by Senator Schmitt (R-NM). Entitled the "United States-Mexico Good Neighbor Act of 1981," it starts out with findings as to the nature of immigration from Mexico and sets up a new group of nonimmigrants, Mexican nationals admitted temporarily to perform labor or services in the U.S. for a period or periods not to exceed 240 days in the aggregate in any calendar year. Section 245 adjustment would be precluded for this class.

Certain common themes emerge. There is an effort underway to provide an absolute ceiling, and a very low one, on *all* admissions including immediate family members, refugees and asylees. (viz. section 776 and H.R. 4162). Various bills specifically attempt to deprive undocumented workers of the Earned Income Tax Credit and government benefits. It is proposed that employers of undocumented workers be fined and denied the business expenses deduction for salaries paid to undocumented employees. Several of the bills provide for elaborate procedures for issuing and verifying "secure" social security documents, impose recordkeeping requirements in connection with these on employers and public assistance officials, and provide specific penalties for attempts to fraudulently obtain or use such identification.

These initiatives are in some ways in tune with and in others at odds with the Reagan Administration's proposals on comprehensive immigration legislation. It is not clear how the Administration's proposals will affect the fate of pending legislation. However, there is no indication of a general desire or agreement to reject the piecemeal approach in favor of a comprehensive approach, and one should be prepared for piecemeal legislation. Note also that comprehensive bills, such as S. 776 or H.R. 4162, reflect influential opinion in Congress, which considers the Administration's proposals "soft on immigration." The legislative battle to expect is a three-way fight between the Administration, the hardliners such as Senator Huddleston, and those committed to liberalization of immigration policy.

For further information please contact Amit Pandya, N.C.I.R. Washington, D.C. Counsel, at (202) 737-1444.

Directory of Refugee Assistance Programs

[The following directory of organizations involved in refugee
40th Street, New York, New York 10018.]
lished by the United States Committee for Refugees, Inc., 20 W.
40th Street, New York, NEW York 10018.]

International

Intergovernmental Committee for Migration (ICM): P.O.Box 100 CH-1211 Geneva 19, Switzerland. Director: James Carlin. Regional representative: Richard Scott, Suite 2122, 60 E. 42nd St., New York, New York 10165. Tel.: 212/599-0440.

Established in 1951, arranges for processing and transportation of European, African, Latin American, and Inodchinese refugees to immigration countries in cooperation with international organizations, governmental and non-governmental agencies concerned with refugees. implementing programs of transfer of technology to developing countries.

International Committee for the Red Cross (ICRC): 17, avenue de la Paix, CH-1211 Geneva, Switzerland.

Private Swiss organization that protects and helps civilian and military victims of armed conflicts worldwide. Includes medical aid, relief supplies, a tracing agency for missing persons, and a program of visitors to prisoners of war and civilian internees.

(Continued on page 16)

Refugee Organizations *(Continued from page 15)*

International Council of Voluntary Agencies (ICVA): 17, Avenue de la Paix, 1202 Geneva, Switzerland. Tel.: 33 20 25. Executive Director: Anthony Kozlowski.

Independent and neutral international association of voluntary agencies established in 1962 as a permanent liaison structure for consultation and cooperation. Presently composed of 60 international and national voluntary agencies.

International Disaster Insitute: 85 Marylebone High St., London WlM 3DE. Director: Dr. Frances D'Souza.

Carries out research into all aspects of disasters including refugee communities; runs briefing and training courses for field staff, and acts as an information center. Also publishes a quarterly journal on disaster-related topics and is in the process of setting up a Refugee Information Unit.

International University Exchange Fund (IUEF): P.O.Box 368, 1211 Geneva 11 Switzerland. Tel.: 29 17 88. Director: Hassim Soumare.

Promotes, through educational and humanitarian assistance, the liberation of countries and peoples under colonial and minority oppression, and assists in the development of the liberated and decolonized territories. Educational and training programs. Cooperates with United Nations agencies, the Organization for African Unity and the Council of Europe.

U.S. Government

Department of Health and Human Services, Office of Refugee Resettlement: 330 C St., SW, Room 1229, Washington, D.C. 20201. Tel. 202/245-0418.

