

Immigration Policy & Law

Bi-Weekly News on Developments in Government, the Courts, and the Workplace

ROUTE TO:

Volume 9, Number 13

September 7, 1995

Deportation

11th Circuit Holds 212(h) Applicable To Deportation

In an uncharacteristic move, the Eleventh Circuit ruled in favor of a Chinese petitioner claiming waiver of inadmissibility for deportation on the basis of 212(h). The unanimous three-judge panel held: "To claim as the INS does here, that Po belongs to a different classification of persons simply by virtue of his failure to depart and reenter is to recognize a distinction that can only be characterized as arbitrary and that is without a 'fair and substantial relation to the object of legislation.'"

The case, *Po Shing Yeung v. INS*, involved a Chinese restaurant worker who had pleaded guilty to, and was convicted of, attempted manslaughter with a knife. Po, who had entered the U.S. as an immigrant in February 1988, was sentenced to five years imprisonment in February 1993.

Miami attorney and South Florida Chapter President of the American Immigration Lawyers Association Tammy Fox-Isicoff says the decision represents solid reasoning, although it was unexpected from a court that usually rules against foreign nationals.

"This is the first case that extends 212(h) availability to individuals in deportation who haven't departed the country," Fox-Isicoff says. "It

See 212(h), p. 8

Hardship

Rehabilitation Depends Upon Admitting Guilt

To admit or not to admit? That was the question in a disturbing Seventh Circuit decision upholding on remand a three-page pro forma Board of Immigration Appeals decision.

"The troubling thing about the decision," says the immigrant's attorney, Chicago lawyer John Koski, "is that here is this guy, he's a model citizen, he works 80 hours a week, pays taxes, leads a stellar life. Apparently, without an admission of culpability, that's not enough."

In *Guillen-Garcia v. INS*, a Mexican native who had lived in the U.S. as a lawful permanent resident since he was 14 was convicted on two occasions of serious crimes involving the use of a gun.

While on probation for the first conviction, he was arrested for attempted murder, convicted and sentenced to 10 years in prison. Four years before he was released, in 1984, INS issued an order to show cause why he should not be deported, charging him with being convicted after entry of two crimes involving moral turpitude.

Garcia conceded deportability but filed a 212(c) petition for waiver on the grounds that he had been rehabilitated, earning a diploma in welding and auto mechanics in prison, establishing close family ties and steadily supporting his family since his release.

See Hardship, p. 11

Inside	
Policy And Procedure	
Final Rule On Expedited	
Deportation Procedures Means	
Less Opportunity For Judicial	
Hearing.....	3
BALCA	
Make Sure Your Corporate Clients	
Document Lawful Reasons For	
Rejecting Each U.S. Applicant	5
Documents By Fax	
Now Available: EOIR's Proposed New	
Appeals Forms.....	7
Supreme Court Docket	
Certiorari Petition Filed On Issue Of	
Waiver Eligibility	9
In The Courts	
Christian Science Foundation Fights	
INS Trend To Keep Out R-1s	10

Exclusion

'Entry' Issue Debated Before Third Circuit

Chinese native Sing Chou Chung, the name plaintiff in the consolidated *Golden Venture* cases, had a busy day August 25. He was released on bail from detention in York, Pa, while one of the *Golden Venture* lead attorneys, David Weinstein, argued on the aliens' behalf before the Third Circuit Court of Appeals.

Last May, Chief District Court Judge Sylvia Rambo (M.D. Pa.) ruled that Chung and five other

See Golden Venture, p. 4

Christian Science Foundation Fights INS Trend

Fort Lauderdale attorney Lawrence Lataif says his client, Tenacre Foundation, was very reluctant to file a lawsuit against the government, but after months of futile negotiations, the Christian Science Foundation decided legal action was the only way to protect its right to train foreign professionals in the tenets of Christian Science nursing.

It also appears to be the only way from curbing the agency's attempt to engage in bureaucratic legislating as well, Lataif says.

