NATIONAL IMMIGRATION LAW CENTER

Immigrants' Rights Update

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Immigration Issues

1,200 PERSONS PER WEEK SUBJECTED TO EXPEDITED REMOVAL – Approximately 1,200 persons per week are being subjected to the expedited removal process that was created by last year's immigration legislation and which took effect April 1, according to statistics released recently by the Immigration and Naturalization Service. About 80 percent of these cases are occurring at ports of entry along the U.S.'s southwestern border.

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), INS inspectors who determine that an arriving alien is inadmissible because of fraud or misrepresentation (INA § 212(a)(6)(C)) or for lack of valid entry documents (INA § 212(a)(7)) may order the alien's expedited removal without a hearing.

About one-third of persons found inadmissible through the expedited removal process have been allowed to withdraw their applications for admission. By doing so, they have avoided receiving a removal order. Individuals to whom a final removal order has been issued through the expedited removal process are barred from returning to the U.S. for five years unless they obtain permission from the attorney general to return. And inadmissibility based on fraud or misrepresentation is a permanent bar to admission.

Individuals who while undergoing inspection by an INS inspector request asylum or express fear of persecution are to be referred to an asylum officer for a separate "credible fear" determination. The INS takes the position that attorneys may not be present at the inspection, although the agency is exploring whether to allow the United Nations High Commissioner for Refugees (UNHCR) to have an official observe this process.

According to the INS's statistics, between 400 and 500 credible fear interviews were conducted during the first three months after the new expedited removal policy went into effect. In other words, less than 4 percent of the over 15,000 individuals who have gone through the expedited removal process have been granted credible fear interviews. About 80 percent of individuals referred to credible fear interviews were found to have a credible fear of persecution in their home countries.

(For more about expedited removal, see "Two Lawsuits Challenge INS's Implementation of Expedited Removal," p. 5.)

[74 INTERPRETER RELEASES 1101 (July 21, 1997).]

INS ISSUES ADJUSTMENT OF STATUS REGULATIONS – The INS has promulgated interim regulations implementing provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of

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1996 (IIRIRA) concerning adjustment of status under section 245(i) of the Immigration and Nationality Act. At present it is not known whether Congress will extend section 245(i), which under current law terminates on Sept. 30, 1997. The Senate has passed a permanent extension of section 245(i) as part of the Commerce, Justice, State Fiscal Year '98 Appropriations bill, while the House version does not contain an extension.

Prior to the 1994 enactment of section 245(i), adjustment of status was available only to individuals who were lawfully admitted and paroled into the U.S. Further restrictions under INA section 245(c) bar adjustment of applicants (other than immediate relatives of U.S. citizens) who have been employed in the U.S. without authorization, have not complied with the terms of their nonimmigrant visas, or are among certain specified classes of nonimmigrants. Non–U.S. citizens who were physically present in the U.S. and eligible for immigrant visas but not eligible for adjustment of status in the U.S. had to travel to a U.S. embassy or consulate abroad to obtain an immigrant visa and then be admitted to the U.S. as a lawful permanent resident. In 1994 Congress enacted section 245(i), allowing such individuals to adjust their status in the U.S., provided they pay a special additional penalty. This law serves several purposes, including reducing the work load of embassies and consulates, saving individuals who are eligible for permanent residence the expense and inconvenience of having to travel abroad, and providing substantial revenue to the INS. The law was enacted for only a limited time, and it "sunsets" on Sept. 30, 1997.

As the INS announced in May (see "INS Provides Further Guidance on 245(i) Adjustment," IMMIGRANTS' RIGHTS UPDATE, June 16, 1997, p. 1), the new regulations confirm that the agency will complete the processing of all applications for section 245(i) adjustment that are properly filed prior to Oct. 1, 1997, even where the adjudication cannot be completed by that date. The new regulations therefore revise the prior regulation that required applicants to apply early enough to have their cases completely adjudicated by Oct. 1, 1997. However, applications for adjustment that are not filed until after Sept. 30, 1997, must be adjudicated as regular adjustment applications under INA section 245(a).

The IIRIRA increased to $1,000 the "additional sum" that section 245(i) applicants must pay to apply for adjustment of status. The regulations specify that this sum is in addition to the regular fee for adjustment and that it is not a "fee" that may be waived under INS regulations. Under the statute, spouses and unmarried children of persons who became permanent residents through the (IRCA) amnesty or Special Agricultural Worker legalization programs are exempt from the requirement that they pay the additional sum, if they are qualified for and have applied for Family Unity status. In the commentary to the regulations, the INS noted that individuals whose voluntary departure status under the Family Unity program expires remain exempt from paying the additional sum. However, the INS also noted that individuals who qualify for Family Unity are not exempt from the payment unless they first have filed the Family Unity application, Form I-817.