Provides assistance to refugees after initial placement in U.S. communities, with federal funding, through existing federal programs which are administered by states.

Department of Justice, Immigration and Naturalization Service: 425 Eye St., NW Washington, D.C. 20536. Tel.: 202/633-2000. Acting Commissioner: Doris Meissner

Administers immigration and naturalization laws relating to the admission, exclusion, deportation and naturalization of refugees.

Office of the United States Coordinator for Refugee Affairs: Room 7526, Department of State, Washington, D.C. 20520. Tel.: 202/632-3964. Refugee Program Office, Room 6313, Department of State, Washington, D.C. 20520. Tel.: 202/632-5822.

Formulates policy and plans for U.S. refugee and migration programs; acts as clearinghouse for information on refugee affairs.

Senate Judicary Committee, 132 Russel Senate Office Building, Washington, D.C. 20510. Tel.: 202/224-8050. Strom Thurmond, Chairman. Subcommittee on immigration and Refugee Policy: Alan Simpson, chairman.

Studies and makes recommendations on the problems of refugees; has jurisdiction over immigration and naturalization legislation.

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Herman Erbe Legal Clinic

LEGALIZATION UPDATE

Vol. 2 Issue 5 April 29, 1988

NEWS FROM INS

Simplified Filing with INS – Richard Norton, Associate Commissioner for Examinations, has clarified the procedures for filing a "skeletal" application with INS on or before the May 4th deadline. Applicants should file as complete an application as possible by the deadline, but they will be able to amend the application or even file a substitute application two months later at the time of the interview at the LO.

Special QDE Filing Procedures – On April 8, 1988, Richard Norton sent a letter to all QDEs explaining the special procedures for their accepting applications and later forwarding them to the LOs. According to INS, a QDE can accept an I-687 application establishing a "credible, prima facie claim to eligibility" and a signed consent to forward form prior to May 5, 1988. At a meeting on April 21, Terrance O'Reilly from INS confirmed that the QDE does not need to receive a completed application, documents, or the filing fee by the May 4th deadline. The QDE has until July 5, 1988 to submit to the LOs all applications filed with QDEs on or before May 4. 1988, in accordance with the 60-day submission requirement. During this 60-day period, the applicant must submit to the QDE all documents and the required filing fee. INS is requesting QDEs to complete a survey form that asks for the total number of 1/1/82 applications filed by May 4, 1988 that the QDE intends to submit within the 60-day period. This survey form must be submitted to the local LO by May 13. Presumably, this procedure will safeguard against QDEs accepting additional applications after the May 4th deadline. [Heidi Schoedel, World Relief].

LO Extended Hours – Terrance O'Reilly stated that LOs would be open for extended hours during the week of May 2, and that they would remain open until midnight, May 4. All persons in line before midnight would be served. [Heidi Schoedel].

Known to the Government – INS issued a telex on April 11, in response to the April 6 decision in the Avuda, Inc. case (see Legalization Update, Vol. 2, Issue 4). The wire states that INS has not decided whether to appeal the order. It instructs all district directors to follow the Court's standard in adjudicating all cases where "knowledge to the government" of an alien's illegal status is an issue. Furthermore, it instructs district directors and LOs to permit affected persons to file their applications without the filing fee and to allow these applicants to submit "skeletal" applications. (The filing fee requirement will be deferred in these cases rather than completely waived.) Work permits should be issued to these applicants unless the applications are clearly fraudulent. The wire instructs RPF directors not to issue final decisions in these cases until they receive further guidance from the INS Central Office. For a copy of the wire contact NCIR. In order to comply with the court's order, the INS is publicizing the ruling. On April 13, Richard Norton sent a letter to the QDEs notifying them of the decision. Notifications were also sent to other national networks in addition to radio and print medias.

