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Mentally Retarded Refugee Orphan's Quest for Freedom and Justice and the Need for Systemic Reform in the Treatment of Unaccompanied Alien Children

*By Christopher Nugent and Robert Bradner
of Holland & Knight LLP
and Benoit Jacquemotte of
Latham & Watkins LLP*

On December 23, 2003, Department of Homeland Security (DHS) Under Secretary Asa Hutchinson agreed to release our pro bono client Malik Jarno,

a mentally retarded teenager who was transferred from maximum security adult jail to the International Friendship House, a refugee shelter in York, Pennsylvania. Because of his inappropriate treatment by immigration officials, Malik has become a powerful symbol of the plight of over 5,000 unaccompanied alien children arriving on our shores every year in search of protection, freedom and safety. Sadly, these refugee children like Malik encounter a U.S. immigration system that detains them in children's centers, shackles them like prisoners, and neglects to address their vulnerabilities and special needs.

Although Malik is mentally retarded with the intellectual capacity of an eleven year old, DHS has kept him detained primarily in adult prisons while his asylum proceedings have dragged on for three years. Malik's family was killed and his home was destroyed in the midst of ethnically and politically motivated violence in his native Guinea. Upon arrival at Dulles International Airport in 2001, Malik was detained by immigration officials and kept in adult jails for almost eight months before he was allowed to appear before a judge to apply for asylum. During Malik's detention, where he was commingled with adult convicts, Malik's special needs as a mentally disabled child were neglected. Immigration authorities relied on suspect bone and dental testing to treat Malik as an adult even though his birth certificate was both authenticated by the Embassy of Guinea in Washington, D.C. and determined by immigration officials to be free from tampering and alteration. Additionally, immigration officials never acted on Malik's request to seek relief in state court as an abandoned child, a process which would have made him eligible for a green card under the special immigrant juvenile visa program.

Immigration authorities even sent an agent to Guinea to investigate Malik's identity and background, providing Malik's unredacted birth certificate to Guinean government officials in contravention of the spirit and letter of immigration regulations intended to protect the personal information of asylum seekers from the very foreign governments that may seek to persecute them.

As of August, 2003, Malik faced imminent deportation to Guinea, after the Board of Immigration Appeals (BIA) affirmed the denial of Malik's asylum claim and the Court of Appeals for the Fourth Circuit denied Malik's stay of removal. Malik's attorneys had also brought a civil lawsuit seeking monetary damages and injunctive relief for physical abuse he suffered at the hands of prison guards while detained at the Piedmont Regional Jail in Farmville, Virginia. While Malik did not prevail in this litigation, the civil case permitted the fostering of productive working relationships with federal authorities and delayed Malik's deportation to Guinea, where he is highly unlikely to survive on his own. The litigation allowed Malik's lawyers to gather new evidence from U.S. officials and other experts in Guinea in an effort to persuade the BIA to reopen his case sua sponte based on a new asylum theory: that Malik faced imminent persecution in Guinea as a mentally retarded homeless orphan without family to care for him.

Additionally, since August 2003, Malik's plight generated extraordinary support and interest from members of Congress and the public. Over 30 members of Congress from both sides of the aisle intervened on Malik's behalf, including Senators Ted Kennedy (D-MA), Sam Brownback (R-KS) and Rick Santorum (R-PA) and Congressmen Chris Smith (R-NJ), Frank Wolf (R-VA), Tom Lantos (D-CA) and Chaka Fattah (D-PA). Thirty-five reputable national and local mental health, refugee and children's advocacy organizations also urged immigration officials to redress the injustice wrought against Malik, including Amnesty International, The ARC of the

United States, a national advocacy group for the developmentally disabled), and Mental Disability Rights International. Malik's case also attracted much attention from international media organizations, including the New York Times, the Washington Post (editorial), The Associated Press, Reuters, MSNBC and BBC. At a press briefing, United Nations High Commissioner for Refugees (UNHCR) Goodwill Ambassador and actress Angelina Jolie also addressed Malik's plight. According to Congresswoman Zoe Lofgren (D-CA), Malik's case "highlights the defects in our system regarding unaccompanied minors. He committed no crime and should not have been imprisoned."

