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RIGHTS and REALITIES

Journal of a Closeted Attorney

Lesbian and Gay Adoptions

Immigrants' Imperilment

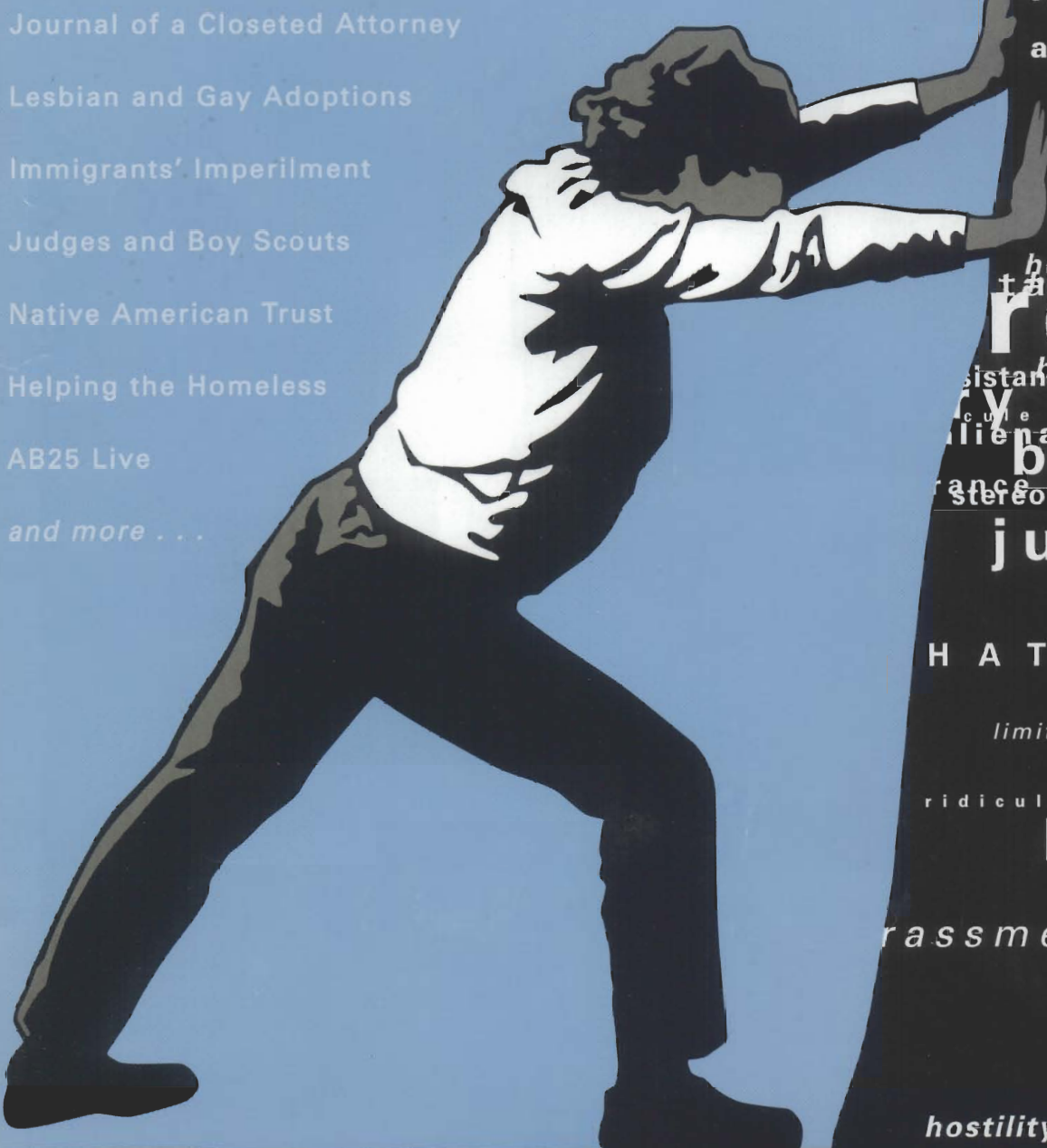
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*The coming reorganization raises questions
about immigrants' civil rights.*

Ongoing troubles at INS—especially recently-issued student visas for two dead 9/11 hijackers—have focused pressure on lawmakers to reign in what is arguably America's most notorious federal agency. INS can be reformed, but only with strong central management delivering on a clear purpose. That purpose should be delivering prompt and fair benefits adjudication for work visas, citizenship, and family immigration, and securing America's borders through a strong border presence, computer tracking of temporary visitors, and effective detection and deportation of illegal aliens. The key is to create a political environment where these goals can be clearly and publicly pursued.

