

# **BRIEF OF THE POST-DEPORTATION HUMAN RIGHTS PROJECT**

in support of the

## **Request for Public Thematic Hearing Concerning U.S. Deportation Policy and the Rights of Migrants**

before the

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**  
149<sup>th</sup> Period of Sessions

pursuant to

Article 66 of the Rules of Procedure  
of the Inter-American Commission on Human Rights

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**TABLE OF CONTENTS**

**I. INTEREST OF PETITIONER POST-DEPORTATION HUMAN RIGHTS PROJECT.....3**

**II. SUMMARY AND BACKGROUND ..... 4**

**A. Immigration Judges Lack the Discretionary Authority to Consider Personal Circumstances and Family Unity in Many Deportation Cases..... 4**

**B. Lack of Discretion Has Led to a Drastic Increase in Deportations ..... 7**

**III. ONCE DEPORTED, INDIVIDUALS DO NOT HAVE A REALISTIC POSSIBILITY TO REUNITE WITH THEIR FAMILIES. .... 9**

**A. Bars to Permanent Reunification in the United States ..... 9**

**B. Limited Avenues for Temporary Return to the U.S. .... 16**

**IV. THE U.S. LEGAL SYSTEM LACKS MECHANISMS FOR DEPORTED PARENTS TO PARTICIPATE IN FAMILY COURT MATTERS ..... 19**

**V. ADJUDICATORS MUST HAVE MORE DISCRETION TO PROTECT FAMILY UNITY. .21**

**VI. CONCLUSION ..... 22**

## **I. INTEREST OF PETITIONER POST-DEPORTATION HUMAN RIGHTS PROJECT**

The Post-Deportation Human Rights Project (PDHRP), based at the Center for Human Rights and International Justice at Boston College, offers a novel and multi-tiered approach to the problem of harsh and unlawful deportations from the United States. It is the first and only legal advocacy project dedicated to the representation of individuals who have been deported from the United States. The PDHRP also aims to conceptualize the new field of post-deportation law, not only by providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members, but also through research, legal and policy analysis, media advocacy, training programs, and participatory action research. Its ultimate goal is to introduce correct legal principles, predictability, proportionality, compassion, and respect for family unity into the deportation laws and policies of this country.

The PDHRP previously filed an amicus brief in the case of *Wayne Smith and Hugo Armendariz v. The United States of America* (Case No. 12.561 and 12.562), in which the Inter-American Commission on Human Rights concluded that the United States violated petitioners' rights under Articles V (right to private and family life), VI (right to family), VII (right to protection for mothers and children), XVIII (right to fair trial), and XXVI (right to due process of law) of the American Declaration by failing to provide an individualized balancing test in their deportation proceedings to weigh the State's legitimate interest to protect and promote the general welfare against an individual's fundamental rights, including the right to family life.

## II. SUMMARY AND BACKGROUND

The PDHRP joins with other petitioners in a request for a public thematic hearing before the Inter-American Commission on Human Rights to consider the effect of mandatory deportation laws and policies on family unity.<sup>1</sup> This brief will provide some context on the harsh U.S. immigration and deportation laws that lead to the separation of thousands of families each year, and then – through stories of affected individuals – it will focus on the equally harsh provisions and policies that prevent family reunification following deportation.

### A. Immigration Judges Lack the Discretionary Authority to Consider Personal Circumstances and Family Unity in Many Deportation Cases

The tightening of immigration and deportation laws and the stepped up enforcement policies of the United States have led to the removal of hundreds of thousands of individuals each year with strong family ties in the United States, including tens of thousands of lawful permanent residents. Two 1996 laws, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration and Immigrant Responsibility Act (“IIRIRA”), greatly increased the grounds for deportation from the United States by expanding the sorts of criminal convictions that result in mandatory deportation. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010). At the same time, these laws also eliminated and replaced certain discretionary forms of relief that had previously allowed Immigration Judges to take into consideration an individual’s “equities,” such as community and family ties, when deciding whether to order someone deported.

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<sup>1</sup> *See*, Request for Public Thematic Hearing Concerning U.S. Deportation Policy and the Rights of Migrants (submitted concurrently).