The commentary to the regulation also notes that prospective immigrants who qualify for adjustment under section 245(i) may apply for adjustment while they are in deportation proceedings. In addition, the commentary notes that adjustment is also available for eligible individuals in removal proceedings (proceedings initiated on or after Apr. 1, 1997).

In the new regulations, the INS concludes that individuals who are deportable for having engaged in terrorist activities under INA section 237(a)(4)(B) are ineligible to adjust under section 245(i).

The regulations also address two new categories that the IIRIRA added to the list of categories of individuals who are not eligible for regular adjustment under INA section 245(c). New section 245(c)(7) bars adjustment for beneficiaries of employment-based visas who are not in a lawful nonimmigrant status at the time they apply for adjustment. The new requirement that such individuals be in a *nonimmigrant* status means that this restriction applies to individuals in other lawful statuses, such as parolees. However, the commentary notes that this bar does not apply to aliens who were in a lawful nonimmigrant status at the time they applied for adjustment, who subsequently departed the country and then reentered pursuant to an approved advance parole.

New section 245(c)(8) bars from regular adjustment of status "any alien who was employed while the alien was [not work-authorized] or who has otherwise violated the terms of a nonimmigrant visa." The new regulations confirm that this provision does not apply to immediate relatives of U.S. citizens or to certain special immigrants, who are specifically allowed to adjust under section 245(c)(2). For all other individuals, a violation of the terms of a nonimmigrant visa or unauthorized employment, whether committed before or after the filing of an adjustment application, renders an individual ineligible for regular adjustment under section 245(a). The mere act of filing an adjustment application does not constitute a violation of the terms of a nonimmigrant visa, provided that the filing occurred prior to the expiration of the alien's nonimmigrant status. There are some other exceptions for which adjustment is not barred. These include cases where the alien's failure to maintain status was through no fault of his or her own or for technical reasons, and where the alien made a timely request for extension of a nonimmigrant visa that was not approved until after the authorized period of stay expired.

Generally, if an alien's employment authorization expires after he or she files for adjustment and the alien works without it, the INS will consider that the person is barred from adjusting under section 245(c)(8). For this reason, the INS strongly recommends that individuals apply for work authorization as adjustment applicants (under 8 C.F.R. section 274a.12(c)(9)) at the same time they file the adjustment application. In cases where an individual had work authorization at the time of filing for adjustment and would otherwise have been authorized to continue working had he or she not filed, the INS will not consider the individual to be an "unauthorized alien." Again, this bar does not apply to immediate relatives of U.S. citizens and to certain special immigrants.

The commentary also discusses several of the new grounds of inadmissibility enacted by the IIRIRA. The INS has concluded that section 212(a)(6)(A), which makes inadmissible aliens who are "present in the [U.S.] without being admitted or paroled," does not bar adjustment under section 245(i). Section 212(a)(9) contains a number of bars to admission that apply to individuals who have been ordered removed or who have left the U.S. after being unlawfully present for at least 180 days. The commentary notes that these various provisions apply only to individuals who depart the U.S. and then seek admission.

The interim regulations were effective as of July 23, 1997, the date they were published in the Federal Register. Written comments to these regulations must be submitted on or before Sept. 22, 1997. [62 Fed. Reg. 39,417 (July 23, 1997).]

INS INSTRUCTS ON HANDLING SUSPENSION CASES FOLLOWING THE VACATING OF *N-J-B-* – The Immigration and Naturalization Service's general counsel and the INS office of field operations each has issued a memo to instruct field offices on procedures they are to follow regarding suspension of deportation cases in light of the attorney general's action vacating the decision in *In Re N-J-B-*, Int. Dec. 3309 (BIA 1997).

In *N-J-B-*, the Board of Immigration Appeals (BIA) interpreted section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as limiting eligibility for suspension of deportation only to persons who can establish that they had accumulated seven years' continuous physical presence in the U.S. before the INS commenced deportation proceedings against them. On July 10, 1997, the attorney general vacated that decision and announced that the Clinton administration would sponsor legislation to ensure that individuals who deserved to apply for suspension under pre-IIRIRA law would still be able to do so (see "Attorney General Vacates BIA's Restrictive Interpretation of Suspension Eligibility," IMMIGRANTS' RIGHTS UPDATE, July 23, 1997, p. 1). The INS memoranda are intended to serve as interim guidance until the attorney general issues a new decision in *N-J-B-*.

The INS general counsel's memo, issued July 11, 1997, sets forth special interim criteria that the INS should apply in considering whether to join in a motion to reopen a case to allow the applicant to apply for suspension of deportation. The memo instructs the INS to join in such cases where the alien was placed in proceedings prior to Apr. 1, 1997, and has been physically present in the U.S. for a continuous period of seven years at the time the motion to reopen is filed, unless one of three exceptions applies. The exceptions are for (1) persons who were denied suspension for reasons other than failing to meet the seven years' continuous presence requirement, (2) persons convicted of aggravated felonies, and (3) persons who clearly are ineligible for suspension for reasons other than the seven years' presence requirement. The INS should not consider individuals to be clearly ineligible for failing to meet the extreme hardship standard unless that determination has been made by an immigration judge, the BIA, or a federal appellate court.