Expungements – The INS Central Office has finally issued a memorandum defining the term "conviction" and stating the effect of an expungement for legalization eligibility. The memo follows the recent Board of Immigration Appeals decision in Matter of Ozkok (see Legalization Update, Vol. 2, Issue 2). According to the memo written by Richard Norton, expungements will eliminate the conviction for non-drug related offenses. Therefore, legalization applicants will neither be excludable under the relevant criminal grounds of exclusion nor be barred by the three misdemeanor/one felony rule due to a conviction which was later expunged. Expungements will not be effective in eliminating the conviction of drug related offenses. The memo states further that the following post-conviction remedies will be effective in voiding the conviction for legalization purposes: pardons, grants of writs of error coram nobis, offenses committed as a juvenile, convictions prior to October 12, 1984 under the Federal Youth Corrections Act, and convictions prior to November 1, 1987 under federal first offender provisions of the Controlled Substances Act. In contrast, judicial recommendations against deportations will not eliminate a conviction. Deferred adjudication of guilt or deferred prosecution may still be considered a conviction if the state's procedures meet the BIA's three-prong test in Ozkok. For a copy of the memo, contact NCIR. [Interpreter Releases, April 25, 1988].

Public Charge – In response to the Perales v. Meese litigation in New York (see Legalization Update, Vol. 2, Issue 4), INS filed with the Court on April 19 a copy of a memorandum that was to be sent to all INS Regional and District Legalization Offices on April 20. The memorandum informs the INS offices that AFDC received by a U.S. citizen child should not be attributed to his or her parent applying for legalization. However, the memo states that if the welfare recipient is a U.S. citizen child and the family is relying on AFDC as its sole means of support, then the legalization applicant may be considered to have received public cash assistance. But the memo points out that under those circumstances the applicant would not be able to establish a history of employment, which is a requirement of the "special rule" for determining public charge.

The memorandum sets forth a detailed explanation of the procedure and standards to be followed in determining excludability based on public charge. First, the applicant is judged under the traditional, prospective test which weighs a number of factors to determine whether the applicant is likely to become a public charge in the future. To determine whether a person would be eligible under the prospective test, the wire instructs the INS offices to follow the State Department's Foreign Affairs Manual. Under the State Department's analysis, if the applicant is relying solely on personal income to prove unlikelihood of becoming a public charge, that income should be above the federal poverty income guidelines. The Foreign Affairs Manual also emphasizes flexibility and taking into account such factors as the applicant's age, physical condition and vocation. If an applicant would be inadmissible under the traditional public charge standard, the wire directs the LOs to apply the special rule. Under the special rule, those applicants who would be ineligible under the prospective test are allowed to become temporary and permanent residents if they can establish a history of employment evidencing self-support without receipt of public cash assistance. For a copy of the telex, or for more information on public charge excludability, contact NCIR.

Stepping Up Denials – INS has issued legalization wire #59 which instructs the RPF directors to reduce the backlog of cases that were recommended for denial by the LOs. The directors are instructed to issue final decisions, even in cases where there is a field investigation being conducted by the U.S. Attorney. The wire also instructs local LOs to issue final denials in cases where the applications contain material inconsistencies, contradictory information or discrepancies between applications and information provided at the interview. If eligibility cannot be established without using this discredited information, LOs are instructed to issue final denials on form I-692. They are also instructed to advise the applicant of the right to appeal and to provide a notice of appeal. If the application is not denied at the LO, the LOs are required to supply sufficient information on the worksheet to support a decision by the RPF. [Interpreter Releases, April 4, 1988].

Draft Second Phase Regulations – INS has issued a preliminary working draft of its regulations regarding the second phase of legalization under §245A. The following is a synopsis of the major provisions:

1. Application Process. Temporary resident aliens may submit applications for permanent residence during the 12-month period beginning after the alien has resided 18 months in temporary resident status. (Temporary resident status dates back to the day the alien submitted the application.) Applications for permanent residency submitted before the 18 months have expired will be received and processed but will only considered "filed" when the applicant's 12-month period begins to run.