For lawful permanent residents of the United States, the most significant provision of the 1996 laws was the elimination of a discretionary form of relief known as 212(c) relief (former 8 U.S.C. § 1182(c)). This relief had been previously available to certain long-term lawful residents who were removable based on criminal convictions or fraud. In its place, a significantly more stringent form of relief was put in place, called “cancellation of removal.” 8 U.S.C. § 1229b(a). Cancellation of removal is not available to those convicted of crimes defined as “aggravated felonies” under immigration law. *Id.* The types of criminal convictions that are considered “aggravated felonies” have grown exponentially since the creation of this category in 1988. Since 1996, the category has included relatively minor and nonviolent offenses. For example, a theft offense with a one year sentence is an aggravated felony. 8 U.S.C. § 1101(a)(43)(G). This is true even where the sentence is “suspended,” meaning that the individual never had to spend a single day in jail due to the criminal conviction. 8 U.S.C. § 1101(a)(48)(b). Moreover, for many years, the government pursued aggressive interpretations of other aggravated felony provisions relating to “crimes of violence” and drug possession. Although these interpretations were ultimately rejected by the Supreme Court, many thousands were deported before those rulings were made. *See, Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Lopez v. Gonzales*, 549 U.S. 47 (2006).

An Immigration Judge has no discretion to consider the individual equities in an aggravated felony case, including the passage of time since the conviction, whether the person has been rehabilitated, how long he or she has lived in the United States, or the effects the deportation might have on the deportee’s family, including U.S. citizen spouses and children. Deportation proceedings based on conviction for an aggravated felony also subject those charged – even long-term lawful residents – to virtually mandatory deportation. There are no publicly

available statistics on exactly how many lawful permanent residents have been deported as aggravated felons. But a reasonable estimate is that tens of thousands of those deported each year are lawful permanent residents, a large percentage of whom are charged as aggravated felons.<sup>2</sup>

Other forms of relief from deportation similarly leave many deportees with U.S. citizens and lawful permanent resident spouses and children unprotected. One provision, for example, allows individuals who are out of status and who have lived in the United States for at least ten years to avoid deportation if they can show that their deportation would cause hardship to a U.S. citizen or lawful permanent resident family member. However, where the individual is placed in deportation proceedings prior to reaching the ten year mark, this form of relief is unavailable – even if the individual has been here for ten years or more by the time a decision is issued in the case. Further, the level of hardship that must be demonstrated is “exceptional and extremely unusual hardship” – an exceedingly high standard. 8 U.S.C. § 1229b(b)(1)(D). Lastly, there is a strict numerical limit, and no more than 4,000 people may be granted this form of relief each year. 8 U.S.C. § 1229b(e)(1).

Moreover, more than half of all removals occur in fast-track proceedings<sup>3</sup> that were put in place by the 1996 laws. 8 U.S.C. §§ 1225(b); 1231(a)(5). These fast-track removals – ordered and carried out by low-level enforcement agents – target individuals apprehended at or near the

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<sup>2</sup> Human Rights Watch, *Forced Apart (by the Numbers)*, (2009), available at <http://www.hrw.org/reports/2009/04/15/forced-apart-numbers-0>. The report analyzes in detail data provided by the U.S. Department of Homeland Security on the numbers and criminal history of deported individuals, and concludes that 72 percent of those deported between 1997 and 2007 based on criminal grounds had nonviolent offenses (including prior immigration violations).

<sup>3</sup> Office of Immigration Statistics, U.S. Department of Homeland Security, *Immigration Enforcement Actions: 2011*, Table 5, available at <http://www.dhs.gov/immigration-enforcement-actions-2011>.

border or a port of entry and those who unlawfully return to the U.S. after deportation.<sup>4</sup> They offer only minimal protection for those fearing persecution or torture in their countries of origin and do not take into account strong family ties in the U.S.

#### B. Lack of Discretion Has Led to a Drastic Increase in Deportations

It is against this backdrop of expanded grounds of deportation, stepped-up enforcement, and the elimination of discretionary authority of Immigration Judges, that a record number of deportations are taking place, inevitably leading to family separation that is often permanent. In the past 15 years there has been a massive increase in deportations.<sup>5</sup> In recent years, the U.S. government has carried out approximately 400,000 deportations each year and hundreds of thousands more people are “voluntarily” returned to their countries of origin without a formal deportation order.<sup>6</sup> Recent studies have shown that, just in the past two years, more than 200,000 parents of U.S. citizens have been deported.<sup>7</sup> At any given time, it is estimated that more than 5,100 children are in the U.S. foster care system because their parents or caretakers are in immigration detention or have been deported.<sup>8</sup> A 2007 Human Rights Watch report estimated that approximately 1.6 million family members – including husbands, wives, sons, and daughters – were separated from loved ones due to deportations based on criminal offenses, and that

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<sup>4</sup> Human Rights Watch, *Turning Migrants Into Criminals* (May 2013) available at <http://www.hrw.org/reports/2013/05/22/turning-migrants-criminals-0>. This report describes how thousands of individuals are criminally prosecuted for the federal crime of illegal reentry, a growing number of whom are former long-term residents seeking to rejoin family in the United States. (p. 4, 44-61).