The INS's decision to join in a motion to reopen does not constitute a waiver of the right to contest the merits of the alien's claim. Rather, it is a procedure to allow the alien to present claims that would otherwise be barred by the general rule that a motion to reopen must be filed within 90 days of the issuance of a final order.

According to the memo, INS field offices should consent to filing motions to reopen only under exceptional and compelling circumstances, and in no individual case should consent be given for more than one joint motion to reopen.

The memo also instructs that in suspension cases calendared by the immigration court, until a new decision is issued in *N-J-B-* the INS should take the position that such cases should go forward in order to determine whether the applicant meets all the other requirements for suspension besides seven years' continuous presence.

The office of field operations memo, also issued July 11, 1997, provides a temporary stay of deportation for aliens who were placed in proceedings prior to Apr. 1, 1997, and have been physically present in the U.S. for a continuous period of seven years at the time the motion to reopen is filed. The stay does not apply to individuals who come within one of the three exceptions listed in the general counsel's memo, as described above.

The memo also advises that the INS will not issue "bag and baggage" letters to, apprehend, or take into INS custody any aliens who are protected from removal under the instruction, unless they are involved in criminal activity. Aliens may be removed if they make a written request to be removed. In such cases, the person's legal representative must be notified of the request before he or she is removed.

In response to the Clinton administration's call for legislation, lawmakers in both the Senate and the House of Representatives have introduced bills to alleviate the IIRIRA's retroactive impact on persons who were both eligible for suspension of deportation under pre-IIRIRA law and in proceedings initiated prior to Apr. 1, 1997. The Senate bill, S. 1076, is sponsored by Senators Connie Mack (R-Fla.), Bob Graham (D-Fla.), and Edward Kennedy (D-Mass.). The House bill, H.R. 2302, is sponsored by Representatives Lincoln Diaz-Balart (R-Fla.) and 13 co-sponsors.

[INS Memos HQCOU90/16.11-P and ENF 50/12.4.3-P (July 11, 1997), *reprinted at* 74 INTERPRETER RELEASES 1222 (Aug. 11, 1997).]

INS REVISES ASYLUM APPLICATION FORM; AVAILABLE BY OCTOBER AT EARLIEST – The Immigration and Naturalization Service has published a revised version of Form I-589, Application for Asylum and Withholding of Removal, in the Federal Register and sent it to the Office of Management and Budget (OMB) for approval. Because the new form must be approved by the OMB before it can be distributed, it will not be until mid-October at the earliest that asylum applicants will be required to use it.

The OMB had requested that the INS delete former Part E of the application, apparently to simplify the form. However, the INS has folded this part's questions into Part A, so now Part A contains all the biographical questions relating to the applicant. The Federal Register notice says that keeping these questions on the form relieves the asylum officer from having to ask them, which in turn makes the interview less confrontational.

The new form requires applicants to list all their children, regardless of the children's age, civil status, or whether they are in the United States. The form also asks applicants to provide information about parents, past residences and employment, and education. The Federal Register notice says that requiring applicants to provide such specific details will help prompt them to remember facts relevant to their persecution claims and aid asylum officers in determining lines of questioning.

To make it easier for applicants to comply with the photograph requirement, the new form requires them to submit passport-style rather than ADIT-type photos. According to the Federal Register notice, passport-style photos are easier to obtain.

[62 Fed. Reg. 37,604 (July 14, 1997), *reprinted at* 74 INTERPRETER RELEASES 1116 (July 21, 1997).]

FINAL REGULATION ISSUED RE. ACQUISITION OF CITIZENSHIP BY CHILDREN OF U.S. CITIZEN MOTHERS – Certificates of U.S. citizenship may now be issued to certain persons who were born abroad to U.S. citizen mothers but who formerly were deemed ineligible to acquire U.S. citizenship through that relation, according to a regulation issued recently by the Immigration and Naturalization Service. The regulation implements a 1994 law requiring equal treatment of U.S. citizen women and men with regard to their abil-

ity to "transmit" U.S. citizenship to their children born abroad.

That law permits U.S. citizen women who are married to aliens to transmit U.S. citizenship to children born outside of the U.S. prior to 1934, provided that the mother resided in the U.S. at some time prior to her child's birth. Under previous law (section 301(h) of the Immigration and Nationality Act), only U.S. citizen fathers could transmit U.S. citizenship to their children born abroad prior to 1934.

The final regulation permits individuals who desire documentation of U.S. citizenship to file an application for a citizenship certificate or a U.S. passport. Persons residing in the U.S. are permitted to file locally, while those living abroad are required to make their claim at a U.S. consulate. Applicants must submit appropriate documentation, such as birth certificates or passports, to prove that they qualify for a certificate of U.S. citizenship under this provision. [8 C.F.R. § 301.1 (issued Aug. 25, 1997).]

