

that localities' failure to provide housing opportunities for the poor while creating opportunities for the affluent violated the state constitution's requirement that zoning powers be used to advance the general welfare.²¹ Where communities do not provide a "realistic opportunity" for development of their fair share of affordable housing, they are subject to a builder's remedy of a "density bonus"—essentially allowing the development of more homes than the affordable-rate ratio normally allows. The article points to the development of thousands of affordable units constructed in the wake of *Mount Laurel*.²² However, another author points out that most of the beneficiaries of the affordable housing built as a result of *Mount Laurel* are white families who previously lived in the suburbs.²³

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First Amendment Concerns

Finally, the NIMBY Report's championing of the use of civil rights laws is accompanied by cautions that efforts to counter community opposition may cross paths with protected First Amendment activities.²⁴ These arguments are more fully fleshed out in *City of Cuyahoga Falls v. Buckeye Community Hope Fdn.*,²⁵ a suit by an organization attempting to develop homes for low- and moderate-income families. The development was repeatedly delayed by community opponents and city officials, who used, among other obstructionist tactics, a referendum to require public approval of zoning decisions.²⁶ Unfortunately, in the recently announced Supreme Court decision, the developers' claims for damages were rejected.²⁷ Housing advocates must plan carefully to overcome opposition to fair housing and affordable housing development that involves protected speech or the public's right to vote. ■

²¹*Id.* at 21.

²²*Id.*

²³Goetz, *supra* note 12, at 25.

²⁴Allen, *supra* note 1, at 5.

²⁵2003 WL 1477301, ___ U.S. ___ (March 25, 2003). For a summary of *Cuyahoga Falls*, see p. 301, *infra*.

²⁶Citrino et al, *supra* note 2, at 8.

²⁷2003 WL 1477301, ___ U.S. ___ (March 25, 2003).

Housing Benefits for Qualified Aliens Who are Battered Still in Question

Introduction

On February 20, 2003, the President signed into law the Fiscal Year (FY) 2003 omnibus appropriations act, which included appropriations for the Department of Housing and Urban Development (HUD).¹ Accompanying the law was a congressional report directing the Justice Department and the Department of Housing and Urban Development (HUD) to reconcile Section 214 of the *Housing and Community Development Act of 1980* ("Section 214"),² which restricts federal housing assistance to certain immigrants, with other laws expanding the groups of immigrants that are eligible for public benefits.³ Originally, language reconciling the laws was part of the appropriations bill. However, at the last minute the language was removed from the bill and report language substituted.

Section 214 lists seven categories of non-citizens who are eligible to receive federally assisted housing.⁴ Other legislation addressing immigrant restrictions in public benefit programs sets forth a definition of a *qualified alien* that includes three additional categories of eligible immigrants: battered immigrants who are spouses or children of lawful

¹Consolidated Appropriation Resolution, 2003, Pub. L. 108-7, 117 Stat. 11, (Feb 20, 2003).

²42 U.S.C.A. § 1436a (West Supp. 2002) (hereinafter Section 214).

³H.R. 108-10, 108 Cong. 1st Sess. 476, 1495 (Feb. 12, 2003).

⁴Section 214 is applicable to applicants for and residents of public housing, Section 8, Section 236 (below-market rent only), rent supplement, Section 235 and Housing Development Grant Programs. 24 C.F.R. § 5.500 (2002). Technically, it is also applicable to Rural Housing Service (RHS) programs; however, RHS has not yet adopted regulations implementing Section 214. Section 214 defines a resident alien as

- (1) an alien lawfully admitted for permanent residence as an immigrant as defined by section 1101(a)(15) and (20) of Title 8, excluding, among others, alien visitors, tourists, diplomats, and students who enter the United States temporarily with no intention of abandoning their residence in a foreign country;
- (2) an alien who entered the United States prior to June 30, 1948, or such subsequent date as is enacted by law, has continuously maintained his or her residence in the United States since then, and is not ineligible for citizenship, but who is deemed to be lawfully admitted for permanent residence as a result of an exercise of discretion by the Attorney General pursuant to section 1259 of Title 8;
- (3) an alien who is lawfully present in the United States pursuant to an admission under section 1157 of Title 8 or pursuant to the granting of asylum (which has not been terminated) under section 1158 of Title 8;
- (4) an alien who is lawfully present in the United States as a result of an exercise of discretion by the Attorney General for emergent reasons or reasons deemed strictly in the public interest pursuant to section 1182(d)(5) of Title 8;
- (5) an alien who is lawfully present in the United States as a result of the Attorney General's withholding deportation pursuant to section 1231(b)(3) of Title 8;

residents, and Cuban and Haitian immigrants.⁵ Advocates had sought to get HUD to include these three categories of immigrants in its Section 214 regulations. Because they were unsuccessful, they tried to address the issue through corrective legislation. Unfortunately, the report language is all that they secured.