<sup>5</sup> Office of Immigration Statistics, U.S. Department of Homeland Security, *2011 Yearbook of Immigration Statistics*, Table 39, available at <http://www.dhs.gov/yearbook-immigration-statistics> (indicating that 69,680 deportations were carried out in 1996, as compared to 391,953 deportations in 2011).

<sup>6</sup> *Id.*

<sup>7</sup> Seth Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, Colorlines, available at [http://colorlines.com/archives/2012/12/us\\_deports\\_more\\_than\\_200k\\_parents.html](http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html) (analyzing data provided by the U.S. Department of Homeland Security through a Freedom of Information Act request).

<sup>8</sup> Applied Research Center, *Shattered Families* (Nov. 2011), available at <http://arc.org/shatteredfamilies>.

540,000 of those affected were U.S. citizens.<sup>9</sup> Furthermore, a growing body of research has documented the negative – indeed often devastating – effects of U.S. deportation policies on the countries that must receive U.S. deportees.<sup>10</sup>

Generally, individuals with certain family ties – such as spouses of U.S. citizens or lawful permanent residents, and parents of adult U.S. citizens – can qualify for an immigrant visa leading to permanent status in the U.S. Those who have been removed, however, face often insurmountable obstacles to reunification with their families in the U.S. due to harsh and punitive legal provisions. Individuals who have been removed but who have family members who continue to reside in the U.S. – including U.S. citizen spouses and children – also face significant obstacles to return, even on a temporary basis. The cumulative effect of these laws and policies on families is often prolonged or lifetime separation. This brief highlights some of the most common situations that our organization has encountered. It recounts stories of individuals who have been deported from the United States and who face long-term or permanent separation from family members. This tragic outcome is largely due to the lack of discretion given to adjudicators under current immigration laws and policy to consider individual circumstances and give weight to family unity.<sup>11</sup>

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<sup>9</sup> Human Rights Watch, *Forced Apart*, p. 44 (July 2007), available at <http://www.hrw.org/reports/2007/07/16/forced-apart>.

<sup>10</sup> See e.g., Daniel Kanstroom, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA*, (Oxford University Press 2012).

<sup>11</sup> For additional commentary on the need for discretion and proportionality in immigration proceedings, see, e.g. Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431 (Spring 2011).

### **III. ONCE DEPORTED, INDIVIDUALS DO NOT HAVE A REALISTIC POSSIBILITY TO REUNITE WITH THEIR FAMILIES.**

Despite the overwhelmingly large number of deported individuals and the families that are torn apart as a direct result of deportation, harsh legal bars to return following deportation often make permanent family reunification impossible. Even temporary permission to visit with family in the U.S. is exceedingly difficult to obtain, and for most is not a realistic option.

#### **A. Bars to Permanent Reunification in the United States**

As detailed above, deported individuals often leave behind U.S. citizen or lawful permanent resident family members, including spouses, children, and parents. At times, these family relationships may qualify them to apply for an immigrant visa. 8 U.S.C. § 1184. However, prior immigration or criminal history – or simply the fact of their deportation – makes many deportees categorically ineligible for an immigrant visa. *See generally* 8 U.S.C. § 1182(a). Therefore, despite their family ties, they remain unable to obtain immigration status and they cannot return to the U.S. to reunite with spouses and children. Though some bars to immigrant visa eligibility can be overcome by special waivers,<sup>12</sup> others make one permanently ineligible for lawful resident status in the U.S., in effect, banned for life. What follows are examples of the obstacles faced by individuals who have been deported or who have left the U.S. when they seek to return lawfully to reunite with family.

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<sup>12</sup> See, e.g. 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of unlawful presence), 1182(h) (waiver of some criminal grounds of inadmissibility), 1182(i) (waiver for fraud and misrepresentation).