On December 19, 2003, the BIA invoked its sua sponte authority to reopen Malik's asylum proceedings in light of the new evidence and extraordinary public interest in Malik's matter. Soon after the BIA's extraordinary decision and just before Christmas, Secretary Hutchinson issued an order releasing Malik from York County Prison, a maximum security state penitentiary.

Sadly, Malik's difficult plight continues. One day after Malik was freed, on Christmas Eve, DHS attorneys filed an emergency motion with the BIA to reconsider and vacate its decision to reopen Malik's case. While the BIA has not acted on DHS' motion at the time of this publication, Malik's pro bono lawyers at Holland & Knight LLP, Latham & Watkins LLP and Jones Day continue to advocate for him zealously before the BIA - and are committed to doing so until his plight is resolved justly and permanently. To date, these three international law firms have donated more than two million dollars in legal services to secure relief for Malik.

Unfortunately, while Malik is now free, thousands of other unaccompanied children continue to languish in immigration detention. Unlike Malik, who has an army of pro bono attorneys working on his behalf, most refugee children are

unrepresented in their immigration proceedings, as these vulnerable minors are not afforded the right to government-appointed representation. According to a 2000 Georgetown [Law School] study analyzing Department of Justice data, asylum seekers who are represented by counsel are up to six times more likely to obtain a grant of asylum than those without representation. However, as Malik's plight clearly demonstrates, pro bono representation alone cannot guarantee meaningful justice because of fundamental flaws in the immigration system's treatment of unaccompanied alien children.

To prevent such injustices, it is imperative that Congress pass the Unaccompanied Alien Child Protection Act of 2003. This bipartisan legislation, which enjoys the support of the American Bar Association, was introduced in the U.S. Senate as S. 1129 by Senators Dianne Feinstein (D-CA) and Sam Brownback (R-KS) and as H.R. 3352 in the House of Representatives by Zoe Lofgren (D-CA) and Chris Cannon (R-UT). This legislation would build on the improvements of the Homeland Security Act (HSA) of 2002, which transferred basic care, custody and placement functions for refugee children from the Immigration and Naturalization Service to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services. The provisions of HSA addressing the plight of refugee children were crafted quickly, leaving DHS and ORR without clear mandates and responsibilities with respect to these children, particularly in the areas of custody and release decisions, age determination procedures and state court dependency proceedings.

The Unaccompanied Alien Child Protection Act implements critical reforms to address the horrors inflicted on Malik and other refugee children. For example, under the legislation, age determinations would be conducted by ORR and no longer would not be based on the bogus science of dental or bone age determinations - as had been used in

Malik's case to keep him in adult jails for three years. The legislation also grants ORR the explicit authority to consent to the placement of children like Malik in state dependency proceedings for special immigrant juvenile status. Under the legislation, children would be appointed pro bono counsel within seven days of their placement in ORR custody - instead of languishing, like Malik, for months in adult jails without representation. Children like Malik with disabilities or other special needs would also be appointed guardians ad litem to consider their best interests throughout their legal proceedings. Finally, the legislation would address numerous deficiencies in the immigration court system's treatment of children by, among other things, requiring special training for immigration judges, prosecutors and pro bono attorneys handling children's cases.

In the meantime, despite continued uncertainty in his case, Malik is finally receiving the care he has needed since his arrival in the United States over three years ago. In the process, Malik is beginning to heal from the injustices inflicted on him by immigration authorities. According to Malik, however, "If I knew [what was in store], I would not have come here. I did not know that. I didn't know about (he slammed his wrists together as in handcuffs). I did not know what means asylum - I am thinking it's going to be good."

Malik's case makes clear that refugee children deserve far better from our country: they need the Unaccompanied Alien Child Protection Act of 2003 and its protections to be the law of the land.