CONGRESS LIFTS RESTRICTION ON SECTION 322 NATURALIZATION – Congress has passed legislation to remove a restriction that, had it remained in force, would have made it more difficult for the foreign-born child of a U.S. citizen parent to naturalize.

Under section 322 of the Immigration and Nationality Act, persons born abroad to a U.S. citizen parent may apply affirmatively for U.S. citizenship through a streamlined process. This process for gaining U.S. citizenship is distinct from the process of proving that one acquired U.S. citizenship at birth abroad to a U.S. citizen and thus is eligible for a certificate of citizenship or a U.S. passport (see "Final Regulation Issued Re. Acquisition of Citizenship by Children of U.S. Citizen Mothers," above). Persons who naturalize under section 322 become U.S. citizens upon taking the citizenship oath.

The new legislation eliminates a provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) that made foreign-born children of a U.S. citizen parent ineligible for section 322 naturalization unless the parent had resided in the U.S. for at least ten years. The new measure reinstates the standard for parental residence in the U.S. that was established in 1994—i.e., for the foreign-born person to qualify for section 322 naturalization, his or her parent need have resided in the U.S. for only five years, two of which were after the age of 14. The bill to lift the IIRIRA-imposed restriction—Pub. L. 105-38—was signed by the president on Aug. 8.

INS ISSUES REVISED DETENTION POLICY – The office of the INS commissioner has issued a new "detention use policy" based on revised detention priorities, which in turn are based on the mandatory detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The new policy is effective immediately and replaces the previous Detention Priority List that was issued on May 14, 1995.

Under the new policy, there are four categories of detention: mandatory, high priority, medium priority, and lower priority. Aliens subject to *mandatory detention* must be detained and are not eligible for release. They have first priority for all available INS detention space, so long as it is suitable. This category includes aliens arriving at ports of entry who are found to be inadmissible because they lack valid entry documents and those who are subject to expedited removal proceedings. Under the policy, these aliens may not be released from detention unless (1) they must be paroled because of a medical emergency or to meet a legitimate law enforcement objective, (2) they are referred for a full removal proceeding (for example, based on a finding that they have a "credible fear" of being returned to their home country), or (3) they are releasable under a stay of removal pursuant to INA section 241(c).

Aliens arriving at land borders who make false claims to U.S. citizenship, permanent residence, or refugee or asylum status also must be detained. Aliens arriving at land borders who are subject to expedited removal but who make a claim that they fear persecution in their home country may be required to wait in Canada or Mexico pending final determination of that claim. In this case, if the person's claim relates to fear of persecution in either Canada or Mexico, he or she should not be required to wait in that country, but rather must be detained.

Another category of aliens subject to mandatory detention are those who must be detained under the Transition Period Custody Rules (TPCRs) of the IIRIRA (see "INS Certifies Lack of Detention Space," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 1996, p. 5). Under the IIRIRA, terrorist aliens and most persons deportable for criminal grounds must be detained. However, because the attorney general has certified that INS lacks detention space and resources to detain all persons deportable for the specified criminal grounds, the TPCRs allow the INS to consider criminal aliens for discretionary release if (1) they were "lawfully admitted" to the U.S. or (2) they are unremovable because the country of deportation or removal will not accept their return. These individuals may be released if they demonstrate that release would not pose a danger to persons or to property and that they would not pose a flight risk. The TPCRs are in effect until at least Oct. 9, 1997, and may be extended for another year beyond that date.

Another category of aliens considered to be subject to mandatory detention are aliens against whom a final order of removal has issued within the preceding 90 days. This mandatory 90-day detention period applies only to aliens subject to removal orders—not to deportation or exclusion orders (in other words, removal proceedings had to have been initiated against the alien on or after Apr. 1, 1997).

Yet another category of aliens subject to mandatory detention are those in exclusion proceedings with aggravated felony convictions. The policy notes that the INS may not parole an alien in exclusion proceedings who has been convicted of an aggravated felony unless (1) the alien is determined to be unremovable under old INA section 236(e)(2), and (2) the alien meets the criteria for release under that provision.

Aliens subject to *high priority* (category 2) detention include: (1) those whose detention is essential for border enforcement; (2) those with administratively final orders of exclusion or deportation (including absconders); (3) criminal aliens not subject to mandatory detention; (4) aliens removable on security and related grounds; and (5) those engaged in alien smuggling.

Aliens subject to *medium priority* (category 3) detention include: (1) inadmissible arriving aliens not in expedited removal proceedings; (2) aliens smuggled into the U.S.; (3) aliens who have committed fraud before the INS; and (4) aliens apprehended at a work site who have committed fraud in obtaining employment. All other aliens subject to removal proceedings are considered subject to *lower priority* (category 4) detention.