1. *The “Permanent Bar” Due to Illegal Reentry Following Prior Removal or Unlawful Presence*

Jesus Manuel Trevizo Valdez entered the United States unlawfully in 1999 as a young man.<sup>13</sup> He eventually married Cynthia Trevizo, a U.S. citizen, and the couple decided to take steps to regularize Jesus’s status. With the help of a “notario,”<sup>14</sup> Cynthia filed a family petition on Jesus’s behalf. However, the paperwork contained an error and indicated that Jesus had entered the U.S. twice rather than just once. The notario advised Jesus and his wife that the error was inconsequential, and that it would not affect their visa application. In December 2007, Jesus traveled to Ciudad Juarez, Mexico, for his immigrant visa interview.<sup>15</sup> Based on the information included in the application – indicating that Jesus had been present in the U.S. unlawfully for more than a year, had departed, and then had illegally reentered – his immigrant visa was denied pursuant to the “permanent bar” of 8 U.S.C. § 1182(a)(9)(C). Individuals who unlawfully reenter or attempt to reenter the United States following deportation or after having departed the U.S. following a year or more of unlawful presence are subject to a “permanent bar” to return. 8 U.S.C. § 1182(a)(9)(C). Permission to return to the United States cannot even be requested, under the current application of this provision, until the individual subject to the bar has remained outside the country for a period of ten years.<sup>16</sup>

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<sup>13</sup> Lisa Falkenberg, “*Right Way*” Ended in 10-Year Visa Ban, HOUSTON CHRONICLE (June 15, 2011), available at <http://www.chron.com/news/falkenberg/article/Lisa-Falkenberg-Right-way-ended-in-10-year-1690016.php>.

<sup>14</sup> In the immigration context, the term “notario” is generally used to refer to individuals who fraudulently represent themselves as qualified to offer legal advice or services concerning immigration law but who are not attorneys. See generally, American Bar Association, “About Notario Fraud,” available at [http://www.americanbar.org/groups/public\\_services/immigration/projects\\_initiatives/fightnotariofraud/about\\_notario\\_fraud.html](http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud.html).

<sup>15</sup> Most individuals who entered unlawfully must first leave the United States to be able to apply for a family based immigrant visa at a U.S. Consulate abroad.

<sup>16</sup> *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007); *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006).

Despite efforts to correct the record to show that Jesus had in fact only entered the U.S. once, following an unsuccessful attempt that did not result in a deportation order, and that he therefore should not be subject to the permanent bar, Jesus remains in Mexico. Cynthia, an elementary school nurse's assistant, has struggled with depression due to the separation from her husband but must remain in the U.S. to work. She visits her husband whenever possible. Jesus will have to wait until he has been outside the country for ten years – until 2017 – before he becomes eligible even to request a waiver to be granted an immigrant visa through his wife. For this couple, the permanent bar has meant long-term separation and has essentially put their life on hold.

Roberto Contreras Osorio came to the United States unlawfully in 1990 when he was 16 years old.<sup>17</sup> In 1993, he was convicted of gun possession, served part of a one year sentence, and was deported to Mexico. Roberto returned to the U.S. unlawfully in 1998, and a year later met his future wife, Giselle. The couple married in April of 2001, and that same month they went together to an immigration office, seeking to regularize Roberto's status. The couple thought that the process would be straightforward. They were legally married and Giselle was a U.S. citizen. Instead, Roberto was arrested by immigration authorities and quickly deported. A few months later, Giselle moved to Cuernavaca, Mexico, intending to remain with her husband while he sought an immigrant visa. Giselle then proceeded to file a family petition for Roberto, but the couple eventually learned that, because Roberto had returned to the U.S. unlawfully after having been deported, he would not be eligible to even request an immigrant visa until he had remained outside the U.S. for ten years following his deportation. Giselle and Roberto made the difficult decision to remain in Mexico together, though it meant a lot of sacrifices. Giselle was separated from her family and was unable to be by her grandfather's bedside when he passed away. She

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<sup>17</sup>Information provided is based on interviews with Giselle Stern and the couple's immigration attorney.

was unable even to attend his funeral. Roberto was finally granted an immigrant visa in June 2013 – twelve years after his deportation.

This penalty makes it impossible for deported individuals to be reunited with their families in the U.S., no matter the circumstances that led to their removal or how compelling their personal situations may be. For many families, like Jesus and Cynthia, this means a decade-long separation as they “wait out” the bar. For others, as was the case for Roberto and Giselle, the permanent bar may mean long-term exile of U.S. citizen members of the family as they remain abroad with their loved one.