Christopher Nugent is a member of the Immigration and Nationality Committee of the Section of International Law of the American Bar Association and Community Services Team Administrator at Holland & Knight LLP in Washington, D.C. His telephone number is (202) 419-2428, and his e-mail address is christopher.nugent@hklaw.com. Robert Bradner is a Partner in the Public Policy and Regulation

Group at Holland & Knight LLP in Washington, D.C. Benoit Jacqmotte is an associate in the Corporate Department at Latham & Watkins LLP in Washington, D.C. The views expressed in this article are solely those of the authors.

US-VISIT Debuts at Selected Air and Sea Ports

*Provided by Michael F. Turansick of
Fragomen, Del Rey, Bernsen & Loewy*

On January 5, 2004, the Department of Homeland Security (DHS) launched the first phase of its U.S. Visitor and Immigration Status Indication Technology (US-VISIT) system at selected air and sea ports of entry. On the same day, DHS issued an interim final rule on US-VISIT and a notice to foreign nationals subject to the system (69 Fed. Reg. 468, 69 Fed. Reg. 482).

The new rule states that only those foreign nationals who are entering the United States pursuant to a nonimmigrant visa are subject to the system; individuals who are entering under the Visa Waiver Program (VWP) are not currently required to comply with US-VISIT's regulations. Special registration under the National Security Entry-Exit Registration System (NSEERS) will continue. Though it is expected that NSEERS will be subsumed into the US-VISIT system, certain individuals may still be required to register in NSEERS and comply with its important departure control and reporting obligations.

Background

US-VISIT is a "check-in/check-out" mechanism that, when fully implemented, will record the entry and exit of foreign visitors to the U.S., scan each visitor's fingerprints and photographs against national security and law enforcement databases, and maintain each visitor's U.S. travel history. The

system involves information sharing among Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), the Transportation Security Administration, the General Services Administration, and the Departments of State and Transportation.

US-VISIT is to be implemented in stages. The first phase focuses primarily on the system's entry procedures. Enhanced exit procedures, discussed below, will be employed on a rolling basis throughout 2004. By December 31, 2004, US-VISIT is to be fully implemented at the fifty most highly trafficked land ports of entry. All ports of entry are expected to have the system in place by December 31, 2005.

Who Must Comply with US-VISIT?

During the first stage of implementation, US-VISIT procedures will be required of foreign nationals who are admitted to the United States pursuant to a nonimmigrant visa and who travel to or from the U.S. through a port at which US-VISIT is in operation. Nonimmigrant visa holders are not obligated to enter or exit through a port where US-VISIT is in operation, but if their port of entry or departure is a US-VISIT port, compliance with the procedures is obligatory. Failure to comply where required may result in a foreign national being deemed inadmissible to the United States, in violation of the terms of his or her status, or ineligible for future immigration benefits.

Certain nonimmigrant visa holders are exempt from US-VISIT: (1) children under the age of 14; (2) individuals over the age of 79; (3) foreign nationals in most A, C, G or NATO nonimmigrant visa categories; (4) individuals who have been exempted by the Secretary of Homeland Security, the Secretary of State or the Director of the Central Intelligence Agency; and (5) classes of foreign nationals that the Secretary of Homeland Security and the Secretary of State jointly determine to be exempt. In addition, foreign

nationals who enter the United States under the Visa Waiver Program are exempt from US-VISIT.

Entry Procedures under US-VISIT

US-VISIT alters some of the procedures that are undertaken when a foreign national seeks to enter the United States.