The new detention policy directs that INS personnel give priority in detention to aliens subject to mandatory detention. If there is

no detention space available locally to detain a category 1 alien, INS officers are to (1) attempt to acquire additional space, or if this is not possible, (2) transfer the alien to another district or region, or as the last resort, (3) release a lower-priority alien to make space for the category 1 alien.

Aliens in categories 2, 3, and 4 should generally be detained according to the level of priority. However, INS district directors, regional directors, Border Patrol sector chiefs, and the executive associate commissioner for field operations may make exceptions to this general rule based on local circumstances, regional enforcement initiatives, or special national enforcement initiatives.

[INS Memo 96 ACT 049 (July 14, 1997), *reprinted at* 74 INTERPRETER RELEASES 1188 (Aug. 4, 1997).]

AG EXTENDS TPS FOR NATIONALS OF SOMALIA, BOSNIA-HERCEGOVINA – The attorney general has issued two separate notices granting extensions of temporary protected status (TPS) to nationals of (or individuals of no nationality who last habitually resided in) Somalia and Bosnia-Hercegovina. Temporary protected status is granted to persons from countries that are designated by the attorney general as experiencing ongoing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning. The attorney general has now extended the TPS designation for both nationalities for an additional year. The designation for Bosnia-Hercegovina is extended from Aug. 11, 1997, to Aug. 10, 1998; the designation for Somalia is extended from Sept. 18, 1997, to Sept. 17, 1998.

Somalis and Bosnians who previously registered for TPS must reregister in order to take advantage of these extensions. Applicants for reregistration must file form I-821 without the fee, and form I-765, Application for Employment Authorization. If they do not seek work authorization, they must still file the I-765 but need not pay the fee.

Bosnians must reregister within the 30-day period beginning Aug. 1, 1997, and ending Sept. 1, 1997; Somalis must reregister between Aug. 19, 1997, and Sept. 17, 1997. Late reregis-tration may be excused under the provisions of 8 C.F.R. section 244.17(c).

The attorney general estimates that there are 400 Bosnians and 350 Somalis who have previously been granted TPS in the U.S. and are eligible for reregistration.

Somalis and Bosnians who did not previously register for TPS may also be eligible to register under the TPS extension if they meet the requirements of 8 C.F.R. section 244.2(f)(2). To meet these requirements, individuals must have been "continuously physically present" in the U.S. since the original TPS designation (Aug. 10, 1992, for Bosnians; Sept. 16, 1991, for Somalis), must have had a valid immigrant or nonimmigrant status during the original registration period, and must register no later than 30 days from the expiration of that status.

[62 Fed. Reg. 41,420 (Aug. 1, 1997).]

INS PROPOSES TO REORGANIZE ITSELF – The Immigration and Naturalization Service has proposed a comprehensive reorganization of both its structure and operations. The proposal would strengthen the authority of the regional directors, enhance the stature of the Border Patrol within the INS, integrate the office of the associate commissioner for field operations, and consolidate the offices of policy and programs.

The INS's proposed reorganization comes in the wake of continued criticism of the agency's failures and inefficiencies as detailed in a report recently released by the House Appropriations Committee. The report criticizes the INS for suffering from "mission overload"—that is, trying to manage too many priorities—and suggests that the time may have come for certain enforcement responsibilities to be assigned to other agencies. A report to be released soon by the Commission on Immigration Reform echoes these same concerns.

The Appropriations Committee directs the attorney general to review the commission's recommendations for structural changes and develop a plan for more efficient performance of the INS's "core" functions: border and interior enforcement, adjudication of immigration-related employment standards, adjudication of immigration and citizenship benefits, and administrative review of decisions. The committee directs the attorney general to submit her plan by Apr. 1, 1998. In light of the call for a massive overhaul of the agency and the fact that reorganization would require congressional approval, the future of the INS's reorganization plans is unclear. [74 INTERPRETER RELEASES 1173 (Aug. 4, 1997).]

Litigation

TWO LAWSUITS CHALLENGE INS's IMPLEMENTATION OF EXPEDITED REMOVAL – On Aug. 12, 1997, the U.S. District Court for the District of Columbia heard argument regarding the government's motion to dismiss in *AILA v. Reno*, No. 97-CV-0597 (EGS), a challenge to the asylum-related aspects of the Immigration and Naturalization Service's implementation of expedited removal. The court indicated that it will issue a decision by Sept. 12, 1997. A separate but related case, *AILA v. Reno*, No. 97-CV-01229 (EGS), challenges expedited removal procedures as applied against non–asylum-seekers. Both cases have status conferences set for Sept. 12, 1997.

Attorneys or representatives seeking to bring problems with the expedited removal process to the attention of plaintiffs' counsel may contact them by calling Judy Rabinovitz at the ACLU Immigrants' Rights Project (212-549-2618) (asylum-related problems) or Anna Gallagher at the Legal Action Center of the American Immigration Law Foundation (202-371-9377) (non–asylum-related).