## *2. Permanent Bar Based on False Claim to U.S. Citizenship*

Erika had entered the United States unlawfully in 1995. Two years later, she married Alberto Rincon, a lawful permanent resident, and they had two U.S. citizen children. In 1999, Erika traveled to Mexico to visit her ailing mother. When she returned to the United States in April of 1999, she was detained and interrogated at the border. Erika was confused and frightened, and during the interrogation she admitted that she had falsely claimed to be a United States citizen. Based on this admission, the border officers issued an expedited removal order and immediately deported her to Mexico without giving her an opportunity to plead her case before an Immigration Judge.

Shortly after her deportation, Erika returned to the U.S. to be with her young children. In March 2002, she filed an application for adjustment of status to obtain lawful permanent residence based on her marriage. At the interview, immigration enforcement officers arrested her and denied her application for adjustment of status. Although Erika had no criminal history and was working hard to raise her U.S. citizen children, under current immigration laws she is

subject to multiple grounds of inadmissibility. Most strikingly, she is *permanently* barred from the United States because of the finding that she made a false claim to U.S. citizenship.

Individuals who are deemed to have made a false claim to U.S. citizenship are treated especially harshly by U.S. immigration law. *See generally*, 8 U.S.C. § 1182(a)(6)(C)(ii). Though a waiver of this ground of deportation and inadmissibility was available pre-1996 (and remains available for claims made prior to the change in law), no such waiver exists today. The permanent bar as a result of a false claim to U.S. citizenship applies without any individualized consideration given to the equities in her favor and without regard to protecting the right to family life. Erika is also subject to the “permanent bar” described in the prior section due to her unlawful return to the United States after having accumulated unlawful presence.<sup>18</sup> For Erika, these provisions meant immediate deportation to Mexico based on the reinstatement of her prior order of deportation. On appeal, the Ninth Circuit Court of Appeals affirmed the deportation order, effectively permanently banishing Erika from the United States.<sup>19</sup>

Even claims to U.S. citizenship made by minors or without knowledge of their falsity have been found to subject one to this bar, creating, in essence, unforgiving strict liability. Individuals found to have made a false claim to U.S. citizenship are permanently barred from obtaining an immigrant visa, without an opportunity to have their equities – including the effect that their inability to return to the U.S. will have on family unity – considered by an adjudicator.

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<sup>18</sup> Erika also has a 20 year bar as a result of her multiple removals (the expedited order in 1999 and the reinstated order in 2004). 8 U.S.C. § 1182(a)(9)(A). It is significant to note that in neither deportation proceeding did Ms. de Rincon ever have an opportunity to prepare a defense. The first deportation occurred on an expedited basis at the border; she had no opportunity to obtain a lawyer or prepare a defense; an ICE enforcement officer at the interrogation (not an immigration judge) made the finding that she had made a false claim to U.S. citizenship and ordered her to be removed. The second deportation occurred on an expedited basis shortly after her interview with the Immigration Service; an ICE enforcement officer (not an immigration judge) reinstated the prior order of removal and then two days later she was deported to Mexico.

<sup>19</sup> *de Rincon v. DHS*, 539 F.3d 1133 (9th Cir. 2008).

### 3. *Harsh Bar for Nearly All Drug Offenses*

Roberto Peralta lawfully immigrated to the United States with his family when he was two years old. In 2010, based on convictions from the mid-1990's, Roberto was deported to the Dominican Republic. He left behind his partner and their four young children.<sup>20</sup> Despite Roberto's long history of rehabilitation and strong family ties, Roberto faced mandatory deportation due to the combination of the broader definition of "aggravated felony" and the elimination of discretionary relief brought about by the 1996 laws.<sup>21</sup> All drug offenses – with only a narrow exception for a single marijuana possession offense – make one permanently excludable and ineligible for a visa, and pose a lifetime bar to living in the United States. 8 U.S.C. § 1182(a)(2)(i)(II). Because the old convictions related to controlled substances, Roberto remains permanently ineligible for lawful resident status in the U.S., despite his numerous family ties in the U.S.