Background

Certain undocumented immigrants seeking legal permanent residency status may do so through a United States Citizen (USC) or a Lawful Permanent Resident (LPR), as long as the two are related or married. The USC or LPR files a visa petition on behalf of a spouse or child so that the individual may remain in, or immigrate to, the United States. The petition can only be filed by the petitioner (USC or LPR) on behalf of a beneficiary (spouse or child). This process essentially entitles new immigrants, or those seeking to come to the United States, rights through another eligible individual. Unfortunately, some citizens and LPRs have misused their control of the process by physically abusing members of their family and precluding them from reporting the violence by threatening to withhold participation in the petition process. In response, Congress passed the *Violence Against Women Act* (VAWA) in 1994, which enabled a battered spouse and/or child to self-petition for lawful permanent residency.⁶ Unfortunately, it remained unclear if applicants with pending self-petitions and visa applications, classified as *qualified aliens* under immigration legislation, were eligible for low-income housing benefits independent of their abuser.

PRWORA and IIRAIRA

The *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* (PRWORA) states that certain federal "public benefits" including "public and assisted housing" are only available to "qualified" immigrants, as defined in the statute.⁷ PRWORA applies to public and Section 8 housing but it is not

clear if it applies to other HUD programs.⁸ The *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRAIRA) amended PRWORA to expand the list of groups eligible for assistance to include three groups that were originally omitted: certain battered immigrants and Cuban and Haitian immigrants.⁹ According to VAWA, if an abused spouse or child meets the self-petition eligibility requirements she or he is considered a *qualified alien* for the purpose of receiving public benefits.¹⁰ To qualify, the battered immigrant must make a *prima facie* showing to support her or his eligibility for public benefits. This includes, *inter alia*, a showing of status as a spouse or child of a USC or LPR, a demonstration of being battered or subject to extreme cruelty, evidence of suspension of deportation, or cancellation of removal, and a showing of a substantial connection between the battery and the need for the benefits.¹¹

HUD's Contrary Interpretation

Notwithstanding the clear intent of these laws to include battered immigrants and Cuban and Haitian immigrants as *qualified aliens*, HUD's General Counsel's office interpreted Section 214 to exclude battered immigrants from access to public or assisted housing. The language deleted from the omnibus appropriations bill was meant to address HUD's restrictive interpretation and would have guaranteed all immigrants who are classified as *qualified aliens* under PRWORA and IIRAIRA eligibility for public and assisted housing.¹² It would have done so by amending Section 214 to state that "a *qualified alien* includes all immigrants who fit the definition as stated in PRWORA as amended by any subsequent legislation."¹³

While removing the legislative change, the conferees, in the report accompanying the appropriations, directed HUD

to work with the Department of Justice to develop any necessary technical corrections to applicable housing statutes with respect to qualified aliens who are the victims of domestic violence and Cuban and Haitian immigrants to ensure that such statutes are consistent with the Personal Responsibility and Work

(6) an alien lawfully admitted for temporary or permanent residence under section 1255a of Title 8; or

(7) an alien who is lawfully resident in the United States and its territories and possessions under section 141 of the Compacts of Free Association between the Government of the United States and the Governments of the Marshall Islands, the Federated States of Micronesia (48 U.S.C. § 1901 note) and Palau (48 U.S.C. § 1931 note) while the applicable section is in effect: *Provided*, That, within Guam any such alien shall not be entitled to a preference in receiving assistance under this Act over any United States citizen or national resident therein who is otherwise eligible for such assistance.

⁵ 8 U.S.C.A. § 1641 (b) and (c) (West Westlaw 03-11-03).

⁶ 8 C.F.R. § 204.2, et. seq. (2003). When Section 501 of IIRAIRA amended PRWORA, Congress added a new Section 431(c) to PWORA, which provides that the term "qualified alien" shall include such immigrants. Section 431(c) was subsequently amended by Section 1508 of the VAWA of 2000. See also the *Immigration and Nationality Act* on the INS Web site at www.ins.gov.

⁷ 8 U.S.C.A. § 1611 (West Westlaw 03-11-03).

⁸To date, HUD has not defined which of its currently unrestricted housing programs are covered by PRWORA and has directed recipients of those funds not to consider immigration status. 61 Fed. Reg. 60,535, 60,537 (Nov. 29, 1996); NOW Legal Defense and Education Fund, *Immigrant Women Program*. Legislative Update, February 14, 2003.

⁹See Section 501 of the *Illegal Immigration Reform and Personal Responsibility Act of 1996*.

¹⁰8 U.S.C. A. § 1641(c) (West Westlaw 03-11-03).

¹¹*Illegal Immigration Reform and Personal Responsibility Act of 1996*, 8 U.S.C. § 1641(c)(1) (West Westlaw 03-11-03).