(For more on expedited removal, see "1,200 Persons Per Week Subjected to Expedited Removal," p. 1.)

NINTH CIRCUIT UPHOLDS INJUNCTION OF DEPORTATION PROCEEDINGS BASED ON FIRST AMENDMENT CLAIMS – The Ninth Circuit Court of Appeals has upheld a district court's injunction of deportation cases against seven Palestinians and one Kenyan, in one of the first appellate decisions to consider the scope of judicial review provisions in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). This is the latest decision in protracted litigation dating back to the 1987 arrest of the plaintiffs by the Immigration and Naturalization Service based on their association with the Popular Front for the Liberation of Palestine (PFLP).

In 1995, the Ninth Circuit upheld the district court's issuance of

a preliminary injunction, based on claims that the Immigration and Naturalization Service was selectively prosecuting deportation proceedings against plaintiffs in retaliation for their exercise of First Amendment–protected rights. The court at that time rejected the government's claim that non–U.S. citizens have lesser rights under the First Amendment than citizens have. *American-Arab Antidiscrimination Committee v. Reno,* 70 F.3d 1045 (9th Cir. 1995). Following the remand of the case to the district court, the INS moved to dissolve the injunction and dismiss the case on two grounds. First, the INS argued that deportation proceedings were properly based on fund-raising activities by the plaintiffs that the government contends are not protected by the First Amendment. Second, the government contended that IIRIRA section 242(g) deprived the district court of jurisdiction over the case. The district court rejected these arguments, and the INS appealed.

Upholding the district court, the Ninth Circuit first found that the court retained jurisdiction over the case despite the enactment of section 242(g), which reads: "[E]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders . . . ." The court found that this provision took effect on Apr. 1, 1997, and applies retroactively to cases that were pending on that date.

However, the court also found that the provision incorporates certain other provisions of the new INA section 242 (added by the IIRIRA), even though the entire section applies only to the judicial review of removal orders in proceedings that were initiated on or after Apr. 1, 1997. The court found that section 242(g) incorporates section 242(f)'s authorization of injunctive relief "with respect to the application of [the INA's removal provisions] to an individual alien" in removal proceedings. Noting that district court jurisdiction in this case was necessary in order to afford meaningful review of plaintiffs' First Amendment claims, the court concluded that section 242(f) permits review of such constitutional claims. The court also rejected the government's claims that fundraising activities on behalf of the PFLP are not protected by the First Amendment, noting that the district court had found "no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." The court therefore affirmed the district court's decision.

American-Arab Antidiscrimination Committee v. Reno, __ F.3d __ (9th Cir. July 10, 1997).

NINTH CIRCUIT ALLOWS SUITS AGAINST CONSULAR OFFICIALS FOR FAILING TO DECIDE VISA APPLICATIONS – Lawsuits can be brought against consular officials for failing to make a decision regarding a visa application, the Ninth Circuit Court of Appeals recently held. The decision in *Patel v. Reno* makes an exception to the general rule that ordinarily forbids lawsuits challenging the discretionary denial of a visa. In *Patel*, the U.S. citizen plaintiff waited eight years for the consular official to decide whether to issue a visa to the citizen's wife and children. The consular officials, without any authority, had held the applications in abeyance because there were questions regarding the bona fides of the marriage through which the petitioner had initially become a permanent resident.

State Department regulations impose a clear obligation on consular officials to render a decision, according to the Ninth Circuit. While a suit could not be brought to challenge certain discretionary decisions, a suit is permissible to force the consular officials to decide. In addition, the court's decision makes clear that visa denials would also be subject to review if the government failed to act on the basis of a facially legitimate and bona fide reason, as well as under the Administrative Procedures Act.

Patel v. Reno, No. 96-55359 (9th Cir. Aug. 1, 1997).

Employment Issues

INS CLARIFIES THE "THREE-DAY RULE" FOR COMPLETING THE I-9 FORM – In response to a letter sent by an immigration practitioner, the general counsel of the Immigration and Naturalization Service has clarified the "three-day rule" that applies to completing the I-9 employment eligibility verification form.

Under the "employer sanctions" provision of the Immigration and Nationality Act, U.S. employers are required to fill out an I-9 form for each new employee within three days of hire, or within one day if the person is employed for less than three days. The worker is required to show the employer proof of the worker's identity and employment eligibility, and the employer is to record this information on the I-9 form. The INA requires that the I-9 be filled out within three *business* days. The INS interprets this to mean that if the *employer* is normally open for business seven days per week, it is to count weekends and holidays toward the three-day time limit for completing its new employees' I-9 forms.