Applications are to be mailed to the RPF having geographical jurisdiction over the temporary resident alien. Original documentation must accompany the application except that copies may be submitted if documents are government records, employment records held by the employer, a union or collective bargaining organization, medical records, school records maintained by the school or school board, or other records maintained by a party other than the applicant. When submitting records not maintained by the applicant, the party maintaining the record must certify the copies as true and correct, and the records must include the seal or signature of that party or its authorized agent. Those applicants whose temporary residence application did not include HIV test results must also submit those results with the permanent residence application. Applicants will be interview at an INS office before a final decision on the application for permanent resident status.

2. English and Citizenship Requirement. The applicant must either take the English language and civics exam or submit an affidavit of satisfactory pursuit of an appropriate course. If the applicant wishes to take the exam, ability to speak and understand English will be determined from questions at the INS interview. Ability to read and write English is to be tested by using excerpts from the 1987 Federal Textbook on Citizenship. The test on knowledge of U.S. history and government will be administered in English only. The scope of the test will be the subjects covered in the Textbook. If the applicant fails the exam, he or she can take the test a second time or submit an "affidavit of satisfactory pursuit" of a course of study recognized by the Attorney General. If the applicant plans to satisfy the English and civics requirements by submitting an affidavit of satisfactory pursuit of an authorized course, there is no requirement to take the INS exam. The affidavit must be issued by the designated school. To be satisfactorily pursuing a course, the applicant must have attended an authorized program for at least half of a 60-hour course and must be demonstrating progress according to the standards of English/citizenship prescribed by the program.

3. Recognized Courses. For the course to be recognized, it must be given by an established public or private institution, by an institution approved to issue form I-20, by a QDE in good standing, or by an institution certified by the District Director in whose jurisdiction the program is conducted. The regulations define QDEs in good standing to include those whose cooperative agreements were not suspended, terminated or allowed to lapse by INS. In addition to being provided by one of those institutions, the regulations require that for courses to be recognized they must include textbooks published under the authority of section 346 of the INA, and follow the Requirements and Guidelines for Courses of Study Approved by the Attorney General for Phase Two Legalization. Selection of teachers must include as many of the following criteria as possible: experience in Training in English to Speakers of

Other Languages (TESOL), experience as classroom teacher with adults, cultural sensitivity and openness, familiarity with competence-based education, knowledge of curriculum and materials adaptation, knowledge of a second language, and flexibility. If teachers are not certified and have no experience teaching English to speakers of other languages, they must be affiliated with an organization that can provide necessary supervision. For a copy of the draft regulations contact NCIR.

REPORTS FROM THE FIELD

NATIONAL

Statistics – As of April 18, 1988, a total of 1,609,492 legalization applications had been filed with LOs; 1,209,381 were 1/1/82 amnesty applications and the remaining 400,111 were SAW applications. The Western Region accounted for 58% of the applications filed; the Southern Region, 22%; the Eastern and Northern Regions, 10% each. Approximately 93% of the applicants had been interviewed by the LO. INS has received $267,140,665 in filing fees to date. [INS Cumulative Statistics]. The application rate for mid-April was averaging between 7,000 and 10,000 filings per day. As of April 16th, the RPFs had issued 894,254 final decisions, of which 19,642 were denials (2.2%). Of those denials, 11,800 (60%) were for SAW applications, even though SAW applications make up only 25% of the total applications. [Heidi Schoedel].

During his testimony in front of the House Appropriations Committee, Commissioner Nelson estimated that by the end of the 1/1/82 legalization program, between 1.3 and 1.5 million people would have applied for legalization. His estimate for the SAW program is that by November of this year between 400,000 and 600,000 applications will have been received. He calculated fraud rate in the SAW program to be about 17 percent. In addition he calculated that 30,000 Cubans and Haitians would adjust under section 202 of IRCA; 30,000 Poles, Afghans, Ethiopians and Ugandans would adjust under that legalization program; and 50,000 applicants would adjust under registry. [Interpreter Releases, March 28, 1988].