Christina and Manuel Matias-Arroyo had started a family, owned a home, and had recently opened a hair salon.<sup>22</sup> But in the early morning hours of May 2008 immigration raided their home and detained Manuel. He was soon transferred to a detention center in Alabama and then Louisiana before being deported to Mexico. Manuel had entered the U.S. unlawfully from Mexico several years before meeting his wife. At the time, he was put in immigration proceedings, but did not receive a letter informing him of an upcoming hearing, and when he did not show up in court he was ordered deported in his absence. He only found out about this

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<sup>20</sup> Albor Ruiz, *Dad of Four Faces Deport Hell*, N.Y. DAILY NEWS, May 3, 2007, available at <http://www.nydailynews.com/new-york/bronx/dad-faces-deport-hell-article-1.248726>.

<sup>21</sup> *Peralta-Taveras v. Gonzales*, 488 F.3d 580 (2d Cir. 2007).

<sup>22</sup> Joe Calderon, *Immigration Laws Tear a Family Apart*, SHOPPER-NEWS NOW, Vol. 47, No. 46, Nov. 17, 2008.

outstanding order of deportation when he and his wife – a U.S. citizen – consulted an immigration attorney to try to regularize his status.

Since her husband's deportation, Christina has been diagnosed with severe clinical depression. She describes herself as withdrawn, and says that she does not like to be around happy families because it just reminds her of what her own family could have been. She has also faced major financial hurdles, and has had to apply for government assistance and ask her church community for help just to get by. After Manuel's deportation, Christina remained hopeful that he would be able to return, and she worked hard to gather letters of support. But because of a conviction for drug possession that is more than a decade old – and that has since been expunged – Manuel was denied a family-based immigrant visa and was told he is permanently barred from returning to the United States. The fact that he has had a clean record for over a decade and has a U.S. citizen wife and young son made no difference to his immigration case. Christina and their son, Diego, remain in the U.S. and plan to visit Manuel this coming October.

4. *Extreme Hardship to U.S. Citizen Children Not Sufficient to Waive Prior Unlawful Presence*

Ana Ines Gutierrez-Garcia left Guatemala during the Civil War in the 1980's.<sup>23</sup> She was questioned a few months later while a passenger in a car in the United States. The agents suspected that she was undocumented, and a notice ordering her to appear in court was sent to her at the address she provided. However, Ana's partner at the time was abusive, and her mail was often withheld from her. She did not go to court on the scheduled date because she never received the notice, and the immigration judge ordered her deportation in her absence. For years, Ana fought to reopen her case but was rejected numerous times and never had an

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<sup>23</sup> Information provided is based on interviews with Ana Ines Gutierrez-Garcia and a review of her immigration court record (on file with the Post-Deportation Human Rights Project).

opportunity to present her asylum claim to a judge. In 2009, she was physically deported and had to leave her then-teenage daughter, who is a U.S. citizen, behind.

Though Ana's daughter has since turned 21 and is now old enough to file a petition for an immigrant visa on behalf of her mother, Ana won't be able to qualify for the visa. Those who have accrued a year or more of unlawful presence in the U.S. and have since departed voluntarily or have been removed, are generally barred from returning for a period of ten years. 8 U.S.C. § 1182(a)(9)(B)(i)(II). Those who qualify for an immigrant visa through a relative can request a waiver to this bar by showing that their inability to return to the U.S. would cause extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent. 8 U.S.C. § 1182(a)(9)(B)(v). For purposes of requesting this waiver, however, hardship to children, even U.S. citizen children, is deemed irrelevant.

Ana accrued more than a year of unlawful presence in the U.S., and thus faces this ten year penalty. Ana has no criminal history, had lived in the U.S. for about twenty years, and has a U.S. citizen daughter. However, because extreme hardship to U.S. citizen children is not sufficient to request a waiver of inadmissibility, and because Ana does not have a parent or spouse who is a U.S. citizen or green card holder, she is not eligible to request a waiver and to have discretionary factors in her case considered. Ana must therefore wait in Guatemala until 2019 before she can seek to rejoin her daughter in the U.S.

B. Limited Avenues for Temporary Return to the U.S.

The current legal framework provides numerous avenues for temporary entry to the U.S. For example, individuals – including those who have been previously deported – may request a visitor's visa or seek to enter the U.S. through a grant of humanitarian parole. However, those

with a history of deportation face significant hurdles in obtaining such temporary status so that in practice these avenues are essentially unavailable.