The letter to which the INS general counsel responded points out that under this interpretation of the three-day rule, some workers who need to obtain replacement documents from, or otherwise interact with, the INS in order to be able to complete the I-9 process may not be able to do so within the three-day period. This would be the case, for example, if the worker were hired on a Friday and the following Monday were a holiday.

In rejecting the letter's suggestion that only days when federal agencies are open for business should be counted as "business days" under the three-day rule, the INS general counsel said that the agency's current interpretation is more consistent with the INA's language, leads to better enforcement, and results in less confusion than would be the case under the suggested interpretation.

CORRECTION: EAD CARD ARTICLE – In "New EAD Card No Longer Shows Basis for Work Authorization," IMMIGRANTS' RIGHTS UPDATE, July 23, 1997, p. 8, we reported that Form I-766, the new Employment Authorization Document, does not visually indicate the basis upon which employment authorization was granted. This is incorrect; the new card simply has abbreviated the reference to the applicable INS regulation. Instead of providing the full reference to the regulation under which employment is authorized (e.g., "Provision of Law: 274a.12(c)(8)"), the new card contains a code that shows only the subsection of the appropriate regulation under the heading "Category" (e.g., "Category: (c)(8)").

The National Immigration Law Center . . .

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NATIONAL IMMIGRATION LAW CENTER
Immigrants & Welfare Update

August 29, 1997

Federal Regulations

HHS AND SSA DEFINE "MEANS-TESTED FEDERAL PUBLIC BENEFIT" FOR IMMIGRANTS UNDER THE 1996 WELFARE BILL – In separate actions, the federal Department of Health and Human Services (HHS) and the Social Security Administration (SSA) have published notices in the Federal Register to define the term *"federal means-tested public benefit"* as used in last year's welfare bill, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) (Pub. L. 104-193). The only programs administered by these two agencies that meet the new definition are Supplemental Security Income (SSI), the Food Stamp Program, Temporary Assistance for Needy Families (TANF), and Medicaid.

Under last year's welfare and immigration acts, a number of restrictions limit immigrants' receipt of federal means-tested benefits. These restrictions include the following:

- Legal immigrants who entered the U.S. on or after Aug. 22, 1996, are barred from receiving means-tested federal benefits during their first five years here.
- After their first five years in the U.S., most individuals who immigrated to join family members will continue to be blocked from federal means-tested public benefits by "alien sponsor deeming." Under "deeming," an immigrant may qualify for a program only if the combined income and resources of the immigrant, the immigrant's sponsor (who signed one of the new affidavit of support agreements required by last year's immigration bill), and the immigrant's sponsor's spouse are below the income and resource threshold for the program. As a result, most future family-sponsored immigrants will be ineligible for federal means-tested public benefits until they have worked ten years in the U.S.
- After Dec. 31, 1996, if an immigrant received a federal means-tested public benefit during a calendar quarter, the immigrant cannot count any work during that quarter towards the "40 quarters" exemption to ineligibility for SSI, food stamps, and other benefits. (Under this exemption, immigrants who can prove they have been employed in the U.S. for 40 quarters may be eligible for these public benefits.)
- Finally, should a legal immigrant qualify for and receive a federal means-tested public benefit despite these restrictions, the immigrant's sponsor is legally liable and may be sued for reimbursement by the agency that administers the benefit program.

Under the new HHS rule, the term *"federal means-tested public benefit"* applies solely to "benefits provided by Federal means-tested, mandatory spending programs, and not to any discretionary spending programs or to any mandatory spending programs that are not means-tested."

This definition closely follows the wording of the statute and its legislative intent, and essentially has four elements. To fall within the PRWORA restrictions, a benefit must (1) be provided by a "federal" (not a state) program, (2) be "means-tested" (i.e., subject to an income or resource screen), (3) be subject to the "mandatory" (rather than "discretionary") spending rules of the federal budget process, and (4) not be included among exempted programs specifically listed in the PRWORA.

The notice by HHS announces the Clinton administration's definition of *"federal means-tested public benefit"* and specifically provides that TANF and Medicaid are the only programs under HHS jurisdiction that fall within the definition. In a separate notice, the SSA has provided that SSI is the sole program under its jurisdiction to which the definition applies. The Clinton administration has not yet stated whether the new children's health initiative, financed by tobacco taxes under the Balanced Budget Act, will also fall within the definition and therefore be subject to the welfare bill's immigrant restrictions.

Although the new rule is effective immediately, it has a 60-day comment period, and comments will be considered in the development of a final rule. Washington insiders anticipate that anti-immigrant activists will attempt to expand the definition to include many other programs via comments and pressure on the administration, or else by subsequent legislation, and immigrants' rights advocates plan to submit comments in support of the rule. For further information, contact NILC.

[62 Fed. Reg. 45,256, 45,284 (Aug. 26, 1997).]