CALIFORNIA

Border Patrol Raids – Robert Moser of Catholic Social Services (CSS) has reported two incidents where Border Patrol officers thwarted that agency's efforts to conduct outreach. In one instance, Border Patrol agents, in conjunction with San Diego police officers, raided a temporary field registration station in Rancho Penasquito where undocumented workers were being interviewed and fingerprinted in relation to their legalization applications. At least three applicants were arrested by the Border Patrol. In the second incident, agents waited outside a farm where CSS had arranged to pick-up applicants in order to take them to its Barrio Logan office to process their applications. After receiving instructions from the CSS office, the driver of the CSS bus approached the Border Patrol, identified himself and explained the purpose of his visit. The agent informed him that the applicants would be arrested unless they had official documentation. The San Diego INS district director had been previously informed of CSS's intention to conduct legalization outreach at Rancho Penasquito. [Gil Carrasco, USCC].

UTAH

Misinformation – Two SAWs who had obtained temporary resident status were incorrectly informed by staff at the LO in Salt Lake City that they must continue to work in agriculture in order to be eligible for permanent residency. These same farmworkers were given similar false information from an LO in Oxnard, CA. Through the efforts of legal services attorneys, the INS Central Office informed the LO in Salt Lake City that it had misinterpreted the requirements for maintaining SAW status. [Tracy Burgess, Utah Legal Services]. In order to be eligible for permanent residency, SAWs must only demonstrate that they have not committed an act making them deportable during the temporary resident stage. If you are aware of incidents where INS has given out similar false information regarding SAW eligibility, please contact NCIR.

ADMINISTRATIVE APPEALS

Denial and Appeals Procedures – On April 11, 1988, Richard Norton sent a memo to all INS regional and field offices explaining the new procedures for processing legalization applications, denials, and appeals. The memo discusses procedures that were previously agreed to by INS after negotiations with staff from the ABA, AILA, and other national coordinating agencies (see Legalization Update, Vol. 2, Issue 2). The memo states the following major changes. First, the applicant and the legal representative must be notified of adverse factors if a case is being denied based upon adverse information not previously furnished to the applicant. The applicant should be given 30 days to respond to this new evidence. In cases which have already been denied based on such adverse information, the applicant shall be allowed to reopen the case in order to review this information.

Second, if an appeal is filed and a request is made to review the record of proceedings, an additional 30 days will be allowed in order to file the appellate brief, which period runs from the date the proceedings file is made available. A request for extension of this period may be submitted to the Legalization Appeals Unit.

Third, denial notices should contain clear and precise information regarding the reasons for the denial. Samples of both correct and incorrect notices are attached to the wire.

Fourth, the wire standardizes the period allowed to submit an appeal. Since notices of denial are sent by regular mail, it allows three extra days after the notice of denial is mailed

to start computing the thirty days within which to file an appeal.

Fifth, QDEs must be notified when an applicant that it assisted is required to submit additional documentation or a waiver. The QDEs should also be sent copies of denial notices for their clients. For a copy of the wire, contact NCIR.

SAW Issues – The Legalization Appeals Unit (LAU) has issued two noteworthy decisions. In the first, it included corn as a fruit even though the corn was not being grown for human consumption. In reaching this conclusion, the LAU found that if the plant at issue fits the Department of Agriculture's definition of "fruit", "vegetable", or "other perishable commodity", it is irrelevant what use the specific crop was going to be put. [For information on an INS memo regarding corn, see Legalization Update, Vol. 2, Issue 4].

The second LAU decision deals with sufficiency of documentation. The LAU found that affidavits from a foreman and the applicant, and a declaration from the applicant's cousin were insufficient to find a "just and reasonable inference" that the applicant worked the required amount of time. [SAW Newsletter, Vol. 1, Issue 15].

Known to the Government – The LAU considered the "known to the government" issue in a decision dated January 20, 1988, prior to the recent decision in Ayuda, Inc. The LAU found that even though the applicant may have violated her H-1 temporary nonimmigrant status and that the INS knew of that violation before January 1, 1982, such violation was not "known to the government" within the meaning of 8 C.F.R. §245a.1(d). [Interpreter Releases, April 4, 1988].

LITIGATION

"Brief, Casual and Innocent" – The INS's restrictive interpretation of what constitutes a "brief, casual and innocent" absence for purposes of eligibility for 1/1/82 legalization has been struck down recently by two courts. The INS regulation makes ineligible for §245A temporary residence those potential applicants who left the U.S. after May 1, 1987 without obtaining INS advanced parole.

