Fordham Law Review

Volume 52 | Issue 5 Article 11

1984

Automatic Imposition of No-Work Conditions on Bonds in Deportation Proceedings: An Abuse of Discretion and Due Process

Charles D. Brown

AUTOMATIC IMPOSITION OF NO-WORK CONDITIONS ON BONDS IN DEPORTATION PROCEEDINGS: AN ABUSE OF DISCRETION AND DUE PROCESS

INTRODUCTION

Under the Immigration and Nationality Act of 1952 (INA),[1] the Immigration and Naturalization Service (INS) may require an individual it believes is deportable to post a bond to ensure his appearance at a deportation proceeding.[2] The INS recently adopted rules (New Rules) that automatically impose a no-work rider on such bonds.[3] A no-work rider is a condition prohibiting an individual from working until his status is adjudicated.[4] Under the New Rules, an individual risks imprisonment if he is employed during this time.[5] In order for an individual to be authorized to maintain employment during this period, he must prove the existence of compelling circumstances.[6]

As the rules previously stood (Old Rules), no-work riders were applied solely on a case-by-case basis.[7] Under the Old Rules, no-work riders could be imposed only if a District Director of the INS obtained

---

1. Ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982)).

2. 8 U.S.C. § 1252(a) (1982).

3. 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)); Mailman, *Appearance Bonds; The No-Work Rider*, N.Y.L.J., Apr. 6, 1983, at 1, col. 1.

4. Appleman, *Bond Conditions Prohibiting Unauthorized Employment*, 4 Immigration J. 1, 1 (1981); *see* 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)); Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order at 2, National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. (C.D. Cal. Dec. 16, 1983) [hereinafter cited as NCIR Brief].

5. 48 Fed. Reg. 51,142, 51,142 (1983); NCIR Brief, *supra* note 4, at 2. Additionally, the bond may be forfeited if the District Director finds that there has been a substantial violation of the bond conditions. 8 C.F.R. § 103.6(e) (1983); 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure, § 6.15d, at 6-102 (rev. ed. 1984).

6. 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)(iii)); *see* NCIR Brief, *supra* note 4, at 3. Factors examined in determining whether compelling reasons exist include: the effect on the labor market, 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)(iii)(A)), prior immigration violations by the alien, *id.* (to be codified at 8 C.F.R. § 103.6(a)(2)(iii)(B)), the existence of a reasonable basis for discretionary relief, *id.* (to be codified at 8 C.F.R. § 103.6(a)(2)(iii)(C)), and the number and status of individuals supported by the alien. *Id.* (to be codified at 8 C.F.R. § 103.6(a)(2)(iii)(D)).

7. *See* 8 C.F.R. § 103.6(a)(2)(iii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)) (factors to be considered in individual bond imposition); Appleman, *supra* note 4, at 1, 4 (explaining the case-by-case analysis under the Old Rules); *see, e.g.*, *In re* Vea, Interim Decision No. 2890, at 6-7 (B.I.A. 1981); *In re* Leon-Perez, 15 I. & N. Dec. 239, 241-43 (B.I.A. 1975).

prior approval of a Regional Commissioner by establishing that certain conditions warranted such action.[8] These conditions included the occurrence of prior immigration violations,[9] the probability of subsequent violations,[10] the lack of domestic dependents[11] and the negative impact on the domestic labor market.[12]

The New Rules arguably exceed the authority of the INS and infringe on the rights of the individual in a deportation proceeding. Assuming that the right to work is a protectable interest, the New Rules may violate an individual's right to due process.[13] Moreover, because the purposes underlying the imposition of bond conditions in immigration cases are routinely limited to ensuring appearance at subsequent proceedings[14] and safeguarding national security,[15] the

---

8. 8 C.F.R. § 103.6(a)(2)(ii), (iii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)); Appleman, *supra* note 4, at 1, 4; Mailman, *supra* note 3, at 1, col. 1.

9. 8 C.F.R. § 103.6(a)(2)(iii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)); *see In re* Leon-Perez, 15 I. & N. Dec. 239, 242 (B.I.A. 1975).

10. 8 C.F.R. § 103.6(a)(2)(iii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)); *see In re* Leon- Perez, 15 I. & N. Dec. 239, 242 (B.I.A. 1975).

11. 8 C.F.R. § 103.6(a)(2)(iii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)); *see In re* Leon-Perez, 15 I. & N. Dec. 239, 242 (B.I.A. 1975).

12. 8 C.F.R. § 103.6(a)(2)(iii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)); *see, e.g., In re* Vea, Interim Decision No. 2890, at 6 (B.I.A. 1981); *In re* Leon-Perez, 15 I. & N. Dec. 239, at 241-42 (B.I.A. 1975).

13. NCIR Brief, *supra* note 4, at 4. See *infra* notes 74-143 and accompanying text.

14. *See* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 7 (C.D. Cal. Dec. 16, 1983) ("conditions imposed on the bond must be relevant to the purpose of securing the appearance of the alien"); *In re* Vea, Interim Decision No. 2890, at 5 (B.I.A. 1981) ("[A]n alien should not be detained or required to post bond . . . unless there is a finding that he is . . . a poor bail risk."); *In re* Patel, 15 I. & N. Dec. 666, 666-67 (B.I.A. 1976) (imposition of bond condition must be relevant to likelihood of appearance); *In re* Kwun, 13 I. & N. Dec. 457, 462 (B.I.A. 1969) (detention of an alien for other than security threats or poor bail risk is not proper); *In re* Moise, 12 I. & N. Dec. 102, 104-05 (B.I.A. 1967) (alien determined to be a poor bail risk and denied bond); S. Rep. No. 1515, 81st Cong., 2d Sess. 641 (1950) (bond for the release of an alien during deportation proceedings should be conditioned upon the alien's appearance) [hereinafter cited as Senate Report], *reprinted in* 1 O. Trelles & J. Bailey, Immigration and Nationality Acts Legislative Histories and Related Documents 641 (1979); 2 C. Gordon & H. Rosenfield , *supra* note 5, § 8.16a, at 8-142 ("An obvious justification for the denial of bail is found when there is a reasonable basis for suspecting that the alien will flee."); Mailman, *supra* note 3, at 3, col. 1 (ensuring appearance at subsequent proceeding is a prime objective of bond release). *See generally* NCIR Brief, *supra* note 4, at 16-17 (explaining the purposes for detention and bond release).

15. *In re* Vea, Interim Decision No. 2890, at 5 (B.I.A. 1981) ("an alien should not be detained or required to post bond . . . unless there is a finding that he is a threat to national security"); *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976)

imposition of these rules may exceed the discretionary authority of the INS.[16] Nevertheless, Congress granted the INS broad discretion to determine appropriate bond conditions.[17] Consequently, the New Rules may be justified as a means to protect the domestic labor market.[18]

This Note examines whether the imposition of automatic no-work riders pending deportation proceedings exceeds the discretionary authority of the INS and violates the due process rights of the individual subject to the deportation proceeding.[19] Part I discusses the extent of the INS discretion in imposing bond conditions and suggests that the legislative history and case law limit the discretion to appearance and national security concerns. Part II examines the protectable interests of an individual subject to a no-work rider and determines that automatic implementation of no-work riders violates these interests. This Note concludes that the New Rules exceed the authority of the INS

(alien may be denied bond if he is a risk to national security); *In re* Au, 13 I. & N. Dec. 133, 137-38 (B.I.A. 1968) ("Denial of bail has been sustained by the courts only where it has been demonstrated that the alien is not a good risk security-wise . . . ."); *see* Carlson v. Landon, 342 U.S. 524, 541 (1952) ("[W]e conclude that the discretion as to bail . . . justif[ies] [the Attorney General's] detention of all these parties . . . as a menace to the public interest."); *In re* Kwun, 13 I. & N. Dec. 457, 462 (B.I.A. 1969) (detention is permissible when an alien is a national security risk); H.R. Rep. No. 3112, 81st Cong., 2d Sess. 1-4 (1950) (change in the immigration law necessary as a response to national security threats); S. Rep. No. 2239, 81st Cong., 2d Sess. 6 (1950) (need to control alien population is a factor in national security); 2 C. Gordon & H. Rosenfield, *supra* note 5, § 8.16a, at 8-142 ("The courts have held that the Attorney General may deny bail to active members of the Communist party."); Avirom & Serviss, *The Setting of Bond, Bond Redetermination, Breach and Recovery*, in Practising Law Institute, Advanced Immigration 1980, at 39 (1980) (Course Handbook No. 158) (national security is a factor in determining bond release); Mailman, *supra* note 3, at 3, col. 1 (national security is a prime interest in bond release determinations). *See generally* NCIR Brief, *supra* note 4, at 16-17 (explaining the purposes for detention and bond release).

16. *See* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 7 (C.D. Cal. Dec. 16, 1983); NCIR Brief, *supra* note 4, at 12-19. See *infra* notes 20-73 and accompanying text.

