

NLWJC - Kagan

DPC - Box 034 - Folder 005

Immigration - Section 377

Immig - section 377

▶ **Julie A. Fernandes**
10/23/98 02:32:48 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP, Elena Kagan/OPD/EOP, Robert N. Weiner/WHO/EOP
cc: Leslie Bernstein/WHO/EOP, Marjorie Tarmey/WHO/EOP, Laura Emmett/WHO/EOP
Subject: Section 377 summary

Attached is a short memo summarizing the facts re: late amnesty claimants (subject to Section 377).



377.MEM

The Immigration Reform and Control Act of 1986 (IRCA) established a scheme under which certain aliens unlawfully present in the United States could apply for permanent residence. An applicant must have resided continuously in the United States in an unlawful status since at least January 1, 1982; must have been physically present in the United States continuously since November 6, 1986 (IRCA's enactment date); and must have been otherwise admissible as an immigrant. In order to be eligible for this benefit, the applicant must have applied during the 12-month period beginning on May 5, 1987.

On May 1, 1987, INS promulgated several regulations related to eligibility that were later found by the courts to be inconsistent with the statute. Two of the regulations dealt with an alien's travel outside the U.S. during the application period. Another indicated that receipt of any form of public benefit (even for citizen children) would cause the alien to be ineligible for legalization. Because of these regulations, many individuals who were likely eligible for legalization were turned away from INS offices and otherwise discouraged from applying. The CSS and LULAC class action lawsuits challenged the INS travel regulations in federal court. The Zambrano class action challenged the benefit regulation.

The district court in all three cases held that the travel and benefit regulations violated the statute, ordered the INS to extend the application period to November 30, 1988 for class members who were deterred from applying for legalization because of knowledge of INS's unlawful regulation(s), and issued an injunction requiring the INS to withhold deportation and provide work authorization to these class members pending resolution of their claims. The DOJ appealed all three orders to the 9th Circuit Court of Appeals, arguing that the federal courts had no authority to extend the deadline for any discreet group of aliens. The 9th Circuit affirmed the district courts' orders to extend the deadline in all three cases.¹

DOJ appealed these rulings to the Supreme Court. The Supreme Court rejected the DOJ's position that the lower federal courts did not have jurisdiction to change the application deadline for a discreet group, but held that the district courts had erred by not determining whether the claims of class members were "ripe." The Court explained that a plaintiff's claim challenging the INS's legalization procedure was only "ripe" once that plaintiff took the necessary affirmative steps in the application process prior to INS's application of the erroneous regulation to him. Thus, if an alien was "front-desked" -- i.e., presented a completed application to the INS and had his application rejected prior to its being filed (based on a determination by someone at the "front desk" that one of the regulations made the alien ineligible) -- his claim was ripe for adjudication. In addition, in a footnote, the Court indicated that a plaintiff could also have a ripe claim if the front-desking policy was a "substantial cause" of the alien's failure to apply for legalization. The Court remanded these cases to the district courts and ordered the courts to conduct ripeness analyses regarding the various discreet groups.

On remand, the district courts all held that an applicant who was told by the INS that they were ineligible because of the application of one of the erroneous regulations had a ripe claim and was thus entitled to an adjudication and a continuation of the benefits that class members had been

¹ CSS and Newman were consolidated by the 9th Circuit for purposes of their appeal.

enjoying (stays of deportation and work authorization). The DOJ appealed these rulings to the 9th Circuit in early 1996, arguing that the district courts had misinterpreted the Supreme Court's remand.

During the pendency of this appeal, Congress enacted Section 377 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which retroactively stripped the federal courts of jurisdiction over any claim under the legalization program, unless the applicant filed a completed application (including an application fee) with the INS within the original statutory window.² After IIRIRA was enacted, the DOJ moved to have the CSS, Newman, and Zambrano suits dismissed. On January 16, 1998, the 9th Circuit ordered the district court to dismiss all of the plaintiffs' claims in CSS for lack of jurisdiction. The district court had a hearing, dismissed the case, and invited the plaintiffs to file a new cause of action. On May 8, 1998, because of the 9th Circuit's interpretation of Section 377 in the CSS case, the district court dismissed the claims in the Zambrano case.

The CSS and Newman classes total approximately 300,000 people. These classes were open to new members as late as 1996. The Zambrano class was closed at the end of the 5-month extension period ordered by the district courts (November 30, 1988). This class includes approximately 9,000 people.