In the context of a habeas corpus petition, a District Court Judge in San Francisco found that the regulation was invalid, inconsistent with the statute, and "truly remarkable in the violence it does to the spirit and purpose of the Act it purports to implement." The case dealt with a potential 1/1/82 applicant who was apprehended at the border trying to reenter the U.S. after a brief absence. INS put him in exclusion proceedings and would not release him on parole in order for him to attend his interview at the LO. The applicant remained in detention for nine months because the INS District Director denied him parole on the grounds that he was ineligible for legalization because of the "brief, casual and innocent" regulation. The district court held that the District Director's decision to deny parole was devoid of a "facially legitimate and bona fide reason." The court defined an "innocent" departure in a broader fashion than the INS interpretation and referred to caselaw in the suspension of deportation context. Gutierrez v. Ilchert, C-88-0585 EFL (N.D.Cal., March 28, 1988).

In a nationwide class action suit, a district court judge issued an order that enjoins INS from applying the "brief, casual and innocent" regulation. Catholic Social Services v. Meese, CIV. S-86-1343 LKK (E.D.Cal. April 22, 1988).

Public Charge – A suit was filed in District Court for the Eastern District of California challenging INS's "proof of financial responsibility" regulation. Plaintiffs seek declaratory relief on the issue of whether AFDC, SSI and other federal benefits received by family members should be attributed to the non-recipient family members applying for legalization. They also request the court to enjoin INS from applying its current public charge regulations, to compel INS to legalize those applicants who should qualify under public charge standards, to compel defendants to publicize accurate, comprehensive and intelligible standards regarding the public charge ground of exclusion, and to require INS to extend the application deadline for class members affected by INS's public charge policy. Zambrano v. INS, CIVS-88-455-ELG-EM (E.D.Cal. April 12, 1988). For more information contact Beth Zacovic of San Mateo County Legal Services, (415) 365-8411.

Work Authorization – As part of the settlement in Salinas-Pena v. INS (see Legalization Update, Vol. 2, Issue 3), INS was required to produce standard application forms for work authorization. Attorneys for plaintiffs would like to receive comments from practitioners on what should be contained in such an application form. They would also like to hear comments on problems that have arisen due to INS's use of the federal poverty income guidelines as a measure to determine the need for work authorization. For more information contact Peter Fels at Oregon Legal Services, (503) 276-6685.

"Vegetables" and "Other Perishable Commodities" – The U.S. District Court for the District of Columbia has ruled that the Secretary of Agriculture acted capriciously in excluding sugar cane from the definition of "other perishable commodities." The court also found that the Secretary acted improperly in limiting the definition of "vegetables" to herbaceous plants. The Judge ordered the Secretary to decide whether sugar cane should be defined as a vegetable or as an "other perishable commodity." The decision therefore allows sugar cane workers to count such employment for earning SAW status. The court did not order INS to accept SAW applications from sugar cane workers, and plaintiffs' attorneys are seeking clarification or INS cooperation on this issue. For more information, contact Tina Poplawski of the Farmworker Justice Fund, tel.

(202) 462-8192. Northwest Forest Workers Association v. Lyng, Civil Action No. 87-1487 (D.D.C., April 25, 1988).

Salvadorans – On April 29, Judge David Kenyon of the U.S. District Court for the Central District of California issued a permanent injunction against INS in a nationwide class action suit brought on behalf of all Salvadorans in this country. The relief is far reaching and provides many due process protections. The decision requires INS officials to continue to provide arrested Salvadorans a special advisal informing them of their right to apply for asylum. It also enjoins the INS from using any coercive tactic to discourage Salvadorans from pursuing asylum claims. The INS is prohibited from transferring class members away from the area where they are apprehended for at least a seven-day period in order to allow them to locate counsel, and if they do find representation, venue for future proceedings will remain in that area. The decision also includes provisions for facilitating access to counsel, privacy in attorney/client communications, the requirement to permit receipt and possession of self-help and other legal rights materials by detainees, an obligation on INS to provide detained class members legal reference materials currently available in English and Spanish, and limitations on the use of solitary confinement. For more information or for a copy of the 63-page decision contact NCIR. Orantes-Hernandez v. Meese, CV 82-1107 KN (C.D. Cal., April 29, 1988).