17. S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950); H. R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); *see In re* Toscano-Rivas, 14 I. & N. Dec. 523, 554 (Att'y Gen. 1974).

18. *See* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 9 (C.D. Cal. Dec. 16, 1983); 48 Fed. Reg. 51,142, 51,142 (1983); *cf. In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555 (Att'y Gen. 1974) (justifying old rules as protecting American labor).

19. Since the enactment of the New Rules, only one court has considered the legality of the new system. National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. (C.D. Cal. Dec. 16, 1983). The court preliminarily enjoined the imposition of the New Rules and held that the plaintiff had a fair chance of proving that such rules exceed the Attorney General's authority and violate the rights of the alien. *Id.* at 9-10.

and violate the due process right of the individual and therefore should be rescinded. A preferable approach is to adopt a pre-deprivation case-by-case analysis, similar to that of the Old Rules.

I. The Authority of the INS to Impose No-Work Riders

Section 242(a) of the INA grants the Attorney General discretion to determine whether an individual in a deportation proceeding should be released on bond,[20] and if so, what conditions should be placed on the bond.[21] The authority granted the Attorney General, however, is limited. The Supreme Court in *Carlson v.Landon*[22] stated that a decision of the Attorney General pursuant to such discretion can be overridden "where it is clearly shown that it 'was without a reasonable foundation.' "[23]

In determining whether a reasonable foundation exists, courts have examined various factors,[24] including the likelihood that the individual will be held deportable,[25] the nature of the charge against him,[26]

---

20. 8 U.S.C. § 1252(a) (1982); 1A C. Gordon & H. Rosenfield, *supra* note 5, § 5.4d, at 5-61.

21. 8 U.S.C. § 1252(a) (1982); 1A C. Gordon & H. Rosenfield, *supra* note 5, § 5.4d, at 5-61.

22. 342 U.S. 524 (1952).

23. *Id.* at 540-41. The Court stated:

> The Government does not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse. . . . [T]he language of the reports is emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse.

Id. at 540; *see* Rubinstein v. Brownell, 206 F.2d 449, 455 (D.C. Cir. 1953), *aff'd*, 346 U.S. 929 (1954); United States *ex rel.* Potash v. District Director, 169 F.2d 747, 751 (2d Cir. 1948); NCIR Brief, *supra* note 4, at 14-15; 2 C. Gordon & H. Rosenfield, *supra* note 5, § 8.16a, at 8-141.

24. *E.g.*, Carlson v. Landon, 342 U.S. 524, 541 (1952) (factor examined is whether an individual is a "menace to the public interest"); United States *ex rel.* Barbour v. District Director, 491 F.2d 573, 578 (5th Cir.) (factor examined is whether "release of an alien would be a danger to the national security"), *cert. denied*, 419 U.S. 873 (1974); United States *ex rel.* Belfrage v. Shaughnessy, 212 F.2d 128, 129-30 (2d Cir. 1954) (one factor to be considered is whether an individual refuses to answer questions about political affiliations); *In re* Marks, 198 F. Supp. 40, 45 (S.D.N.Y. 1961) (factor to be considered is the criminal record of the alien); *In re* Shaw, 17 I. & N. Dec. 177, 178 (B.I.A. 1979) (factors to be considered are legal history, likelihood of appearance at subsequent proceedings, employment and family ties); *In re* Patel, 15 I. & N. Dec. 666, 666-67 (B.I.A. 1976) (factor to be considered is stay beyond visa expiration).

25. United States *ex rel.* Potash v. District Director, 169 F.2d 747, 751 (2d Cir. 1948).

26. *Id.*

the danger to the public safety if he is released,[27] and his availability for subsequent proceedings.[28] No court, however, has specifically established what constitutes a reasonable foundation. In order for the INS to have a reasonable foundation on which to base the imposition of no-work riders, it must be determined whether the rationale for such imposition is consistent with the rationale for such authority.

A. *Legislative and Judicial Development of INS Discretion Over Bond Release*

Section 242(a) of the INA originated in the Immigration Act of 1917 (Immigration Act).[29] The Immigration Act established the authority of the government agency responsible for immigration policy to release an individual on bond pending a deportation proceeding.[30] The purpose of the bond was to ensure an individual's appearance at subsequent proceedings.[31]

Section 23 of the Subversive Activities Control Act of 1950 (SACA)[32] amended the Immigration Act by granting the Attorney General discretion to determine whether an individual involved in deportation proceedings should be placed in detention or released on bond with conditions attached.[33] This grant of discretion was intended to combat

---

27. *Id.*; *see In re* Shaw, 17 I. & N. Dec. 177, 178 (B.I.A. 1979) ("nature of . . . criminal or immigration law history").

28. United States *ex rel.* Potash v. District Director, 169 F.2d 747, 751 (2d. Cir. 1948); *In re* Shaw, 17 I. & N. Dec. 177, 178 (B.I.A. 1979).

29. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917).

30. *Id.* In 1917, the authority to release on bond was vested in the Secretary of Labor. *Id.* In 1940, the responsibility for administering the immigration laws was transfered to the Attorney General. Reorganization Plan No. V, 5 Fed. Reg. 2223 (1940); *see* 1 C. Gordon & H. Rosenfield, *supra* note 5, § 1.6b, at 1-34.

31. Act of Feb 5, 1917, ch. 29, § 20, 39 Stat. 874, 891 (1917) (a bond should be "conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge"); *see* Senate Report, *supra* note 14, at 641 (bonds for the release of aliens during deportation proceedings should be conditioned upon appearance), *reprinted in* 1 O. Trelles & J. Bailey, *supra* note 14, at 641.

32. Ch. 1024, § 23, 64 Stat. 987, 1010-12 (1950). Section 23 had its origins in the Hobbs Bill, which expanded the Attorney General's authority over detention and bond release of aliens. S. Rep. No. 2239, 81st Cong., 2d Sess. (1950); H.R. Rep. No. 1192, 81st Cong., 1st Sess. (1949). The Hobbs Bill was incorporated in the Senate version of SACA. S. Rep. 2369, 81st Cong., 2d Sess. 3 (1950). This section of the Senate version was later incorporated in the final version of the bill. H.R. Rep. No. 3112, 81st Cong., 2d Sess. 1 (1950).

33. Subversive Activities Control Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010-12 (1950). This act added the express term "discretion" to the concept of bond release. *Compare id.* at 1011 ("in the *discretion* of the Attorney General") (emphasis added) *with* Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 891 (1917) ("[an alien] *may* be released under a bond") (emphasis added).

The lack of the express discretion term in the 1917 Act led to a disagreement concerning the nature of bond release. One court held bond release to be a matter of right. Prentis v. Manoogian, 16 F.2d 422, 424 (6th Cir. 1926) (per curiam). Other

a perceived threat to national security.[34] Congress feared that certain aliens acting with discontented citizens posed an internal threat of communism.[35]

Section 23 of SACA was incorporated into section 242(a) of the INA upon its adoption in 1952.[36] Thus, the legislative history suggests that ensuring appearance and futhering national security are the two policies to be considered when determining whether an alien should be detained or released on bond.[37]

Subsequent to the passage of the INA, courts routinely affirmed the discretionary detention of an alien because the alien was either a risk

---

courts held that the Immigration Act of 1917 permitted government discretion in the issuance of such bonds. *E.g.*, United States *ex rel.* Potash v. District Director, 169 F.2d 747, 750 (2d Cir. 1948); United States *ex rel.* Zapp v. District Director, 120 F.2d 762, 765 (2d Cir. 1941); United States *ex rel.* Zdunic v. Uhl, 56 F. Supp. 403, 410 (S.D.N.Y. 1943), *aff'd*, 144 F.2d 286 (2d Cir. 1944); *see* Carlson v. Landon, 342 U.S. 524, 539-40 (1952) (explaining divergence in the case law).

34. *See* H.R. Rep. No. 3112, 81st Cong., 2d Sess. 1-3 (1950) (SACA necessary to control subversive foreigners). One congressional report stated:

> The situation has now become so serious, with every indication that it will increase rather than diminish in importance, that the committee feels that the enactment of legislation of this type is a necessity, not only to the proper administration of the immigration laws, but from the standpoint of the national security of the United States.

S. Rep. No. 2239, 81st Cong., 2d Sess. 6 (1950). The *Carlson* Court stated that the Attorney General "must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity." 342 U.S. 524, 543 (1950).

35. *See* H.R. Rep. No. 3112, 81st Cong., 2d Sess. 3 (1950) ("The Communist network in the United States is inspired and controlled in a large part by foreign agents. . . . One device for infiltration by Communists is by procuring naturalization for disloyal aliens . . . ."); S. Rep. No. 2369, 81st Cong., 2d Sess. 4 (1950) (substantial need to control the communist threat).

36. Ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1252(a) (1982)); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57 (1952)("This provision, in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950."), *reprinted in* 3 O. Trelles & J. Bailey, *supra* note 14, at 57; S. Rep. No. 1137, 82d Cong., 2d Sess. 29 (same)(1952), *reprinted in* 3 O. Trelles & J. Bailey, *supra* note 14, at 29.

37. *See* H.R. Rep. No. 3112, 81st Cong., 2d Sess. 1-3 (1950) (national security); S. Rep. No. 2239, 81st Cong., 2d Sess. 6 (1950) (same); Senate Report, *supra* note 14, at 641 (appearance), *reprinted in* 1 O. Trelles & J. Bailey, *supra* note 14, at 641; H.R. Rep. 1192, 81st Cong., 1st Sess. 6 (1949) (same); *cf.* Carlson v. Landon, 342 U.S. 524, 544 (1952) ("[T]he new legislation was designed to eliminate the subversive activities of resident aliens . . . ."). Courts and commentators recognize that national security and appearance at pending proceedings are factors in determining bond release and detention. *E.g.*, *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1981); *In re* Kwun, 13 I. & N. Dec. 457, 462 (B.I.A. 1969); 2 C. Gordon & H. Rosenfield, *supra* note 5, § 8.16a, at 8-142; Avirom & Serviss, *supra* note 15, at 39.

to national security[38] or likely not to appear at a proceeding.[39] Furthermore, the Board of Immigration Appeals authorized bond conditions solely for the purpose of ensuring appearance and protecting the public.[40] In *In re Toscano-Rivas*,[41] however, the Attorney General stated that when dealing with bond release, a no-work rider could be imposed to prohibit unauthorized employment in order to guard against the displacement of workers in the domestic labor market.[42] The Attorney General attempted to distinguish past cases limiting discretionary authority to appearance and national security interests because these cases dealt solely with detention.[43] Because the no-work rider is only a bond condition, detention analysis may be inapplicable.

After *Toscano-Rivas*, the INS adopted rules permitting imposition of a bond condition prohibiting unauthorized employment by individuals pending a deportation proceeding.[44] The condition was imposed on a case-by-case basis by establishing that certain factors warranting imposition of the condition existed.[45] The legislative history concerning the Attorney General's authority and the judicial and administrative interpretations of it suggest that the automatic imposition of no-work riders may violate this discretionary authority.

B. *The New Rules and the Attorney General's Discretionary Authority*

Automatic imposition of no-work riders may be justified by the broad discretionary authority granted the Attorney General under the immigration laws.[46] The Attorney General has stated that such au-

---

38. *E.g.*, *In re* Vea, Interim Decision No. 2890, at 5 (B.I.A. 1981); *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976); *In re* Kwun, 13 I. &. N. Dec. 457, 462 (B.I.A. 1969).

39. *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976); *see In re* Moise, 12 I. & N. Dec. 102, 104 (B.I.A. 1967).

40. NCIR Brief, *supra* note 4, at 16; *see, e.g.*, *In re* Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976); *In re* Kwun, 13 I. & N. Dec. 457, 462 (B.I.A. 1969).

41. 14 I. & N. Dec. 523 (B.I.A. 1972, *rev'd, id.* at 550 (Att'y Gen. 1974)).

42. *Id.* at 555.

43. *Id.* at 555-56. The INS, however, has acknowledged that no-work riders are a condition of release. See *infra* notes 66-67 and accompanying text.

44. 39 Fed. Reg. 19,201 (1974) (codified at 8 C.F.R. § 103.6(a)(2)(ii) (1983)), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)).

45. 8 C.F.R. § 103.6(a)(2) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)). See *supra* notes 7-12 and accompanying text. The rider could only be imposed if the District Director received prior approval of the Regional Commissioner. 8 C.F.R. § 103.6(a)(2)(ii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)); *see* Appleman, *supra* note 4, at 4.

46. *See* Carlson v. Landon, 342 U.S. 524, 540 (1952) ("[Congress intended] to make the Attorney General's exercise of discretion presumptively correct and unas-

thority "afford[s] an independent basis for requiring of persons subject to deportation proceedings bonds prohibiting unauthorized employment."[47] Under section 242(a) of the INA, no limitations on the conditions for release prohibit the INS from implementing such rules.[48] Moreover, the legislative history clearly states that the INS is to have broad discretion in establishing bond conditions.[49]

In addition, the adverse affects of alien employment on the United States labor market may justify the automatic imposition of the no-work rider.[50] The Attorney General contends that "a basic purpose of the immigration law is to protect against the displacement of workers in the United States."[51] If the protection of the labor market is indeed a valid justification for the imposition of a bond-release condition, such restriction should be imposed only if the alien awaiting a deportation proceeding actually threatens the employment of American citizens.

Discretion, however, may not permit the INS automatically to impose no-work riders in all cases.[52] The New Rules impose no-work riders on all individuals released on bond during the pendency of a deportation proceeding.[53] No evaluation of the charges or examination of the individual's status is made prior to the imposition of the

---

sailable except for abuse."); *In re* Toscano-Rivas, 14 I. & N. Dec. 523, 554 (Att'y Gen. 1974) ("reports clearly demonstrate a Congressional intent to grant wide discretion"); 8 U.S.C. § 1103(a) (1982) (Attorney General "shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority"); S. Rep. No. 2239, 81st Cong., 1st Sess. 6 (1949) (same).

47. 48 Fed. Reg. 51,142, 51,142 (1983) (quoting *In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555 (Att'y Gen. 1974)).

48. 48 Fed. Reg. 51,142, 51,142 (1983); *see* 8 U.S.C. § 1252(a) (1982).

49. See *supra* note 17 and accompanying text.

50. 48 Fed. Reg. 51,142, 51,142 (1983); *see In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555 (Att'y Gen. 1974); 8 U.S.C. 1182 (a)(14)(B) (1982).

51. 48 Fed. Reg. 51,142, 51,142 (1983) (quoting *In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555 (Att'y Gen. 1974)).

52. *See* Carlson v. Landon, 342 U.S. 524, 543 (1952) (Attorney General does not have "untrammeled" discretion); Rubinstein v. Brownell, 206 F.2d 449, 455 (D.C. Cir. 1953) ("[D]iscretion . . . is a reasonable discretion, not an arbitrary and capricious one."), *aff'd mem.*, 346 U.S. 929 (1954); United States *ex rel.* Hydmon v. Holton, 205 F.2d 228, 230 (7th Cir. 1953) (Attorney General is not left with absolute discretion); National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 7 (C.D. Cal. Dec. 16, 1983) (no-work riders may violate the statutory authority).

53. National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8 (C.D. Cal. Dec. 16, 1983); NCIR Brief, *supra* note 4, at 2, 13; *see* 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)(ii)) ("A condition barring employment shall be included in an appearance and delivery bond . . . unless the District Director determines that employment is appropriate."). *But see* 48 Fed Reg. 51,142, 51,143 (1983) (New Rules exempt permanent resident aliens).

condition.[54] The individual, therefore, is automatically denied employment while trying to exercise his possibly valid right to remain in this country. While it may be reasonable to impose no-work riders on individuals when their employment has been established to be unauthorized,[55] it is questionable whether the Attorney General's discretionary authority justifies the imposition of such a condition on all individuals released on bond regardless of their status.[56] Attributing a certain characteristic to all members of a certain class in order to justify their identical treatment violates the concept of reasonableness.[57] For example, a system that incarcerates all alien communists without a showing that they, as individuals, pose threats to national security is an abuse of INS discretion.[58] Similarly, a system that prohibits employment of any individual released on bond without evaluating whether the individual poses a threat to the domestic labor market also may constitute an abuse of discretion.[59]

---

54. *See* NCIR Brief, *supra* note 4, at 13-14 (individual's status is determined without preliminary hearing); 48 Fed. Reg. 51,142, 51,144 (1983) (same) (to be codified at 8 C.F.R. § 103.6(a)(2)(ii)).

55. *See In re* Toscano-Rivas, 14 I. & N. Dec. 523, 524 (B.I.A. 1972), *rev'd on other grounds, id.* at 550 (Att'y Gen. 1974) (no-work riders approved when aliens conceded deportability). The rules adopted subsequent to *Toscano-Rivas* only restricted "unauthorized employment." 8 C.F.R. 103.6(a)(2)(ii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)).

56. The Supreme Court has suggested that the discretion granted the Attorney General is reasonable when applied on a case-by-case approach. *See* Carlson v. Landon, 342 U.S. 524, 544 (1952). As Justice Frankfurter stated in *Carlson*: "The factors relevant to the exercise of discretion are factors that pertain to each individual as an individual." *Id.* at 562 (Frankfurter, J., dissenting); *cf.* United States *ex rel.* Belfrage v. Shaughnessy, 212 F.2d 128, 129-30 (2d Cir. 1954) (proof of an individual's actual threat to national security is required); Rubinstein v. Brownell, 206 F.2d. 449, 451, 455-56 (D.C Cir. 1953) (same), *aff'd mem.*, 346 U.S. 929 (1954); United States *ex rel.* Potash v. District Director, 169 F.2d 747, 751 (2d. Cir. 1948) (factors for the determination of bail and detention questions).