On April 26, 2002, the House passed H.R. 3231 by a vote of 405 to nine. This new law would reorganize INS into two agencies, one to administer immigration benefits and the other to handle law enforcement and deportation. These two agencies would operate under the supervision of a new Associate Attorney General (AAG) for Immigration Affairs. The AAG would need to seek White House approval on some aspects of operations and policy, but would supervise most operations of the two new agencies.

Santa Clara Congresswoman Zoe Lofgren was one of the few House members to vote against H.R. 3231. Lofgren believes that INS' problem is ultimately a management

by SEAN OLENDER

problem, and that the proposed reorganization will distract current commissioner James Ziglar from needed reforms during this larger restructuring.

Separating adjudications and enforcement is a good first step toward a more fair and efficient process. But INS's problems are deeper than most lawmakers acknowledge. The ease with which the 9/11 hijackers entered the United States and obtained student status has focused concern on INS' inability to regulate America's borders.

Inside the borders, cosmetic security efforts to reassure Americans of their safety—such as posting national guardsmen at airports—bear little relationship to the type of threat we face. Hijackers used clandestine methods to achieve the 9/11 destruction. They didn't attack using assault rifles and hand grenades in pitched battles. On the legal front, recent legislation allowing expanded wiretap authority, searches where the subject is never notified of the search, and other dubious measures likewise bear little relationship to preventing these tragedies in the future.

INS has never been able to control illegal immigration, and it probably never will. An effective immigration service can reduce the number of illegal entrants and overstays, but will never stop all of them.

The 2000 Census estimates that there could be as many as eight million illegal aliens in the United States, and there is

little effort afoot to even try to find them. The majority of these eight million work, pay taxes, raise families, and obey the laws. Approximately six out of ten illegal immigrants entered the United States legally as visitors, students, or workers, and remained past the expiration of their authorized period of stay. From one perspective, illegal immigration must be curbed, and those who have violated the law found and removed from the country. But from another perspective, illegal aliens are hardworking taxpayers who provide a workforce vital to certain U.S. industries. They are human beings with jobs and families, many of whom have been in the United States for years, even decades.

Political pressure to avoid clearly supporting either policy is intense. A lawmaker who publicly called for a more active INS effort to find and deport all illegal aliens would face enormous business and popular opposition. But one who publicly called for the legalization or amnesty of all illegals currently in the country would face similar opposition from other groups. The same dichotomy affects temporary visas for visitors, workers, and students. When INS takes too long to process these cases, there is public pressure and disapproval. But when interests shift to security, INS can't take long enough to make certain violent criminals aren't taking a holiday in America.

The Problem

INS has two fundamental problems: weak central management and a conflicting political mandate. H.R. 3231 provides a framework for creating a political mandate, but it does not fix the management problem. Separating adjudications and enforcement will make it easier to address these two separate political goals, but will not force those goals to be addressed. Weak central management results in inconsistent adjudications, operations, and results. Some INS offices provide fast and efficient service, and others do not. Some offices apply the laws fairly, and others apply rules that do not appear in any statute or regulation.

Weak Central Management

INS lacks clear policies and standardized workflow procedures. A petition denied by one adjudicator can be refiled and may be approved by another. A wrongfully denied work visa case can take more than a year to appeal, and re-filing a denied case in the hope of getting a better-qualified adjudicator may require only a few weeks.

Most immigration cases are processed at one of four regional INS service centers, or one of more than thirty local

INS needs strong centralized management; a reliable method for managing administrative decisions, memos, and opinions; and a consistent grievance procedure for delayed and lost causes

INS district offices. When an INS adjudications officer finds that a petition does not satisfy the minimum legal requirements for approval, that officer issues a Request for Evidence (RFE) asking the petitioning employer or individual to provide further explanation or additional documentation. The problem is that the “law” adjudicators sometimes apply cannot be found in the Code or Regulations. Instead, the law used is an informal law—what could be called a paraw—circulating at a district office or service center. These parawes can be learned by talking to information officers, the ombudsman, or by attending service center or district office liaison meetings. Parawes may differ by INS office, or even between groups of adjudicators at the same office.⁴ The fundamental rules for qualifying for H-1B status, for example, are printed in the Code and Regulations, but the really important rules can only be learned by attending liaison meetings, calling colleagues, and trying to have a friend or two on the inside

who can tell you what the current paraw is.

The H-1-B Status

The real problem is that employers who file temporary work visa petitions are in a hurry. They want to hire a specific person to fill a specific job. Some employers are willing to wait a month or two for the beneficiary to start working, but very few will wait one to two years to complete an administrative appeal. Most jobs are not open for that long. The bulk of appellate law consists of unusual cases where, for some reason, the employer is willing to wait one to two years to fill a temporary position.