All foreign visitors will have their travel documents reviewed by an officer of the Customs and Border Protection (CBP) bureau; the officer will also interview the visitor about his or her stay. In the first phase of US-VISIT, foreign nationals who hold nonimmigrant visas and who enter the United States at certain designated air and sea ports are also required to provide fingerprints and photographs at the port of entry. Using an inkless scanner, the CBP officer records prints of both index fingers, one after the other. The officer also takes a digital photograph of the visitor. The fingerprint and photographic data, along with information in the visitor's travel documents, is stored in the DHS's Arrival/Departure Information System (ADIS); the data is used to verify the visitor's identity and is scanned against law enforcement and national security lookout lists. Based on the verification results, the visitor will be admitted to the U.S. or will be asked to undergo further verification. If data in the verification process indicate possible national security or law enforcement concerns, or improper documentation, the visitor will be referred for additional screening.

US-VISIT entry procedures are currently in place at more than 100 airports and seaports in the United States, and at pre-flight inspection areas at some foreign ports, including Bermuda, the Bahamas, Canada and Ireland. Nonimmigrant visa holders are required to comply with US-VISIT's entry procedures only if they apply for admission to the United States through one of the designated ports of entry. If the foreign national enters through one of the US-VISIT ports, failure

to comply with the new procedures may result in a finding that he or she is inadmissible to the United States, has violated the terms of his or her admission and maintenance of status, or is ineligible for future visas, admission to the United States or discretionary immigration benefits.

Departure Procedures and US-VISIT

US-VISIT's self-service departure procedures for travelers will not be implemented fully until later in 2004. Currently, two ports – Baltimore-Washington International Airport and the seaport in Miami, Florida – are operating pilot programs in order to test US-VISIT's proposed self-service departure procedures. DHS has announced that it will expand the departure pilot program to fifteen ports of entry within the next few months.

Under the departure procedures, a foreign national's travel documents will again be scanned and his or her fingerprints and photographs will be taken. Information collected during the procedure will be stored in ADIS and immediately reconciled to determine whether the foreign national has complied with the terms of his or her visa; the system will also record a visitor's failure to exit. DHS has not yet determined the methods by which the data will be collected, but is contemplating self-service checkout kiosks and hand-held scanners. These methods will be tested during the pilot program.

With the exception of NSEERS registrants (discussed below), foreign nationals who hold nonimmigrant visas are not required to exit through specific ports, but if they choose to leave the United States through a port at which US-VISIT exit procedures have been implemented, they must comply with the procedures. As noted above, exit procedures are currently in place at only two ports in the United States – Baltimore-Washington International Airport and the seaport in Miami, Florida; nonimmigrant visa holders exiting through these ports must undergo departure procedures.

Even if the foreign national does not travel through a port where US-VISIT departure controls are in place, he or she should be sure to preserve documents and other evidence to establish timely exit from the United States, such as airline tickets or passport stamps showing admission to another country. Foreign nationals who possess an I-94 Arrival-Departure Record that must be surrendered on departure should be sure to return the document to the Department of Homeland Security so that exit data can be accurately recorded in the DHS systems.

US-VISIT and NSEERS

The launch of US-VISIT does not change the obligations of foreign nationals who are registered in the National Security Entry-Exit Registration System. Special registrants must still comply with NSEERS' strict requirements on departure from the United States.

NSEERS, a precursor to US-VISIT, was launched in September 2002 to register the entry, exit and whereabouts of individuals deemed to warrant monitoring for national security reasons. Under the NSEERS program, foreign nationals are registered either at the port of entry upon admission to the United States or in response to a Department of Homeland Security notice, or "call-in," after admission. Selection for registration is based on the foreign national's country of citizenship or nationality and other criteria, such as security and intelligence information. Once registered in NSEERS, a foreign national is required to inform the DHS of changes in address, employment or school. In addition, special registrants must undergo departure control when exiting the United States, and may only depart the U.S. through a port of entry that is authorized for special registrant departure.

Individuals who are required to be registered in NSEERS may still be subject to the requirements

of US-VISIT. However, the Department of Homeland Security has stated that fulfilling the registration and departure requirements of NSEERS will meet the requirements of US-VISIT. The Department of Homeland Security has announced that NSEERS will eventually be subsumed into the US-VISIT system. Details of the NSEERS/US-VISIT integration are currently under discussion within DHS; further Client Alerts will be issued as more information is made known.