57. *See* Carlson v. Landon, 342 U.S. 524, 538 (1952) (cannot characterize all aliens as a threat to national security).

58. *See id.* (purpose to injure cannot be imputed to all aliens); *id.* at 558 (Frankfurter, J., dissenting) (undiscriminating and unindividualized standard violates congressional intent); *cf.* United States *ex rel.* Belfrage v. Shaughnessy, 212 F.2d 128, 129-30 (2d Cir. 1954) (cannot impute a threat to national security from an alien's refusal to answer questions about his affiliations); Rubinstein v. Brownell, 206 F.2d 449, 451, 455-56 (D.C. Cir. 1953) (conviction for draft evasion cannot lead to an assumption that the alien is a threat to national security), *aff'd mem.*, 346 U.S. 929 (1954); United States *ex rel.* Daniman v. Esperdy, 113 F. Supp. 283, 286 (S.D.N.Y. 1953) (past communist activity cannot be used to impute a present subversive threat); United States *ex rel.* Schneider v. Esperdy, 108 F. Supp. 640, 643-44 (S.D.N.Y. 1952) (same).

59. *Toscano-Rivas* upheld the imposition of no-work riders as a means to protect the domestic labor market. *In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555 (Att'y Gen.

Moreover, while *Toscano-Rivas* stated that no-work riders could be imposed without exceeding the discretionary authority of the Attorney General,[60] it also warned against "undue utilization" of such conditions.[61] Given this language, the Attorney General's opinion in *Toscano-Rivas* cannot be construed to support automatic imposition of no-work riders.

Futhermore, the alleged threat to the domestic labor market from alien employment may not be a proper basis for automatic imposition of no-work riders.[62] The legislative history of the pertinent immigration laws suggests that the primary purposes of allowing detention and release on conditional bond are to safeguard national security[63] and to guarantee an individual's appearance at a subsequent proceeding.[64] No-work riders may bear little relevance to either of these purposes.[65]

1974). The rules adopted in response to *Toscano-Rivas* recognized the impact on displacement of workers as a factor in the potential imposition of no-work riders. *See* 8 C.F.R. § 103.6(a)(2)(iii) (1983), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)). By determination of the potential threat to the labor market posed by each individual released on bond, the Old Rules fairly considered each individual's potential threat. *See id.*

By imposing no-work riders automatically, however, the New Rules fail to consider whether a particular individual poses a potential threat to the domestic labor market. *See* 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)(ii)). Therefore, if discretion requires individual analysis, see *supra* notes 56-59 and accompanying text, and no-work riders are meant to limit threats to the labor market, *see In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555 (Att'y Gen. 1974); 48 Fed. Reg. 51,142, 51,142 (1983), the individual's threat to the labor market must be examined to establish a reasonable grounds for the discretionary action. *See In re* Vea, Interim Decision No. 2890, at 6 (B.I.A. 1981) (adverse impact of the alien's employment on the labor market was necessary for the rider's imposition under the Old Rules); *In re* Leon-Perez, 15 I. & N. Dec. 239, 241 (B.I.A. 1975) (under the Old Rules, the INS had to establish employment impact to justify imposition of the rider); Appleman, *supra* note 4, at 18 (same).

60. 14 I. & N. Dec. at 555; *see* Appleman, *supra* note 4, at 4.

61. 14 I. & N. Dec. at 557. The Board of Immigration Appeals has interpreted *Toscano-Rivas* to hold that "the utmost care [must] be taken in imposing bond conditions prohibiting employment." *In re* Leon-Perez, 15 I. & N. Dec. 239, 241 (B.I.A. 1975); *see In re* Vea, Interim Decision No. 2890 at 6 (B.I.A. 1981); Appleman, *supra* note 4, at 20.

62. The traditionally-accepted bases for determining detention and bond-release questions are national security, see *supra* note 15 and accompanying text, and assurance of appearance, see *supra* note 14 and accompanying text. Additionally, the INS does not examine any potential economic threat when imposing a bond on an alien. *See In re* Shaw, 17 I. & N. Dec. 177, 178 (B.I.A. 1979) (listing factors examined by INS).

63. See *supra* notes 32-37 and accompanying text.

64. See *supra* notes 29-37 and accompanying text.

65. *See In re* Patel, 15 I. & N. Dec. 666, 667 (B.I.A. 1976) (alien's employment, even though he lacked a labor certificate, rendered his appearance at subsequent

Although the Attorney General in *Toscano-Rivas* distinguished past decisions because they dealt with detention rather than bond conditions,[66] the INS acknowledges that no-work riders are a condition of release.[67] Thus, the alien's adherence to a no-work rider determines whether he will be detained or released. The legislative purposes of protecting national security and ensuring appearance at a subsequent proceeding, therefore, are relevant to determining the validity of automatic no-work riders.

While concern for the domestic labor market may implicate national security interests,[68] the economic effect of alien employment in the American economy has yet to be determined.[69] An alien who accepts work in the United States may have no effect on the employment opportunities of citizens and permanent residents.[70] One commentator has stated that "[e]xperiments conducted by INS show little, if any, damage to citizens even in the few areas where immigrants—legal and illegal—concentrate."[71] In addition, American citizens often will not accept the job that an alien vacates because of its low salary level[72] and the availability to Americans of various governmental

---

proceedings more likely); NCIR Brief, *supra* note 4, at 16 (quoting *Patel*, 15 I. & N. Dec. at 667). A factor in determining the necessity of a bond is employment. *See In re* Shaw, 17 I. & N. Dec. 177, 178 (B.I.A. 1979).

Historically, detention has been used to safeguard the national security interest in preventing subversion. *See* Carlson v. Landon, 342 U.S. 524, 542 (1952) ("no denial of . . . due process . . . where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence"); United States *ex rel.* Belfrage v. Shaughnessy, 212 F.2d 128, 129-30 (2d Cir. 1954) (alien released because there was no danger that he would "engage in the interim in activities inimical to the public welfare"); Rubinstein v. Brownell, 206 F.2d 449, 451, 455-56 (D.C. Cir. 1953) (alien's conviction for evading the draft was not an adequate threat to national security), *aff'd mem.*, 346 U.S. 929 (1954); H.R. Rep. No. 3112, 81st Cong., 2d Sess. 1-3 (1950) (strong national goal to prevent communism is apparent); 96 Cong. Rec. 15,297 (1950) (remarks of Rep. Walters) (changes in the immigration laws are needed to address "a different concept of world revolution").

66. *In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555-56 (Att'y Gen. 1974).

67. 48 Fed. Reg. 51,142, 51,142 (1983) ("Where the 'no work' condition is violated, the appropriate response would be to take the alien into custody.").

68. *See* S. Rep. No. 62, 98th Cong., 1st Sess. 3 (1983).

69. Comptroller General of the United States, Report to the Congress, Illegal Aliens: Estimating Their Impact on the United States 19 (1980) [hereinafter cited as Comptroller Report]; *see* California Advisory Committee to the United States Commission on Civil Rights, A Study of Federal Immigration Policies and Practices in Southern California 8 (1980) [hereinafter cited as California Report]; P. Ehrlich, L. Bilderback & A. Ehrlich, The Golden Door 196 (1979).

70. *See* NCIR Brief, *supra* note 4, at 20-22; Comptroller Report, *supra* note 69, at 19-20. In fact, recent studies indicate that aliens have a positive impact on the domestic economy. Simon, *Don't Close Our Borders*, Newsweek, Feb. 27, 1984, at 11; New York Times, Nov. 15, 1983, at A17, col. 1.

71. Simon, *supra* note 70, at 11.

72. Comptroller Report, *supra* note 69, at 19 (quoting economist Hans F. Sennholz); Simon, *supra* note 70, at 11. In 1975, 65.2% of the illegal aliens in the United

benefits.[73] Thus, such individuals do not displace American workers. Accordingly, it is questionable whether automatic no-work riders satisfy a legitimate national interest.

Automatic no-work riders thus appear to be an impermissible extension of the discretionary authority of the Attorney General. They arbitrarily restrict the ability of individuals to maintain employment pending deportation proceedings. Moreover, they expand the scope of national security interests to encompass an undetermined economic threat. Such a system cannot be classified as being based on a "reasonable foundation."

II. No-Work Riders and Procedural Due Process

The fifth amendment to the Constitution provides that "[n]o person shall . . . be deprived of life, liberty or property without due process of law."[74] It is well established that the due process protection of the fifth amendment extends to individuals in deportation proceedings.[75] In examining the relationship between automatic no-work riders and due process restrictions, it initially must be determined whether the employment interests of the individual pending a deportation proceeding are constitutionally protected. If such an interest is constitutionally protected, procedural safeguards must exist.