Tenacre, which filed the lawsuit in May two years after it filed an R-1 visa application, is fighting a battle familiar to the immigration bar: INS regulations that contradict or circumvent Congressional intent. In Tenacre's case, the issue involves a distinction between sec. 1101(a)(15)(R) of the Immigration and Nationality Act—the provision governing R-1 visas, or nonimmigrant religious workers—and sec. 1101(a)(27)(c)(iii), the provision governing special immigrants eligible for permanent residence.

Sec. 1101(a)(15)(R) requires merely that the R-1 applicant has been a member of the bona fide nonprofit religious organization for the two years preceding the application and seeks entry for a period not to exceed five years to carry on "the vocation of minister of that religious denomination." Sec. 1101(a)(27)(c)(iii) requires additionally that the visa applicant has been practicing his religious vocation or professional work continuously for the two years preceding the application. The regs implementing sec. 1101(a)(15)(R), codified at 8 C.F.R. sec. 214.2(r)(3), require that the applicant show that he or she is "qualified" to perform services for a bona fide nonprofit religious organization.

Tenacre asserts that the regulation requires the nonimmigrant R-1 visa applicant — a temporary trainee seeking to complete his or her training at a U.S. institution — to be as qualified as an experienced religious worker who has completed his or her training and is seeking permanent residence. In practical effect, Tenacre argues, the regs set up a catch-22, preventing it from bringing entry-level foreign professionals to this country to complete the training they need to become fully qualified Christian Science nurses.

Tenacre is awaiting a ruling on its motion to amend a court order denying its request for preliminary injunction. The district court judge found that Tenacre was likely to succeed on the merits but failed to show it would suffer irreparable harm if the request was denied.

Says Lataif: The larger significance of the case is that first, it provides evidence that INS has never

avored training programs and has historically been very restrictive against trainees, whether they be F-1 students or H-1 candidates. Second, it reveals a recent trend by INS to administratively legislate in order to be more restrictive."

INS Equates Trainees With Full-fledged Professionals

In May 1993, Tenacre filed a Form I-129 Petition for a Nonimmigrant Worker seeking a status change for a Kenya native from an F-1 student to an R-1 nonimmigrant religious worker. Tenacre sought the status change so the student could continue his on-the-job training in Christian Science nursing while continuing to prepare to become a Christian Science nurse. The student had been employed with Tenacre for almost a year prior to the date when the petition was filed.

The Eastern Service Center (ESC) denied Tenacre's petition because the student was "training" to be a Christian Science nurse and, therefore, not "fully qualified" for the religious occupation he was going to enter at Tenacre. On a motion to reopen and reconsider, the ESC director concluded that the INS regulations applicable to applicants for an R-1 visa required the religious institution to show that the applicant be "qualified to perform the duties of the traditional religious occupation." Because the Kenyan was a "trainee," Tenacre could not meet the regulation's standard.

After several other unsuccessful motions to reconsider the service center's determination, Tenacre appealed to the INS Administrative Appeals Unit (AAU), which affirmed the determination. The AAU found that the Kenyan did not qualify as nurse and would not be working in an active religious role because the visa petition "was filed to employ the beneficiary as a nurse's aide."

Tenacre filed suit in May 1995, alleging that INS adopted unlawful regulations and interpreted those regulations to preclude entry-level Christian Science nurses from obtaining R-1 visas, in violation of sec. 209 of the INA, the Religious Freedom Restoration Act of 1993, the Civil Rights Act of 1964 and the First and Fifth Amendments.

In finding that Tenacre is likely to succeed on the merits of its motion to enjoin the INS from denying the R-1 visa, the court said: "INS asserted at oral argument that ... the applicant be working 'in a vocation or occupation,' and that if the applicant were merely training for the vocation or occupation, the applicant could not be working 'in the vocation or occupation.'"