¹²NOW Legal Defense and Education Fund, *Immigrant Women Program*. Legislative Update, February 14, 2003.

¹³HJ2 EAS, Department of Veterans Affairs and Housing and Urban Development, and *Independent Agencies Appropriations Act*, 2003.

What This Means for Advocates

While this report language should be helpful, the removal of the language directly amending Section 214 will likely prolong the struggle for battered immigrants and Cuban and Haitian immigrants who are seeking assisted housing. On the national level, advocates will have to work with HUD and the Department of Justice to obtain an interpretation of Section 214 that is consistent with the other laws affecting immigrants and receipt of public benefits. Advocates will hopefully convince the two departments that no further technical amendments are necessary and that there is nothing to prevent the Secretary of HUD from interpreting Section 214 consistently with the other laws affecting immigrants and eligibility for benefits. Alternatively, Congress will need to amend Section 214 in accordance with future HUD and Department of Justice findings.

Until HUD or Congress act, advocates can encourage PHAs, as part of the PHA plan process, to adopt a more expansive reading of Section 214 to include immigrants subject to domestic violence and Cuban and Haitian immigrants. Advocates can also urge PHAs not to take adverse action against individually affected immigrants and urge PHAs or project-based Section 8 owners to rely upon PRWORA. Absent intermediate corrective action, the impacts on battered immigrants' access to housing will continue to be severe.¹⁵ Haitian and Cuban entrants will also continue to be excluded.

Regardless of any corrective action, advocates should remember that under Section 214 not *all* members of the household nor the head of household or spouse need to be eligible for housing assistance in order for the household to qualify for assistance.¹⁶ A single individual, such as a child, who is an eligible immigrant can qualify the entire household for public housing, project-based Section 8, or the voucher program. A household composed of eligible and ineligible immigrants is considered a "mixed family" that is eligible for housing assistance. Such a family will, however, have to pay a prorated rent based on the proportion of eligible members to total household members.¹⁷ If, however, there are no eligible family members in the household, the family will most likely not be accepted for public or federally assisted housing and such a family may be evicted or lose its housing subsidy.¹⁸ ■

¹⁴H.R. 108-10, 108 Cong. 1st Sess 476, 1495 (Feb. 12, 2003), Making Further Continuing Appropriations for Fiscal Year 2003, and for Other Purposes.

¹⁵www.ins.usdoj.gov/graphics/howdoi/battered.htm.

¹⁶24 C.F.R. § 5.508 (2002).

¹⁷*Id.* § 5.520.

¹⁸NOW Legal Defense and Education Fund, Immigrant Women Program. Legislative Update, February 14, 2003.

Round Up of Recently Introduced Housing Legislation

As the 108th Congress enters its fifth month, several bills have been introduced that affect existing federal housing programs or propose new programs. Several of these new initiatives, including the National Housing Trust Fund, an anti-predatory lending measure, and the Department of Housing and Urban Development (HUD) Fiscal Year (FY) 2004 Budget proposal, were described in the March 2003 *Housing Law Bulletin*. This article highlights some of the remaining measures. A complete list of housing bills that have been introduced and their current status can be found at the National Low Income Housing Coalition Web site.¹

Income Verification. The process of determining family income for tenants of HUD-subsidized housing is often plagued by errors, causing tenants to be undercharged or overcharged for rent. Representative Pete Sessions (R-TX) has introduced H.R. 1030 that would require HUD to match assisted tenants' incomes against a Directory of New Hires maintained by the Department of Health and Human Services (HHS), the purpose of which is to check for wage withholding, child support and eligibility for income-tested programs.² H.R. 1030 would require matching the incomes of households assisted under most HUD programs, including public housing, Section 8 vouchers, project-based Section 8, Section 221(d)(3), Section 236 and Section 202/811, against the HHA list. The need for this bill is not apparent because HUD already requires independent wage matching against information maintained by the Department of Labor³ and it is not clear why HHS data would be more reliable or useful. H.R. 1030 also does not contain procedural protections that would enable tenants to dispute alleged discrepancies through a hearing process as is allowed under the current HUD matching program. In 2001, HUD developed an administrative proposal known as the Rental Housing Integrity Improvement Project (RHIP) to correct a wide range of errors in rent determination.⁴ H.R. 1030 does not appear to build on that administration proposal, but instead seeks to introduce an additional data source.

Repeal of Community Service Requirements. The *Quality Housing and Work Responsibility Act of 1998* requires certain tenants of public housing to perform at least eight hours per month of community service in addition to their regular rent

¹www.nlihc.org/news/legupdate.htm.

²42 U.S.C. § 653a (West, Westlaw, 2003).

³24 C.F.R. § 5.236 (2002).

⁴For more information on RHIP, see HUD Proposes Another Initiative to Improve the Income Verification and Rent Determination Process, 31 HOUS. L. BULL. 202 (Sept. 2001).