A. *The Protected Interests*

1. The Right to Work as a Property Interest

Employment authorization may grant certain classes of aliens an entitlement interest in their employment.[76] An entitlement is a pro-

---

States made less than $2.50 per hour. *Id.* at 18. Some commentators state that they never interviewed an alien whose annual income exceeded $5,000. P. Ehrlich, L. Bilderback & A. Ehrlich, *supra* note 69, at 194. Jobs vacated by aliens generally are not filled by citizens. California Report, *supra* note 69, at 8-9; *see* Comptroller Report, *supra* note 69, at 19.

73. Comptroller Report, *supra* note 69, at 19 (social services and unemployment insurance).

74. U.S. Const. amend. V .

75. *E.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590, 596-97 (1953); Johnson v. Eisentrager, 339 U.S. 763, 770-71 (1950); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950); United States v. Pink, 315 U.S. 203, 228 (1942); Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931); The Japanese Immigrant Case, 189 U.S. 86, 99-101 (1903); 1A C. Gordon & H. Rosenfield, *supra* note 5, § 5.5, at 5-66 to -67; J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 1090 (2d ed. 1983); *see* Carlson v. Landon, 342 U.S. 524, 538 (1952).

76. Employment authorization is analogous to a driver's license. *Compare* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. (C.D. Cal. Dec. 16, 1983) (employment authorization) *with* Bell v. Burson, 402 U.S. 535 (1971) (driver's license). Instead of giving the holder the right to drive, employment authori-

tected property interest in a governmental grant of permission or monetary support.[77] Certain classes of aliens are authorized to work incident to their status,[78] or have sought and received such authorization.[79] For example, an alien with an exceptional or technical skill is given the right to work as part of his non-immigrant status.[80] In addition, an alien attending school in the United States may seek authorization for employment.[81] Once authorization for employment is granted, it can be terminated only for good cause.[82] Thus, the statutory authorization to work and the statutory safeguards against improper revocation of this authorization by their nature suggest that the alien has an entitlement interest in the employment authorization meriting constitutional protection.

By contrast, an alien's interest in maintaining employment pending a deportation proceeding may be merely a privilege.[83] The alien's

---

zation gives the holder the right to obtain employment. Driver's licenses have been held to be entitlements. *Bell*, 402 U.S. at 539 ("This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement . . . ."). Additionally, in order to revoke an occupational license, fair procedure is required. *See In re* Ruffalo, 390 U.S. 544, 550-51 (1968). *See generally* J. Nowak, R. Rotunda & J. Young, *supra* note 75, at 549-50 (discussion of entitlements); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255-56 (1965) (same) [hereinafter cited as Reich I]; Reich, *The New Property*, 73 Yale L.J. 733, 739-44 (1964) (same) [hereinafter cited as Reich II].

77. *See* L. Tribe, American Constitutional Law § 10-9, at 515 (1978) ("[T]he Court recognized as entitlements interests founded neither on constitutional nor on common law claims of right but only on a state-fostered (and hence justifiable) expectation, as opposed to a mere hope . . . .") (footnotes omitted); *see, e.g.*, Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's license revocation affects interests that are important enough to require procedural due process); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (interest in continued welfare payments is important and due process is required prior to termination of these benefits). An entitlement exists only to the extent that it is statutorily authorized. J. Nowak, R. Rotunda & J. Young, *supra* note 75, at 549-50; L. Tribe, *supra*, § 10-9, at 515; *see* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (dictum).

78. 8 C.F.R. § 109.1(a) (1983).

79. *Id.* § 109.1(b).

80. *Id.* § 109.1(a)(6)(x) (1983); *see* 8 U.S.C. § 1101(a)(15)(J) (1982) (defining class of skilled non-immigrants).

81. 8 C.F.R. § 109.1(b)(1)(ii) (1983).

82. *Id.* § 109.2(a). If the individual's authorization is to be terminated, notice and an opportunity to rebut the charges are required. *Id.* § 109.2(b).

83. *Cf.* Barsky v. Board of Regents, 347 U.S. 442, 451 (1954) (practice of medicine is a privilege given by the state); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (continued government service is not a constitutionally protected right). A distinction existed in due process theory "between individual 'rights' stemming from constitutional or common law sources and mere 'privileges' bestowed by government. . . ." L. Tribe, *supra* note 77, § 10-8, at 509-10. The government does not have to provide protection for a mere privilege. *See* Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950) (government employment is not a

authority to work is within the sole discretion of the United States government.[84] This governmental authorization vests no right to continued employment in the individual.[85] Consequently, the alien may have only an expectancy interest in employment.[86]

The entitlement theory, however, dispenses with the right-privilege distinction. Entitlements are awards of governmental largesse.[87] The recognition of reliance on such awards differentiates an entitlement from a privilege.[88] In the case of employment authorization, reliance is so substantial that withdrawal of the grant would cause hardship.[89]

---

protectable interest under the fifth amendment), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951); Washington v. Clark, 84 F. Supp. 964, 966 (D.D.C. 1949) (the government may fire employees "if it [sees] fit" for making "protected utterances"), *aff'd*, 182 F.2d 375 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 923 (1951); Wilkie v. O'Connor, 261 A.D. 373, 375, 25 N.Y.S.2d 617, 620 (1941) (welfare payments are a privilege and equated with charity); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1440 (1968) (privileges are unprotected). This distinction may be regaining acceptance. *See generally* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982). *But see* Van Alstyne, *supra*, at 1442 (right-privilege distinction is no longer functional).

84. *See* 8 C.F.R. §§ 109.1(b), 109.2(a) (1983).

85. *See id.*

86. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (defining expectancy as a mere unilateral need or desire); J. Nowak, R. Rotunda & J. Young, *supra* note 75, at 547-48 (same). A non-statutory expectancy does not give the individual an interest in continued benefits. *See* Arnett v. Kennedy, 416 U.S. 134, 152-54 (1974); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 463-64 (1977) (quoting *Arnett*, 416 U.S. at 151-52).

87. Reich II, *supra* note 76, at 785; *see* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); Reich I, *supra* note 76, at 1255.

88. *See* Perry v. Sindermann, 408 U.S. 593, 600-03 (1972) (reliance on de facto tenure plan); Bell v. Burson, 402 U.S. 535, 539 (1971) (reliance on driver's license); Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (it would be "unconscionable" to stop welfare payments without a prior hearing considering the substantial need of the welfare recipient) (quoting trial court); Reich II, *supra* note 76, at 737 ("Hardly any citizen leads his life without at least partial dependence on wealth flowing through the . . . government . . . .").

89. *See* National Center for Immigrant's Rights, Inc. v. INS, No. 83-7927, slip op. at 9 (C.D. Cal. Dec. 16, 1983) (With respect to the issuance of a preliminary injunction, the court noted that "there is sufficient evidence of the possibility that the regulations will impose irreparable harm to those who fall within the purview of the no-work condition."); NCIR Brief, *supra* note 4, at 8-11 (discussing the degree of harm no-work riders would cause individuals); *cf.* Greene v. McElroy, 360 U.S. 474, 492 (1959) (lack of security clearance "seriously affected, if not destroyed" the plantiff's pursuit of a chosen career); Truax v. Raich, 239 U.S. 33, 41 (1915) ("right to work for a living" an essential part of personal freedom); Dent v. West Virginia, 129 U.S. 114, 121 (1889) (right to continued employment "is often of great value" to the holder of the right).

Institutional procedural safeguards, therefore, must limit arbitrary withdrawal.[90] Furthermore, because such authorization cannot be withdrawn unless "good cause" is established, the alien has more than a mere expectancy in continued employment.[91] Thus, any acts affecting these interests must satisfy certain minimum due process requirements.

2. The Right to Work as a Liberty Interest

The right to work is generally a protected liberty interest.[92] The Supreme Court has stated that liberty "denotes not merely freedom from bodily restraint but also the right . . . to engage in any of the common occupations of life."[93] Because the individual in a deportation proceeding is entitled to due process protection,[94] he arguably should not be denied his right to work pending such a proceeding without adequate procedural review.

By contrast, the INS contends that such an individual is not entitled to maintain employment pending a deportation proceeding due to his illegal presence in the country.[95] This position, however, assumes that

---

90. Such safeguards presently exist to prevent arbitrary withdrawal of work authorization. *See* 8 C.F.R. § 109.2 (1983). These institutional safeguards, however, do not apply to the no-work riders. *See* 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)). The new system is automatic and affords no notice or opportunity to address the charges prior to revocation in the context of contemplated deportation. *See* 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)).

91. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (for an individual "[t]o have a property interest in a benefit, . . . [he] must have more than an abstract need or desire for it, . . . [and] more than a unilateral expectation . . . ."). Conversely, if a statute permits termination without cause or for any reason, no right to continued benefits is granted to the individual. *See* Bishop v. Wood, 426 U.S. 341, 345-47 (1976); J. Nowak, R. Rotunda & J. Young, *supra* note 75, at 547. This, however, is not the case with work authorization. *See* 8 C.F.R. § 109.2(a) (1983).