Ms. Sonhae Lee was born in Korea and has been a citizen of the U.K. since 1970.<sup>24</sup> In 2000 she was granted lawful permanent status through one of her adult U.S. citizen daughters. A change in circumstances, however, made it impossible for Sonhae to relocate to the U.S. as originally intended. However, she traveled to the U.S. on numerous occasions to visit her family, and – not knowing that it was improper because she had not maintained residency in the U.S. – used her green card to enter on those occasions. Upon an entry in May 2005, she was stopped at the airport and accused of being an intending immigrant without proper documentation. She was placed in removal proceedings but returned to the U.K. prior to her final hearing to receive treatment for breast cancer. When she did not appear at her hearing in immigration court in September 2006, she was ordered removed in her absence. In February 2012, Sonhae applied for a nonimmigrant visa so that she could travel to the U.S. to visit her youngest daughter who was expecting her first child, and also attend another daughter's wedding. Her visa, however, was summarily denied.

Though her daughters have been able to visit her in the U.K., these visits have been brief due to the daughter's work commitments. Sonhae, now a retired 69-year-old, is currently married to a citizen of the U.K. and has no intention of relocating permanently to the U.S. In fact, she formally abandoned her permanent residency soon after she learned that retaining the card was improper. However, she has been denied the opportunity to spend any significant time with her U.S. citizen daughters and grandchild, causing her significant emotional distress.

In order to obtain most temporary visas, the applicant must overcome a presumption under the law that he or she actually intends to remain permanently in the United States. 8

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<sup>24</sup> Information provided is based on interviews with Sonhae Lee and her husband.

U.S.C. § 1184(b). This means that the individual has the burden of convincing the consular officer that he or she intends to return to the country of deportation following a brief stay in the U.S. More than a million requests for a nonimmigrant visa are denied each year for failure to overcome a presumption of immigrant intent.<sup>25</sup>

For individuals who have been forcibly returned and who have left behind spouses, children, or elderly parents, this legal presumption may very well be an insurmountable hurdle, regardless of applicants' best intentions. In addition, even if they successfully overcome the presumption of immigrant intent, those who have previously been deported are ineligible for a visa for a period ranging from five years to life following their deportation, depending on the circumstances of their cases. 8 U.S.C. § 1182(a)(9)(A). Immigration law allows for a waiver of this ground of ineligibility, but in practice it is difficult to obtain such a waiver for purposes of being granted a nonimmigrant visa. For fiscal year 2012, for example, less than 15% of individuals who applied for a temporary visa and sought a waiver of ineligibility based on having received a prior order of deportation were granted the waiver.<sup>26</sup>

Those seeking to return on a permanent basis may also apply for humanitarian parole. Humanitarian parole can be granted for urgent and humanitarian reasons, and can be granted even to those who would otherwise be inadmissible and thus ineligible for a visa. 8 U.S.C. § 1182(d)(5). Generally, however, the process requires one to have applied for a temporary visa, or to explain why applying for such a visa is not an option.

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<sup>25</sup> U.S. Department of State, *Report of the Visa Office* (2012), Table XX, Immigrant and Nonimmigrant Visa Ineligibilities, Fiscal Year 2012, available at [http://www.travel.state.gov/visa/statistics/statistics\\_5861.html](http://www.travel.state.gov/visa/statistics/statistics_5861.html).

<sup>26</sup> *Id.*

#### **IV. THE U.S. LEGAL SYSTEM LACKS MECHANISMS FOR DEPORTED PARENTS TO PARTICIPATE IN FAMILY COURT MATTERS**

Amelia Reyes-Jimenez came to the U.S. to seek medical care for her severely disabled son when he was an infant.<sup>27</sup> She settled in Arizona and gave birth to three more daughters, all U.S. citizens. One day in 2008, Amelia left her four children in the care of her partner and went to run an errand. Unbeknownst to her, her partner then took the three girls to the park and left her disabled son home alone. A neighbor, hearing the child's cries, called the police and both Amelia and her partner were arrested and charged with child abuse. Amelia was quickly transferred from criminal to immigration custody, and her children were placed in foster care. While Amelia remained in detention fighting deportation for more than one year, she was unable to visit with her children. From detention, she was also unable to comply with the reunification plan set by the family court.