President Proposes Temporary Worker Program: Employment Plan Would Provide Nonimmigrant Status to Undocumented Workers

*Provided by Michael F. Turansick of
Fragomen, Del Rey, Bernsen & Loewy, P.C.*

On January 6, 2004, President Bush unveiled a proposal for a temporary worker program that would create a new nonimmigrant visa category to provide legal status to millions of out-of-status foreign nationals currently living and working in the United States. The goal of the program is to match foreign workers with employers in instances where there is no U.S. worker willing to accept the job that is being offered. The program would be open to out-of-status foreign nationals currently in the United States, estimated to be over 8 million people, as well as to foreign nationals outside the United States who have been offered such a position.

Details of the President's proposal will need to be worked out when the measure goes to Congress. The President emphasized that the proposal is not a so-called "blanket amnesty," and further that foreign nationals provided with status under this program will not receive preferential treatment over temporary visa holders in the United States or

foreign nationals abroad who are seeking permanent residence.

Overview of the Proposed Program. Under the program as outlined by President Bush, foreign nationals in the United States who are out of status would pay a one-time registration fee and receive a temporary worker card, valid for three years, thus providing legal status for these individuals. Although the program would require temporary workers to return to their home country after the three-year period comes to an end, indications are that the worker would have the option to renew the temporary worker card. Program participants would be able to travel freely back and forth between their home country and the United States. The proposal does not reference portability or address whether or with how much ease a foreign national could move between jobs in the United States.

Status for Family Members. The program would provide derivative status to the foreign national's family members, as long as there is evidence that the foreign national can support them during their stay in the United States, and that no family member is employed here, unless through this program.

No "Earned Adjustment" Provision. This program does not include provisions that would provide the pathway for foreign nationals to obtain lawful permanent resident (LPR) status (often referred to as a green card). Immigration proponents had hoped that the President would include a provision allowing the opportunity to apply for LPR status after a set period of time working in the United States, often referred to as "earned adjustment." Participants in the program could apply for permanent residence through the existing process, which generally requires either a petitioning employer and a test of the U.S. labor market or a close family relationship. Both options entail lengthy processing times, and many of the family categories have significant visa backlogs.

The President emphasized that there would be no preferential treatment for program participants over others filing in the traditional manner.

Length of New Nonimmigrant Status and Impact on Seeking Permanent Residence Status. The White House proposal states that the period of stay would be three years, and would be renewable, but does not indicate that this would be indefinite. Press reports have indicated that it could be renewed for one more three-year period. Critics have already suggested that given possible visa backlogs, the existing LPR process could take more than three or even six years, especially should the Other Workers permanent immigration visa category retrogress. The proposed increase in the permanent visa numbers, discussed below, could help alleviate this potential problem.

Incentives for Foreign Nationals to Return to their Home Countries. The proposal also calls for the United States to work with countries abroad in order to provide economic incentives to foreign nationals returning home at the program's end, such as allowing individuals working in the United States to receive credit in their home nations' retirement systems, and the creation of tax-preferred savings accounts collectable upon return to their native countries.

Temporary Labor Certification and Delays. The proposal does not indicate what kind of workers or what types of jobs would be matched up, just that out of status workers and others not yet in the United States would be eligible to apply for classification under the new nonimmigrant visa based on a job or job offer and after ensuring that no U.S workers are available to take the position. It also is not clear how the test of the U.S. labor market would function (*i.e.*, how much or what kind of evidence of recruitment an employer would be required to provide) or whether this would be similar to the current labor certification process run by the Department of Labor.

Increased Border Security and Interior Enforcement. The President's proposal states that this program would be coupled with increased border security measures and interior workplace enforcement, though limited details were provided.