92. Greene v. McElroy, 360 U.S. 474, 492 (1959); Truax v. Raich, 239 U.S. 33, 41 (1915); Allgeyer v. Louisiana, 165 U.S. 578, 589-90 (1897); Dent v. West Virginia, 129 U.S. 114, 121 (1889); Powell v. Pennsylvania, 127 U.S. 678, 684 (1888); United States v. Briggs, 514 F.2d 794, 798 (5th Cir. 1975); National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 7 (C.D. Cal. Dec. 16, 1983); Whetzler v. Krause, 411 F. Supp. 523, 527 (E.D. Pa. 1976), *aff'd mem.*, 549 F.2d 797 (3d Cir. 1977); NCIR Brief, *supra* note 4, at 24-25 (quoting Greene v. McElroy, 360 U.S. at 492); *see* United States v. Robel, 389 U.S. 258, 265 n.11 (1967) (right to earn a living is a protected interest) (quoting Greene v. McElroy, 360 U.S. at 492); Onweiler v. United States, 432 F. Supp. 1226, 1232 (D. Idaho 1977) (same); Endicott v. Van Petten, 330 F. Supp. 878, 883-84 (D. Kan. 1971) (same); Mailman, *supra* note 3, at 3, col. 2 (same).

93. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

94. See *supra* note 75 and accompanying text.

95. National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 7-8 (C.D. Cal. Dec. 16, 1983); 48 Fed. Reg. 51,142, 51,143 (1983) (INS contending

the individual is, in fact, illegally present in the country.[96] Pending adjudication at a deportation proceeding, this issue has not yet been resolved.[97] The government has the initial burden of proving at the deportation proceeding that the individual is in the country illegally.[98] By denying such an individual the right to work through the imposition of a no-work rider, however, the INS is determining illegality prior to proper adjudication of the issue.[99] The liberty interest in the right to continued employment should exist until an immigration judge determines illegal status.

B. *What Process Is Due*

The Supreme Court, in *Mathews v. Eldridge*,[100] enunciated three factors for determining the due process safeguards required in an administrative proceeding:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

---

no-work rider will prevent employment of illegal aliens). Prior to the issuance of an appearance bond, the INS conducts an investigation, *see* 1A C. Gordon & H. Rosenfield, *supra* note 5, § 5.2, at 5-15 to -35, and issues an order to show cause, 8 C.F.R. § 242.1(a) (1983). This order commences the deportation proceedings. *Id.* The order to show cause includes the charges and factual allegations, *id.* § 242.1(b), and is issued by an authorized INS officer, *id.* § 242.1(a), "upon a prima facie showing of deportability," 1A C. Gordon & H. Rosenfield, *supra* note 5, § 5.3b, at 5-36.

96. National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8 (C.D. Cal. Dec. 16, 1983); *see* NCIR Brief, *supra* note 4, at 14; Mailman, *supra* note 3, at 3, col. 3.

97. *See* Woodby v. INS, 385 U.S. 276, 285-86 (1966) (establishing degree of proof in deportation proceeding); 8 C.F.R. § 242.14(a) (1983) (same); Note, *Deportation: Procedural Rights of Reentering Permanent Resident Aliens Subjected to Exclusion Hearings*, 51 Fordham L. Rev. 1339, 1344 (1983) ("[A] decision of deportability is invalid unless it is based on 'clear, unequivocal and convincing' evidence.") (quoting 8 C.F.R. § 242.14(a) (1982)). This determination is made solely by an Immigration Judge. 8 C.F.R. § 242.8(a) (1983). Until a constitutionally-mandated hearing before the Immigration Judge is held, *see* The Japanese Immigrant Case, 189 U.S. 86,100 (1903), it cannot be assumed that an individual is an illegal alien. *See* Woodby v. INS, 385 U.S. at 285-86; National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8 (C.D. Cal. Dec. 16, 1983); 8 U.S.C. § 1252(b) (1982); NCIR Brief, *supra* note 4, at 13-14; Wildes, *The Exclusion and Deportation Processes—Basic Procedures*, in Practising Law Institute, Thirteenth Annual Immigration and Naturalization Institute 425 (Course Handbook No. 167) (1980).

98. Woodby v. INS, 385 U.S. 276, 285-86 (1966); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923).

99. NCIR Brief, *supra* note 4, at 14; *see* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8 (C.D. Cal. Dec. 16, 1983).

100. 424 U.S. 319 (1976).

> Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[101]

The *Mathews* test balances the individual's constitutional interests against the government's interests in avoiding an undue administrative burden.[102]

1. The Private Interest at Stake

The private interest implicated by automatic no-work riders is the individual's ability to maintain employment pending a deportation proceeding.[103] This interest is not just a general right to a certain job, but also is a "right to work in order to eat, have shelter, [receive] medical care . . . and . . . provide for one's children."[104] If an alien is automatically denied the right to work, he may be unable to support himself and his family.[105] Moreover, the circumstances surrounding the imposition of an automatic no-work rider may be grave because the delay between imposition of the rider and possible post-deprivation relief may be several weeks.[106]

This ability to work to ensure survival is analogous to the right of the welfare recipient to receive benefits pending a termination proceeding.[107] The Supreme Court held in *Goldberg v. Kelly*[108] that a welfare recipient is entitled to an evidentiary hearing by an independent factfinder prior to termination of welfare benefits.[109] The ration-

---

101. *Id.* at 335.

102. *Id.* at 335, 348; J. Nowak, R. Rotunda & J. Young, *supra* note 75, at 560; *see* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 47-48 (1976); *cf.* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978) (applying the *Mathews* balancing test in the context of an electrical shut-off).

103. National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8 (C.D. Cal. Dec. 16, 1983); NCIR Brief, *supra* note 4, at 24.

104. NCIR Brief, *supra* note 4, at 24.

105. *Id.* at 11-12. The plight of the individual denied his employment rights is substantial, going beyond lack of support for his family. *Id.* at 8-12 (problems include inability to procure counsel); *see* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8-9, 11-12 (C.D. Cal. Dec. 16, 1983). Additionally, aliens may be deported for becoming public charges within five years of entry unless they can affirmatively prove that the reason for their poverty arose after entry. 8 U.S.C. § 1251(a)(8) (1982).

106. *See* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8-9 (C.D. Cal. Dec. 16, 1983); NCIR Brief, *supra* note 4, at 29-30.

107. NCIR Brief, *supra* note 4 at 29.

108. 397 U.S. 254 (1970).

109. *Id.* at 266-71; L. Tribe, *supra* note 77, § 10-9, at 516-17.

ale for this high degree of due process protection is that "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits."[110] Similarly, an individual in a deportation proceeding is subject to a denial of his fundamental ability to support himself,[111] and therefore, should be entitled to the same degree of due process protection.

An illegal alien, however, may have no legally protected interest in maintaining employment.[112] Futhermore, the interests of a welfare recipient may be distinguished from the interests of an alien: A welfare recipient has received an affirmative grant of benefits from the government,[113] while an alien may not have received such a grant.[114] An analogy may be made to the termination of disability benefits. As is the case with welfare benefits and employment, disability benefits may represent the recipient's primary means of support. Nonetheless, the Supreme Court has held that the interests involved do not require pre-deprivation factfinding.[115] Accordingly, such factfinding may not be necessary for the protection of the alien's interests.

The INS, however, should not be able to assume, prior to a fair adjudication, that the individual is in fact in the country illegally.[116] Moreover, while the benefits given to the welfare recipient and the

---

110. *Goldberg*, 397 U.S. at 264 (emphasis in original).

111. The Supreme Court stated in *Goldberg* that: "Since [the welfare recipient] lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." 397 U.S. at 264. The individual in deportation proceedings who is barred from employment also loses the means to support himself. NCIR Brief, *supra* note 4, at 11-12, 29. In general, aliens are paid low wages. *See* P. Ehrlich, L. Bilderback & A. Ehrlich, *supra* note 69, at 194; California Report, *supra* note 69, at 8. Low wages coupled with a ban on employment render an individual released on bond incapable of supporting himself. *See* NCIR Brief, *supra* note 4, at 11-12. Additionally, he may be unable to procure counsel and and thus may be forced to abandon his right to a deportation hearing. *See Id.*

112. See *supra* note 95 and accompanying text.

113. *See* Goldberg v. Kelly, 397 U.S. 254, 255-56 (1970) (welfare recipients already receiving aid when benefits were terminated).

114. Some aliens may be admitted to the country and not receive work authorization unless they apply for it. 8 C.F.R. §109.1(b) (1983). Additionally, there is an existing problem of illegal immigration into the United States. *See* P. Ehrlich, L. Bilderback & A. Ehrlich, *supra* note 69, at 182-90 (explaining the various estimates of the number of illegal aliens in the country). It therefore appears possible for no-work riders to be applied to those who lack work authorization.