Since the dismissal of these suits, DOJ has determined that class members are no longer entitled to work authorization, stays of removal, or any immigration benefit on the basis of class membership. According to INS, approximately 80,000 class member received work authorization and stays of removal during the pendency of these cases. All of these people (many of whom have lived and worked in the U.S. for more than 10 years) will lose their authorization to work in the coming months. In addition, because class members were not subject to deportation during the pendency of the litigation, most did not apply for suspension of deportation under the old rules (you must have a final order of deportation prior to being eligible to apply for suspension). Now, the rules have changed. The standard for "cancellation of removal" (the new terminology) is much stricter and presents a significant bar.

² Section 377 of IIRIRA reads in relevant part: "(C) JURISDICTION OF THE COURTS -- Notwithstanding any other provision of law, no court shall have jurisdiction of any cause of action or claim by or on behalf of any person asserting an interest under this section unless such person in fact filed an application under this section within the period specified by subsection (a)(1), or attempted to file a complete application and application fee with an authorized legalization officer of the Service but had the application and fee refused by that office.

▶ Julie A. Fernandes
09/29/98 11:39:46 AM
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Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: Section 377 meeting

At this afternoon's meeting, we decided to pursue a legislative fix to the registry date. Alan E. (INS Leg.) and Peter J. are supposed to get together to determine (1) whether there is a Rep. member who is willing to carry some water on this; and (2) what vehicle we could try to attach this to this session. The odds of getting this done this session seem slim, since there has not been much background work on the issue. However, we agreed it was worth trying. Also, Maria E. is going to call Becerra at let him know that there are no administrative options to solve the 377 problem, but that we are going to try to pursue the registry fix. She is also going to let him know that our strategy has to be not to link the registry fix to the late amnesty cases and not to talk about 400,000 people being affected. The highest number of folks that could be affected by the registry change is 80,000 (the number who were granted work authorization over the years), but the number is likely much less than that (those who could demonstrate that they have been in the U.S. since January 1, 1982). I am going to double back with DOJ/INS and Peter and will keep you posted.

julie

Immig - Honduras
and
Immig - Section 377

▶ **Julie A. Fernandes**
10/29/98 09:27:18 PM
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Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: NCLR briefing

As I mentioned on Monday, OPL has asked that I brief the NCLR board Friday morning at 10am on current immigration issues. I am attaching talking points on two issues (Hondurans and Section 377 (late amnesty). Please let me know if these are o.k. Thanks.

julie



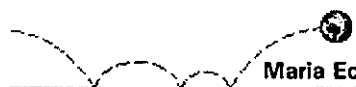
NCLR.TP

Section 377 (late amnesty)

- Last term, we attempted to include in the omnibus appropriations package a change to the INS's registry date that would have allowed those in the country prior to January 1982 to apply to for legal permanent residency. We were unsuccessful.
- We have engaged in discussions with the Department of Justice to determine whether there are any administrative options that could appropriately address the concerns of those who were deterred from applying for amnesty during the 1987-88 window.

Hondurans

- As you know, the Administration fought hard to achieve greater fairness for all foreign nationals, including Hondurans, with pending immigration cases who were adversely affected by the 1996 changes in rules related to suspension of deportation. While we were pleased that the Congress decided to offer relief to some nationalities through NACARA, we were disappointed that others were left out. We will continue to urge Congress to reconsider the exclusion of these other groups.
- In addition, we agree that our immigration and refugee policies should treat similarly situated people similarly. After careful review, we have concluded that some of the Hondurans who came to the U.S. during the 1980s share some of the characteristics of those Salvadoran and Guatemalan who also sought the protection of the U.S. during that period.
- Thus, we are prepared to work with Congress to develop an appropriate legislative solution for those Hondurans who are in the same position as Salvadorans and Guatemalans granted relief under NACARA.
- However, we continue to hold the view that the situation of Hondurans in the United States does not warrant the exercise of the President's extraordinary authority to direct the Attorney General to delay their deportation.



Maria Echaveste

10/19/98 01:36:10 PM

Record Type: Record

To: Julie A. Fernandes/OPD/EOP, Robert N. Weiner/WHO/EOP
cc: Charles F. Ruff/WHO/EOP, Elena Kagan/OPD/EOP
bcc:
Subject: Re: Section 377

I think we should have solicitor general's rationale for appealing this case---this will send Xavier into the stratosphere--is it the usual doj preserve principles for other cases or is it that this case in particular really needs to be appealed--
Julie A. Fernandes

▶ Julie A. Fernandes
10/19/98 11:06:45 AM
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Record Type: Record

To: Maria Echaveste/WHO/EOP
cc: Leslie Bernstein/WHO/EOP
Subject: Section 377

Maria,
Rob and I talked on Friday re: Section 377. First, the Solicitor General has decided to appeal the Magana case. Rob is following up with Castello to find out when this decision was made (his office indicated to me last week that the decision had not been made) and on what grounds they are appealing. Second, Rob wants to press DOJ again on whether there isn't some subgroup of those affected by 377 that could get some relief. He wants to ask DOJ how it would be possible to define a group that could be administratively relieved, consistent with the court findings (for example, those that can demonstrate that they have been in the country since before January 1, 1992 and can meet some threshold showing of deterrance).