In July 2009, the Immigration Judge denied Amelia relief from removal finding that she did not show the requisite level of "exceptional and extremely unusual hardship." The decision was affirmed by the Board of Immigration Appeals four months later. In the meantime, the state moved to terminate her parental rights. In May 2010, while Amelia's case was pending on appeal before the Ninth Circuit, she was deported to Mexico. In February 2012, the Ninth Circuit denied her appeal.<sup>28</sup> Following her deportation, Amelia was only able to participate in family court proceedings by telephone. Her parental rights were terminated, and all four of her children were adopted.

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<sup>27</sup> Rabin, Nina, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 101 (2011-2012).

<sup>28</sup> *Reyes-Jimenez v. Holder*, 469 Fed. Appx. 626 (9th Cir. 2012).

Amelia’s case is not an outlier. In the past two years, the U.S. government has deported approximately 205,000 parents of U.S. citizen children.<sup>29</sup> At any given time, it is estimated that at least 5,100 children are in the U.S. foster care system because their parents or caretakers are in immigration detention or have been deported.<sup>30</sup> Despite these substantial numbers and significant implications, the child welfare system and the immigration laws work in parallel worlds, one often unaware of the intricacies or implications of the other.<sup>31</sup> Even when informed about the needs of the other, the systems often appear irreconcilable.

For example, as was the case for Amelia, a situation may arise in which a child is placed in foster care when the parent is detained by immigration authorities and is subsequently deported. The family court may mandate a reunification plan by which the parent must abide in order to regain custody of the child, but – because of the deportation or the limitations imposed by immigration detention – the parent is unable to comply. Serious problems also arise when a family court sets a custody hearing or termination of parental rights hearing and the parent is unable to attend because he or she has been deported.<sup>32</sup>

Current legal relief in the form of a visitor’s visas or humanitarian parole could offer the necessary pathway for deported parents to return to the U.S. for purposes of attending family court proceedings or otherwise address issues related to child custody. As described above in Part III(B) *supra*, however, these avenues are limited and – in practice – exceedingly difficult to obtain. Humanitarian parole, for example, may be granted in the government’s discretion “only

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<sup>29</sup> Wessler, *supra* note 6.

<sup>30</sup> Applied Research Center, *supra* note 7.

<sup>31</sup> *See generally*, Women’s Refugee Commission, *Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention* (December 2010) available at <http://www.womensrefugeecommission.org/programs/detention/parental-rights>.

<sup>32</sup> *See generally*, David B. Thronson, *Immigration Enforcement and Family Courts*, in CHILDREN IN HARM’S WAY: CRIMINAL JUSTICE, IMMIGRATION ENFORCEMENT, AND CHILD WELFARE (Susan D. Phillips, Wendy Cervantes, Yali Lincroft, Alan J. Dettlaff & Lara Bruce, eds., 2013); David B. Thronson & Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. & FAMILY CT. J. 1 (2012).

on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A). The website of the U.S. Citizenship and Immigration Service, which generally processes humanitarian parole applications, states that parole will be “used sparingly.”<sup>33</sup> Thus, this avenue of return, at least as currently implemented, fails to match the potential need arising from the deportation of close to 100,000 parents of U.S. citizens each year.

## **V. ADJUDICATORS MUST HAVE MORE DISCRETION TO PROTECT FAMILY UNITY.**

Current bars to return are unduly harsh, as demonstrated by the above case examples. The so-called “permanent bar” and the three and ten-year bars for unlawful presence mean that many families face long-term separation. The seemingly absolute bar for individuals who are found to have made a false claim to U.S. citizenship provides no exceptions based on extraordinary circumstances or family hardship. The same is true for individuals with old drug related convictions, including simple possession offenses, who are simply ineligible to obtain permanent status in the U.S. despite having relatives who can petition for them, years of rehabilitation, and other strong equities in their favor. Restoration of discretion at all levels, and specifically for Immigration Judges who are charged with making deportation decisions, and for consular and immigration officers who make decisions on visa and waiver eligibility, is needed in order to allow decision-makers to make holistic and fair decisions in compliance with domestic and international norms.

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<sup>33</sup> U.S. Citizenship and Immigration Service, *Humanitarian Parole*, available at <http://www.uscis.gov/humanitarianparole> (last viewed August 20, 2013).

Further, the existing, though limited, mechanisms that allow individuals who have already been deported to obtain temporary return to the U.S. should be implemented in a way that allows deported individuals to maintain family contact and family unity.

## **VI. CONCLUSION**

For all of the above reasons, the Post-Deportation Human Rights Project joins in the request for a thematic hearing on mandatory deportation and family unity.

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