115. Mathews v. Eldridge, 424 U.S. 319, 347-49 (1976).

116. National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 7-8 (C.D. Cal. Dec. 16, 1983); NCIR Brief, *supra* note 4, at 13-14. See *supra* notes 96-99 and accompanying text.

alien may be distinguishable, the interests in the ability to ensure survival are identical. In addition, the interests of the individual receiving disability benefits may be distinguished because such an individual may have other means of support.[117] The protected interest of the alien pending a deportation proceeding, therefore, must be considered substantial.

2. Risk of Erroneous Deprivation

While no-work riders automatically prohibit individuals who post bond in a deportation proceeding from maintaining employment,[118] certain provisions in the New Rules safeguard the individual's interests. The alien is permitted to continue employment if he establishes that "compelling reasons" exist to justify his reauthorization.[119] In addition, the individual may request that an Immigration Judge review the INS' bond determination.[120] The Immigration Judge then may alter the bond to permit continued employment.

These safeguards, however, fall well below the due process requirements necessary to protect the interests of the individual awaiting a deportation proceeding.[121] The District Director is not an independent

---

117. Mathews v. Eldridge, 424 U.S. 319, 340-41 (1976). The *Mathews* Court distinguishes the disability benefits situation from *Goldberg* because the circumstances of a disabled individual are not necessarily similar to those of a welfare recipient. *Id.* at 340. The disabled, according to the Court, may have other sources of support, such as savings, tort claims and workman's compensation. *Id.* at 341. The alien, like the welfare recipient, is in a more dire circumstance than the disabled individual. See *supra* notes 107-11 and accompanying text.

Additionally, the decision to terminate a disabled person's benefits is based on an objective medical investigation. *Mathews*, 424 U.S. at 343. In the case of termination of welfare benefits or imposition of no-work riders, subjective determinations of credibility and veracity must be made which are not present in a medical evaluation. *Compare Goldberg*, 397 U.S. at 269-70 *and* NCIR Brief, *supra* note 4, at 13-14 *with Mathews*, 424 U.S. at 343-45. Thus, the risk of error is less in an objective medical evaluation than it is in a subjective evaluation. *See Mathews*, 424 U.S. at 344-45.

118. See *supra* notes 3-6 and accompanying text.

119. 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)(iii)); *see* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8 (C.D. Cal. Dec. 16, 1983); NCIR Brief, *supra* note 4, at 3. The District Director examines such factors as the effect on the domestic economy, past violations of the immigration laws, the need for discretionary relief and continued support of dependent residents. 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)(iii)).

120. 8 C.F.R. § 242.2(b) (1983); *see* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8 (C.D. Cal. Dec. 16, 1983). Immigration Judges are not under the authority of the INS. *See* 48 Fed. Reg. 8038, 8039-40 (1983) (to be codified at 8 C.F.R. §§ 3.0, 3.9-.10).

121. An individual subjected to a no-work rider, arguably, should receive due process protection comparable to that of a welfare recipient. NCIR Brief, *supra* note

factfinder.[122] He has a vested interest in the case because his office has brought the action against the alien.[123] While review by the Immigration Judge is independent, this review can only be post-deprivation[124] and may not take place for several weeks after the imposition of the no-work rider.[125]

In certain cases, however, post-deprivation review can afford adequate protection.[126] For example, a holder of a driver's license who

---

4, at 29; *see* Mathews v. Eldridge, 424 U.S. 319, 341 (1976) ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."). See *supra* notes 107-11 and accompanying text. Such a procedure need not "take the form of a judicial or quasi-judicial trial." Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

122. *See* 8 C.F.R. § 242.1 (1983); National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 9 (C.D. Cal. Dec. 16, 1983); *cf.* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("[The factfinder] should not . . . have participated in making the determination under review.").

123. The District Director or his subordinate is the issuer of the charge against the individual. 8 C.F.R. § 242.1(a) (1983); 1A C. Gordon & H. Rosenfield, *supra* note 5, § 5.3b, at 5-36. The District Director also imposes the bond on which the no-work rider is automatically placed. *See* 8 C.F.R. § 242.2(a) (1983); 1A C. Gordon & H. Rosenfield, *supra* note 5, § 5.4d, at 5-61. The District Director's involvement in the investigation that results in the imposition of the no-work rider is the reason that he cannot be considered adequately independent. *See* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 9 (C.D. Cal. Dec. 16, 1983) (review by District Director does not satisfy due process requirements); *cf.* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (welfare official who is acting in a pre-termination evidentiary hearing should not have participated in making the determination under review).

124. 8 C.F.R. § 242.2(b) (1983) (application to the Immigration Judge is made after the initial determination by the District Director).

125. *See* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 8-9 (C.D. Cal. Dec. 16, 1983); NCIR Brief, *supra* note 4, at 28.

126. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 299-300 (1981) (due process does not require a hearing in an emergency situation); Parratt v. Taylor, 451 U.S. 527, 543 (1981) (no due process violation when a prisoner was deprived of his property by prison personnel not following the established state procedure); Mackey v. Montrym, 443 U.S. 1, 18-19 (1979) (summary suspension of a driver's license permissible upon refusal to take a breath-analysis test); Barry v. Barchi, 443 U.S. 55, 64-65 (1979) (suspension of a horse trainer allowed on the evaluation of an expert without a hearing); Parham v. J.R., 442 U.S. 584, 606-07 (1979) (adversary hearing not required for admission of a minor to a state hospital when there is prior medical evaluation by a physician acting as a neutral factfinder); Dixon v. Love, 431 U.S. 105, 113, 115 (1977) (suspension of driver's license based upon multiple traffic violations allowed without a prior hearing); Ingraham v. Wright, 430 U.S. 651, 682 (1977) (no prior hearing necessary for the physical punishment of a school child); Mathews v. Eldridge, 424 U.S. 319, 344, 349 (1976) (recipient of disability payments not entitled to a pre-termination evidentiary hearing when the termination decision is based on a medical evaluation); *cf.* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607-08 (1975) (no prior hearing is required for garnishment provided other safeguards exist); Mitchell v.

violates a traffic ordinance does not receive pre-suspension evaluation when he refuses to take a breath-analysis test.[127] Likewise, the recipient of disability insurance is not entitled to pre-deprivation review prior to the suspension of such payments.[128]

The imposition of automatic no-work riders, however, may be distinguished from such cases. Automatic no-work riders affect a critical interest[129] and pose a high risk of erroneous application.[130] The interests affected in situations when post-deprivation review is considered adequate are not as vital to the individual as his interest in supporting himself and his family.[131] Moreover, the risk of erroneous deprivation in such situations is less than the risk from automatic imposition of bond conditions.[132] Thus, the risk of erroneous deprivation of a critical interest is great when dealing with automatic imposition of no-work riders.

3. Government Interests

The interest of the government[133] in imposing no-work riders is twofold. Initially, automatic no-work riders attempt to prevent displace-

---

W.T. Grant Co., 416 U.S. 600, 618-20 (1974) (no prior hearing for writ of sequestration); Arnett v. Kennedy, 416 U.S. 134, 163-64 (1974) (government employee limited to the procedure that is established in the statute governing dismissal from his job).

127. Mackey v. Montrym, 443 U.S. 1, 18-19 (1979).

128. Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

129. See *supra* notes 76-99 and accompanying text.

130. No-work rider implementation is automatic. See *supra* note 3 and accompanying text. There is no prior evaluation of the individual factors involved in each case. *See* 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)); NCIR Brief, *supra* note 4, at 2, 13-14. Moreover, the evaluation in the no-work rider case is subjective. *See id.*

131. See *supra* notes 103-17 and accompanying text. An individual's interest in his driver's license is not as substantial as his interest in his ability to support himself. *See* Mackey v. Montrym, 443 U.S. 1, 11-12 (1979); Dixon v. Love, 431 U.S. 105, 113 (1977). Moreover, the right to continued disability benefits, although substantial, is not considered as substantial as the welfare recipient's right to continued benefits. *See* Mathews v. Eldridge, 424 U.S. 319, 340-41 (1976). Such a lesser interest allows for termination without a prior evidentiary hearing. *Id.* at 349.

132. *Compare* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 9 (C.D. Cal. Dec. 16, 1983) (high risk of erroneous deprivation with automatic no-work riders) *with* Barry v. Barchi, 443 U.S. 55, 65 (1979) (preliminary evaluation based on expert objective opinion is sufficiently reliable) *and* Mackey v. Montrym, 443 U.S. 1, 14 (1979) (personal liability for erroneous judgment reduces risk of error) *and* Parham v. J.R., 442 U.S. 584, 607 (1979) (independent medical evaluation will protect individual from erroneous decision) *and* Ingraham v. Wright, 430 U.S. 651, 678 (1977) (same) *and* Mathews v. Eldridge, 424 U.S. 319, 344-45 (1976) (low risk of erroneous deprivation in termination of disability benefits).