The court found: "The prior experience requirement [of sec. 1101(a)(27)(c)(iii)] is not in the statutory provision applicable to the R-1 temporary visa but is introduced through the regulations. Congress passed the statutes at the same time, and it clearly distinguished between the two statutes when it included the prior requirement in one and not the other."

Tenacre argues that it is continuously screening church members from all over the world who are seeking acceptance as entry-level Christian Science nurses. INS' long-standing position prohibits the foundation from hiring these applicants, and as a result, the foundation would suffer irreparable harm if the court did not enjoin the agency from continuing to carry out that practice. The court found that Tenacre failed to support its argument with evidence of any other applicants who had been screened out of an R-1 visa.

Lataif says if the court grants the motion, then Tenacre can avail itself of the preliminary injunction pending final disposition of the lawsuit. If the motion is denied, Tenacre will either appeal the denial or move forward on a summary judgment motion.

Tenacre Foundation v. INS No. 95-945 (D.D.C.) (July 13, 1995). Lawrence Lataif, Esq. Fort Lauderdale, for the petitioner.

Hardship, from p. 1

He also claimed innocence of the crimes for which he had been convicted.

The immigration judge found his testimony credible and granted the petition. The Board reversed, reasoning that Garcia's refusal to admit his guilt "was a clear indication that he wasn't rehabilitated." On the first appeal, the Seventh Circuit sent the case back to the BIA, "noting that rehabilitation is not an absolute prerequisite to relief. Acknowledgment of culpability is an important, but not exclusive, factor." The Seventh Circuit directed the Board to clarify its determination that Garcia had not been rehabilitated.

On remand the BIA wrote: "The admission of guilt can be an important stem to a positive showing of reformation. When we add the respondent's denial of culpability for his conviction in 1984, these denials undermine the evidence of reformation proffered by him....In the exercise of our discretion, we conclude that the every serious nature of the respondent's convictions, particularly his conviction for attempted murder[,] outweigh the equities presented by him such that it is not in the best interest of this country to grant the respondent's application for a waiver of inadmissibility

under 212(c)." The Board considered insignificant the passage of time — six years — since Garcia's release.

Appeals Court Hesitant To Touch BIA Decision On Remand

Although the Seventh Circuit said that it would "examine with care" a Board decision returned to the court for the second time, the court deferred to the BIA's exercise of discretion "to place great weight upon the fact that both crimes committed by Mr. Guillen involved the use of force and violence, and that the second occurred during the probationary period of the first."

The court found that the Board had "weighed all the factors and explained its decision," and held that, "As long as the BIA indicates that it considered Mr. Guillen's evidence of rehabilitation, it was not required to discuss that evidence at length. It was entitled to conclude, in its discretion, that his denial of responsibility would tip the balance against a finding of rehabilitation. We shall not disturb its decision."

See Hardship, p. 12

SUBSCRIPTION OFFER

YES! Please start my one-year subscription to *Immigration Policy & Law* for \$497.00, plus \$10.00 shipping/handling (U.S.), \$18.00 (Canada/Mexico) or \$48.00 foreign for 22 issues/year.

Please send me information on your other international products.

VISA* AMEX* MasterCard* MC Bank # _____

Cardholder Name _____

Signature _____

Card # _____ Exp. Date _____

Charge my LRP Acct. # _____ Bill me. P.O. _____ enclosed

Check or money order payable to LRP Publications enclosed.*

* LRP pays shipping & handling fees on all prepaid orders.

Name _____ Title _____

Organization _____

Street Address _____

City _____ State _____ Zip _____

Phone (____) _____ FAX (____) _____

LRP GUARANTEE

You may cancel your subscription to any publication within 30 days by writing "cancel" across the invoice and returning it to us for a full refund or credit.

☎ Call 1-800-341-7874, ext. 310

☎ FAX (215) 784-9639

LRP
Publications

Dept. 440, 747 Dresher Road
P.O. Box 980
Horsham, PA 19044-0980

LR9501-29