Finally, the VP has taken a renewed interest in those who are losing work authorization as a result of the dismissal of the CSS, LULAC and Zambrano cases. Rob also plans to inquire whether if we can define a group to administratively relieve, we can somehow suspend revocation of work authorization for a period of time that allows those affected to attempt to make a showing that they should be relieved.

Please let me know if this all sounds o.k. We can pull together a mtg. to discuss this with Rob when you return from California.

julie

▶ **Julie A. Fernandes**
10/08/98 02:48:04 PM
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Record Type: Record

To: Maria Echaveste/WHO/EOP, Elena Kagan/OPD/EOP
cc: Marjorie Tarmey/WHO/EOP, Leslie Bernstein/WHO/EOP, Laura Emmett/WHO/EOP
Subject: Section 377

I just received a copy of a letter that MALDEF sent to Sen. Hatch requesting that he support an adjustment of the registry to prevent the deportation of those affected by Section 377. So much for not linking the two.

▶ **Julie A. Fernandes**
10/13/98 11:36:06 AM
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Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: Immigration case

Maria has asked about a recent 9th circuit case (Magana-Pizano v. INS) that the advocates think could be a basis to challenge the INS's interpretation of the removal of federal jurisdiction from the late amnesty cases (in Section 377 of the 1996 Act). I found the case (and an earlier one from the 1st circuit) and forwarded them to Rob Weiner. According to Rob, he has been in contact with DOJ about this. Maria has asked me to look at the case also and give her my read.

julie

 Maria Echaveste

10/07/98 08:44:34 PM

Record Type: Record

To: Julie A. Fernandes/OPD/EOP

cc: Elena Kagan/OPD/EOP, Charles F. Ruff/WHO/EOP, Janet Murguia/WHO/EOP

Subject: Late Amnesty--appeal of a case in 9th/2d circuit case

Julie--Congressman Becerra is very concerned about a circuit case that DOJ/INS lost a case that held that legislaiton couldn't strip court of jurisdiction which may provide basis to defeat sec 377--please track down case and talk to me.

Q: What is the INS doing to provide relief to the thousands who, because of Section 377 of the INA, are in danger of being deported?


A: The INS is aware of the issues surrounding those who were members of the CSS, LULAC and Zambrano classes who are now ineligible for immigration benefits (such as work authorization and stays of removal). Current immigration law may provide some avenue for relief for CSS class members. Those who have been in the country for more than 10 years may be eligible for cancellation of removal under IIRIRA. Because of the continued pendency of litigation in both the LULAC and Zambrano cases, we cannot comment on possible outcomes there.

immig-section 377

 Maria Echaveste

03/25/98 07:30:03 PM

Record Type: Record

To: Karen E. Skelton/WHO/EOP, Julie A. Fernandes/OPD/EOP
cc: Elena Kagan/OPD/EOP, Janet Murguia/WHO/EOP
bcc:
Subject: Re: Section 377, Immigration Bill 

Folks--we've recived over 100 letters and more are coming in every day on this issue--we need to get informed on this asap--it involves a longstanding dispute with INS that led to litigation and the INS put in this no judicial review provision so that even though the folks won a right to have their cases reviewed now because of that provision, they're out of luck--Julie, I'll be happy to call Paul Virtue to ask for info so we can get some paper before you call a meeting on this--or maybe you want to call a meeting and have Paul/INS come over and brief this--then we need to hear from the outside advocates on their views--let's try to get this addressed in three/four weeks, shouldn't take that long to figure out what the options are.

Karen E. Skelton

 Karen E. Skelton

03/25/98 05:12:47 PM

Record Type: Record

To: Julie A. Fernandes/OPD/EOP
cc: Maria Echaveste/WHO/EOP
Subject: Section 377, Immigration Bill

This is a long over due e-mail following up with a conversation I had with Cong. Xavier Becerra. He encouraged me to encourage the White House to push for an amendment of the statute to change the terms or effective date of the Act, or do something Administrately, on the amnesty waiver issue. Where are we on this? Is there anything I can do to help?