133. The Supreme Court has allowed the deprivation of protected individual interests without a prior hearing when there is an established governmental or public interest which would be protected by summary adjudication. *See* Hodel v. Virginia

ment of American workers in the domestic labor market.[134] While it is uncertain whether the Attorney General may base his actions on such concerns,[135] the government clearly has a strong interest in the protection of the American worker.[136] In addition, automatic no-work riders seek to reduce the cost of a presumably more burdensome case-by-case procedure.[137] When formulating administrative rules, minimization of the burden to be placed on government agencies is a valid consideration.[138]

The imposition of automatic no-work riders based on these interests, however, is questionable. It is uncertain whether alien employment has an adverse effect on the American worker.[139] Moreover, because no-work riders affect only those aliens awaiting deportation hearings, the riders do not significantly limit illegal alien employment.[140] In addition, while automatic no-work riders may initially decrease the burden on the INS,[141] each alien affected by the New Rules can be expected to seek reauthorization.[142] Thus, the adminis-

---

Surface Mining & Reclamation Ass'n, 452 U.S. 264, 299-300 (1981) (summary orders to cease mining activities are justified as an emergency action to protect public health and safety); Mackey v. Montrym, 443 U.S. 1, 17 (1979) (removing drunk drivers from the road is a sufficient government interest to justify no prior hearing); Ingraham v. Wright, 430 U.S. 651, 680-82 (1977) (interest in school discipline justifies not holding prior hearings for physical punishment).

In the case of aliens subjected to no-work riders, the government maintains a strong interest in preventing the displacement of the American worker. *In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555 (Att'y Gen. 1974); 48 Fed. Reg. 51,142, 51,144 (1983); *id.* at 8820; *see* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 9 (C.D. Cal. Dec. 16, 1983). This governmental interest, however, is unsubstantiated. See *supra* notes 68-73 and accompanying text. Thus, this threat should be outweighed by the seriousness of the individual's interest and the high risk of erroneous deprivation. *National Center for Immigrants Rights, Inc.*, slip op. at 9.

134. *In re* Toscano-Rivas, 14 I. & N. Dec. 523, 555 (Att'y Gen. 1974); 48 Fed. Reg. 51,142, 51,144 (1983); *id.* at 8820; *see* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 9 (C.D. Cal. Dec. 16, 1983).

135. See *supra* notes 68-73 and accompanying text.

136. S. Rep. No. 62, 98th Cong., 1st Sess. 3 (1983).

137. *See* 48 Fed. Reg. 51,142, 51,142 (1983); *id.* at 8820.

138. Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976); *see* Parham v. J.R., 442 U.S. 584, 620 (1979); Ingraham v. Wright, 430 U.S. 651, 682 (1977).

139. See *supra* notes 68-73 and accompanying text.

140. NCIR Brief, *supra* note 4, at 2-3, 22-23.

141. Under the New Rules, the District Director no longer must obtain the permission of the Regional Commissioner to put a no-work rider on a bond. *Compare* 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2)) (New Rules) *with* 8 C.F.R. § 103.6(a)(2) (1983) (Old Rules), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)). The INS claims that this revision will reduce its burden. *See* 48 Fed. Reg. 51,142, 51,142 (1983); *id.* at 8820.

142. Because the no-work rider totally precludes employment and thus hinders an individual in supporting himself, see *supra* notes 103-106 and accompanying text, it

trative burden will probably increase because reauthorization requests may well outnumber the instances in which the Old Rules were applied on a case-by-case basis.[143] A wrongful deprivation of such a critical interest, therefore, should outweigh concerns about governmental efficiency.

III. A Case-By-Case Analysis: Returning to the Old Rules

The legality of imposing automatic no-work riders on individuals pending deportation proceedings is questionable. Because the historical development of the Attorney General's discretionary authority suggests that the sole bases for discretion are ensuring appearance at subsequent proceedings[144] and protecting national security,[145] the uncertain impact of alien employment on the domestic labor market is not an adequate justification for implementation of such rules.[146] In addition, because of the magnitude of the individual interests involved and the lack of pre-deprivation safeguards,[147] such implementation violates the individual's due process rights.[148] Consequently, the New Rules should not be enforced.

While an ideal alternative to the New Rules would require some form of pre-deprivation factfinding by an independent party, this system may be too burdensome on the INS[149] and is inconsistent with the *Mathews* analysis, which rejects an undue burden on the government.[150] A more practical system, which limits arbitrariness and provides a degree of pre-deprivation due process, is the system under the Old Rules. The Old Rules did not automatically impose no-work

---

should be expected that an individual will seek to regain his ability to work. Thus, the INS may be faced with more applications for reauthorization and a greater burden than under the Old Rules.

143. Under the old system the no-work riders were rarely applied. Avirom & Serviss, *supra* note 15, at 39. The number of individuals who will seek reauthorization in comparison to the number of individuals subjected to the old no-work riders will probably place a greater burden on the INS.

144. See *supra* notes 14, 29-31, 36-43 and accompanying text.

145. See *supra* notes 15, 32-35, 36-43 and accompanying text.

146. See *supra* notes 68-73 and accompanying text.

147. See *supra* notes 103-17 and accompanying text.

148. NCIR Brief, *supra* note 4, at 3-4; *see* National Center for Immigrants Rights, Inc. v. INS, No. 83-7927, slip op. at 9 (C.D. Cal. Dec. 16, 1983).

149. Such a system would involve a hearing that nearly duplicates the deportation hearing itself. NCIR Brief, *supra* note 4, at 28-29. In the past, the Supreme Court has declined to require such extensive review. *See* Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976); Goldberg v. Kelly, 397 U.S. 254, 266-67 (1970).

150. Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976); Ingraham v. Wright, 430 U.S. 651, 682 (1977); *see* Parham v. J.R., 442 U.S. 584, 620 (1979) (rejecting complex procedures for admission of a child to a state mental hospital because of the burden on the state).

riders.[151] When the INS wished to impose a no-work rider on an alien, the District Director had to obtain prior approval from a Regional Commissioner by establishing that the circumstances merited such a restriction.[152] By requiring this showing, the Old Rules provided some pre-deprivation procedural protection.[153] Although the Regional Commissioner is not an independent factfinder, he at least is a disinterested third party because he is not directly involved in the bond determination.[154] Thus, the Old Rules guaranteed a degree of due process protection. In addition, because the Old Rules imposed no-work riders on a case-by-case basis only, a determination whether that individual posed a threat to the domestic labor market could be made.[155]

A return to the Old Rules would not impose an undue burden on the government. The INS already has the official mechanism required to handle such pre-deprivation analysis.[156] In addition, an individual awaiting a deportation proceeding was not afforded an opportunity, as he is under the New Rules, to rebut the District Director's justifications.[157] A return to the Old Rules is a suitable compromise when the interests of the individual in avoiding erroneous deprivation of his protected rights are balanced against the governmental interests of economic protection and administrative efficiency.

CONCLUSION

Automatic imposition of no-work riders on individuals awaiting deportation proceedings should not be enforced because such a rule

---

151. See *supra* note 7 and accompanying text.

152. Appleman, *supra* note 4, at 4. See *supra* notes 8-12 and accompanying text.

153. *See* 8 C.F.R. § 103.6(a)(2) (under the Old Rules, District Director had to receive prior approval of the Regional Commissioner to impose a no-work rider), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)).

154. *See* 8 C.F.R. §§ 242.1, 242.2(a) (1983) (regulations give the Regional Commissioner no direct involvement in bringing the charges or in the bond determination); *cf.* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (independent factfinder is an individual not significantly engaged in determination being evaluated).

155. 8 C.F.R. § 103.6(a)(2)(iii) (1983) (displacement of American labor is a factor to be considered in imposing no-work riders under the Old Rules), *amended by* 48 Fed. Reg. 51,142 (1983) (to be codified at 8 C.F.R. §§ 103.6(a)(2), 109.1(b)(8)).

156. The Old Rules were in effect for over 9 years. *See* 39 Fed. Reg. 19,201 (1974) (adoption of Old Rules).

157. Under the Old Rules, no-work riders were not automatic, but once a rider was imposed the only rebuttal was at a proceeding before an Immigration Judge. 8 C.F.R. § 242.2(b) (1983). Under the New Rules, however, the rider is automatic, but the individual may apply to the District Director for reauthorization before going to an Immigration Judge. 48 Fed. Reg. 51,142, 51,144 (1983) (to be codified at 8 C.F.R. § 103.6(a)(2), 109.1(b)(8)).

exceeds the discretionary authority granted to the Attorney General in section 242(a) of the INA. In addition, such a practice violates the due process rights of the individual. Implementation of a case-by-case rule for no-work riders effectively safeguards the rights of the individual pending a subsequent proceeding while limiting the burden on government agencies. This Note, therefore, urges that the INS reinstitute its prior rules concerning no-work riders.

Charles D. Brown