Government auditors have found that INS adjudicators generally do not have a systematic approach to reviewing H-1B petitions, that they do not have access to case-related information that could help them investigate the merit of petitions, and performance review processes give incentives to approve petitions by rewarding officers for the quantity of petitions approved.⁵ INS first tried to implement a national standard for H-1B petition adjudication in August 2000.

Before that time, auditors observed “major differences” between INS offices and individual officers in how adjudicators

decide which petitions to approve.⁶ Practitioners still observe these major differences.

The lack of a consistent and systematic review process occasionally results in an employer submitting an H-1B visa petition to INS, having an adjudicator deny the petition, and then resubmitting it without modification and a second adjudicator approving the same petition.⁷

INS' Conflicting Political Mandate

Congress and the president need to give INS a clear mandate. INS suffers bad press when it fails to control illegal immigration, but it also suffers when it raids worksites, arresting and deporting illegal aliens. Congress and the White House have constituencies that support certain immigration policies and others that do not. Efforts to satisfy both of these constituencies have made INS' primary mandate to avoid attracting attention.

During the economic expansion of the late 1990s, INS adopted a policy of not trying to find or deport any illegal aliens except those who have committed crimes. U.S. industry—especially agricultural and meat-packing companies—complained that worksite raids were putting

them out of business. "It is just the market at work, drawing people to jobs, and the INS has chosen to concentrate its actions on aliens who are a danger to the community," noted Robert L. Bach, INS associate commissioner for Policy and Planning during an interview in 2000.⁸ Brian R. Perryman, the INS Chicago District director, notes that "the Immigration Service has never had the resources to arrest every illegal alien, and now there is a large number and a demand from many companies to employ them,"⁹

If there is little support for deporting all illegal aliens, then some effort must be made to enact another amnesty or legalization provision. Having a large population of illegal aliens living outside the law causes unconscionable social problems. Illegals are less likely to report crimes against them. They are less likely to report workplace health, safety, and wage violations from an obvious fear of being found and reported. And even those who brave the risk of deportation to complain of wrongdoing learn that the law won't protect them.¹⁰

The Solution

INS needs strong centralized management; a reliable method for managing administrative decisions, memos, and opinions; and a consistent grievance procedure for delayed and lost cases. This has to come from Washington. District offices and service centers cannot be left to make paralaaws and procedures. Businesses that hire foreign workers, U.S.

citizens who petition for family members, and applicants for citizenship deserve predictable laws, standard procedures, and reasonable processing times.

Congress and the Bush administration need to develop a consistent immigration policy that balances amnesty and law enforcement. INS claims that it does not have the resources to detect and deport illegal aliens except those who commit crimes. A more likely reason for this failure is the public outcry and political backlash that would result from mass deportation. American society should not tolerate an underclass of millions of exploited and unprotected workers. The American status quo is to allow illegals to remain so as not to offend the large American industries that employ them, but to condemn their presence and have them live in fear. What commercial farm or meat-packing company wouldn't want a worker who was too frightened to complain if the company missed a few paychecks?

Ironically, during the past two years, INS has been making some progress instituting reforms. And this was Congresswoman Lofgren's point. If this bill becomes law, it is unclear how much it will affect the current reform process. This bill may mark the start of a period of unprecedented inefficiency while INS focuses on the enormous task of separating one poorly run organization into two.

NOTES

Zoe Lofgren worked as an immigration lawyer before she was elected congresswoman, thus her understanding of these issues may exceed those of her colleagues.

"House votes: Abolish INS," Eric Schmitt, *New York Times*, April 26, 2002.

Immigration: The Economic and Demographic Facts, Julian L. Simon, published by the Cato Institute and the National Immigration Forum, December 11, 1995.

For example, see H-1B Case LIN-99-243-50365, Petitioner ADITI Corporation at page 6; here the Administrative Appeals Unit (AAU) in reversing the denial of an H-1B case, notes that the director of the INS Nebraska service center introduced a new concept of speculative employment to deny a case. In reversing, the AAU noted, "There is no support for the exploration of this concept per se in either statute or regulations."

"H-1B FOREIGN WORKERS: Better Controls Needed to Help Employers and Protect Workers," Report of the General Accounting Office, September 2000, Report No. GAO/HEHS-00-157, at page 23.

Id.

Id at 28.

"I.N.S. Is Looking the Other Way As Illegal Immigrants Fill Jobs," Louis Uchitelle, *New York Times*, March 9, 2000.

Id.

An incredible recent Supreme Court decision held that the NLRB was precluded from ordering back wages where an employer wrongfully terminated an illegal immigrant for participating in union activities solely because he was unauthorized to work in the United States. This case represents the new incentives for employers to hire illegals – especially those with fake documents who provide an ignorance excuse for savvy employers.

Hoffman Plastic Compounds v. NLRB, Sup. Ct. Slip. Op. No. 00-1595, 3/27/02.