The proposal, as outlined by the President, would seek to increase the numerical limits on *permanent* employment-based immigrants, though no additional details were made available. The current employment-based immigration yearly cap is 140,000. This cap level has not recently been an issue, though over the next few years backlogs may be expected for immigrants from high volume immigration countries, such as China and the Philippines. In the mid-1990s and previously, there were backlogs of several years for immigrants from such high volume countries, but legislation enacted in 2000 helped ameliorate these visa backlogs.

Impact on Bars to Relief Under Current Law: Three and Ten Year Bars and 245(i). The proposal does not indicate how this regularized status would impact the 3- and 10-year bars, which under current law prevent a foreign national who has been out of status for at least 180 days from leaving the country and re-entering the United States for a period of three years, or a foreign national who has been out of status for more than one year from leaving the country and re-entering the United States for a period of ten years. These harsh immigration provisions were included in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).

As stated above, program participants would be able to travel freely back and forth between their home country and the United States. Thus, the proposal would appear to negate the impact of the 3 and 10-year bars – though it is not clear from the President's remarks and written statement.

Nor is it clear from the proposal whether the 245(i) program or some equivalent provision would be included to allow program participants to

seek permanent residence despite previously being out of status. Section 245(i) of the Immigration Act, prior to its sunset, allowed out-of-status foreign nationals to pay a fee of \$1000 and apply to adjust status to permanent residence from within the United States.

Legislation Currently Pending. In 2003, there were three major immigration reform proposals introduced that were generally similar to the President's proposal: Senators Larry Craig (R-ID) and Ted Kennedy (D-MA) and Representatives Chris Cannon (R-UT) and Howard Berman (D-CA) introduced S. 1645 / H.R. 3145; Senator John McCain (R-AZ) and Representative Jim Kolbe (R-AZ) introduced S. 1461 / H.R. 2899; and Senator John Cornyn (R-TX) introduced S. 1387.

The Craig-Kennedy-Cannon-Berman reform bill, formally called the Agricultural Jobs, Opportunity, Benefits, and Security (AgJobs) Act, would allow undocumented agricultural workers to apply for temporary immigration status as a part of an earned adjustment program based on past work experience; these individuals could then become permanent residents after satisfying certain prospective work requirements. The legislation also would streamline and expand the existing H-2A foreign agricultural worker program.

The Cornyn and McCain-Kolbe bills go beyond agricultural workers, and provide for expanded temporary worker programs, along with an earned adjustment provision that would allow foreign nationals who have worked in the United States under the program for three years to apply for permanent residence.

Specifically, the McCain-Kolbe bill would create new nonimmigrant categories for out-of-status foreign nationals. Employers would be required to recruit U.S. workers, and make attestations regarding wages and benefits and non-displacement of U.S. workers. Under the program,

employers could petition for a foreign national; or after three years, the foreign national could self-petition and seek to adjust status to permanent residence. These nonimmigrant visa categories would specifically permit foreign nationals to change jobs while in the United States. Derivative status for spouses, however, would be limited. This measure and the AgJobs Act provide a good outline of what the President's proposal might look like when it is fully developed and introduced in Congress.

The Cornyn measure, which includes some new approaches to immigration policy, also would create a new nonimmigrant category and would allow for foreign nationals to seek LPR status via consular processing after three years in the program. Priority for permanent residence would be granted based on a point system, that would include as criteria education, payment of taxes, and whether the individual received promotions and pay raises while working under the program, among other factors. In addition, the program would be administered the Secretary of State and the government of another country, with that foreign country developing standards for its citizens to enroll.

It is likely that key immigration policymakers in the House and Senate will attempt to craft new legislation based on the President's proposal. The Craig-Kennedy-Cannon-Berman bill or some version thereof could be subsumed in the new measure, and/or other provisions from these bills could also be included in the new bill.

Welcome!

We are pleased to bring you the ABA International Law and Practice Section: Immigration and Nationality Committee Newsletter. Please send all future submissions and/or suggestions to either Susan Cohen at scohen@mintz.com or Rebecca Weiss at rweiss@mintz.com

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