EMPLOYMENT ISSUES

Liberalization of Anti-Discrimination Regulation – The Department of Justice issued an interim final rule amending the definition of who is a citizen or intending citizen protected from discrimination under §102 of IRCA. That section prohibits employers of four or more employees from discriminating against workers on the basis of the worker's citizenship or intending citizenship. An intending citizen includes lawful permanent resident aliens, lawful temporary resident aliens, refugees and asylees. These persons must file a declaration of intending citizenship. The amending regulation now includes as intending citizens individuals who have applied for but not yet been granted temporary residence, provided that they ultimately are granted that status. Under 28 C.F.R. §44.101(c)(2)(ii), individuals who have been granted lawful temporary resident status are protected from employment discrimination from the date they first applied for legalization. The Department of Justice's change is consistent with the statute and INS's interpretation that once temporary residency is granted, it relates back to the date of application.

Employer Sanctions – INS has conducted 4,255 investigations regarding employers' compliance with IRCA. Out of those investigated, 2,402 employers were found to be in compliance, while 1,782 employers were issued warning citations. Of the citations, 616 were issued in the Western Region, 486 in the Southern Region, 444 in the Eastern Region and 246 in the Northern Region. 71 employers have been issued notices of intent to fine; 34 were in the Western, 15 in the Southern, 13 in the Eastern and 9 in the Northern Region. It is unclear whether INS will continue to issue warning citations for first offenders after June 1, 1988, or whether all such offenders will receive notices of intent to fine. [Interpreter Releases, April 11, 1988].

PUBLIC BENEFITS

Job Training for Aliens – Under IRCA, newly legalized temporary resident aliens are not disqualified from receiving job training under the Job Training Partnership Act. INA §245A(h)(4)(F). Receipt of JTPA services will in no way count as public cash assistance for purposes of the public charge exclusion. Indeed, advocates should urge LTRs who are marginally employed to take advantage of JTPA services in order to ensure that the they will not face any public charge problems at the second stage. Aliens must be authorized to work in order to participate in the training.

JTPA is a short-term federal job training program for low income, disadvantaged individuals, administered by state and local governmental agencies. The entities, working through the various private industry councils (PICs) may contract with community based providers to provide the training. The type and nature of the services provided vary widely in each community. Some organizations may offer direct job placement, on-the-job training, classroom instruction, including some English as a Second Language instruction, high school equivalency test preparation and job training for high school drop-outs. Advocates are urged to contact their local PICs or community providers, ascertain the exact services which are provided and refer newly legalized LTRs to the appropriate organizations.

Social Security Card Fraud Prosecutions – On March 1, seventeen persons were arrested in a raid at a packing house in Des Moines, Iowa, and the workers were charged with a variety of alleged crimes, including use of false Social Security numbers. The INS had gathered evidence to support the arrests through an inspection of the company's employment records, which revealed the alleged use of fictitious Social Security numbers on the I-9 forms, and in some cases false immigration documents. According to a local immigration attorney, at least five of the persons arrested had applied for legalization and had obtained INS work authorization. The government later dropped charges against some of the aliens. The arrests and prosecutions may have had the effect of discouraging persons from applying for amnesty in the Des Moines area. [Des Moines Register, 3/3/88].

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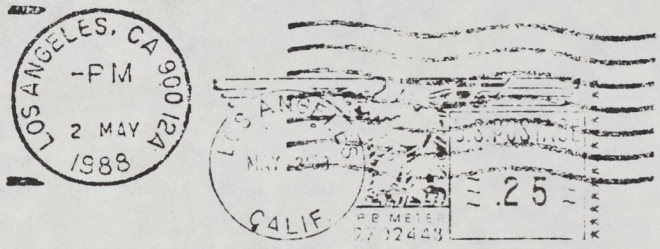

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