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DOJ ISSUES GUIDANCE RE. CONNECTION BETWEEN DOMESTIC VIOLENCE & NEED FOR PUBLIC BENEFITS – The U.S. attorney general has issued guidelines to assist agencies and affected persons to determine when a "substantial connection" exists between domestic violence suffered by an immigrant and the immigrant's need for public benefits. The guidance is in the form of a list of situations that might demonstrate such a connection.

Though last year's welfare legislation—the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)—denies eligibility for public benefits to most immigrants, it provides that battered immigrants and their children may be exempted from these restrictions. To be eligible for public benefits, immigrants who have been the victims of domestic violence must show that there is a "substantial connection" between that violence and their need for public benefits. According to the guidelines the attorney general issued on July 24, 1997, such a connection exists in the following situations:

1. Where the benefits are needed to enable the alien and/or the alien's child to become self-sufficient following separation from the abuser
2. Where the benefits are needed to enable the alien and/or the alien's child to escape the abuser and/or the community in which the abuser lives, or to ensure the safety of the alien and/or his or her child from the abuser
3. Where the benefits are needed due to a loss of financial support resulting from the alien's and/or his or her child's separation from the abuser
4. Where the benefits are needed because the battery or cruelty, separation from the abuser, or work absence or lower job performance resulting from the battery or extreme cruelty or from legal proceedings relating thereto (including resulting child support or child custody disputes) cause the alien and/or the alien's child to lose his or her job or require the alien and/or the alien's child to leave his or her job for safety reasons
5. Where the benefits are needed because the alien or his or her child requires medical attention or mental health counseling, or has become disabled, as a result of the battery or cruelty
6. Where the benefits are needed because the loss of a dwelling or source of income or fear of the abuser following separation from the abuser jeopardizes the alien's ability to care for his or her children (e.g., inability to house, feed or clothe children or to put children into day care for fear of being found by the batterer)
7. Where the benefits are needed to alleviate nutritional risk or need resulting from the abuse or following separation from the abuser
8. Where medical coverage and/or health care services are needed to replace medical coverage or health care services the applicant or child had when living with the abuser

Victims of domestic violence who are not in any of these situations but nevertheless think they are eligible for public benefits may ask the attorney general to make a finding that a substantial connection exists between the battery or cruelty they have suffered and their need for public benefits. Alternatively, the agency assisting a domestic violence victim may make this request. The request should be addressed to:

Diane Rosenfeld, Senior Counsel
The Violence Against Women Office
United States Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530
(202) 616-8894

Although these guidelines already went into effect on July 17, 1997, the attorney general is accepting questions or comments concerning them. Comments may be sent to the above address and will be reviewed to determine whether the guidelines should be revised. [62 Fed Reg. 39874 (July 24, 1997).]

Litigation

DISTRICT COURT DENIES NEW YORK CHALLENGE TO FEDERAL CUTOFF OF SSI AND FOOD STAMPS – The U.S. District Court for the Southern District of New York has issued a decision denying injunctive relief and dismissing the equal protection claims of the plaintiffs in two welfare reform–related cases brought by lawful permanent residents and New York City. The cases were filed after last year's Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) was enacted.

However, the court also found that the retroactive application of the PRWORA's Supplemental Security Income (SSI) restrictions is unlawful, and it issued an injunction regarding this claim. The plaintiffs argue that the restrictions should not be applied to deny benefits for periods prior to the provision's Aug. 22, 1996, enactment. The court also certified a class covering lawful permanent residents in New York, Connecticut, and Vermont who have been or will be denied SSI or food stamps because of the PRWORA.

The plaintiffs in the two cases contended that the provisions of the PRWORA that bar most lawful permanent residents from receiving SSI benefits and food stamps are unconstitutional because they improperly discriminate between U.S. citizens and permanent residents. The court found that, because some non–U.S. citizens remain eligible for SSI and food stamps under the PRWORA, the law must be analyzed not as a discrimination based on citizenship but as a distinction between two groups of noncitizens. The court concluded that this distinction must be analyzed under the deferential "rational basis" standard of review because of the plenary authority possessed by Congress with respect to the admission and exclusion of noncitizens. The court then concluded that the PRWORA's SSI and food stamp restrictions are rationally related to legitimate governmental interests in encouraging naturalization and self-sufficiency, saving costs, and removing an incentive for immigration.

However, the court also found that the Social Security Administration's (SSA's) interpretation of the law to deny benefits that were owed to permanent residents for periods of time prior to the law's enactment is impermissibly retroactive. The court therefore issued an injunction to prevent the SSA from failing to pay SSI benefits to lawful permanent residents who applied for SSI prior to Aug. 22, 1996.

Similar equal protection lawsuits have been filed in a num-

ber of states (see "New Lawsuits Challenge Provisions in PRWORA & IIRIRA," IMMIGRANTS & WELFARE UPDATE, July 23, 1997, p. U-4). *Abreu v. Callahan*, No. 97 Civ. 2126 (LAK) (S.D.N.Y. July 24, 1997).

CLASS ACTION CHALLENGES FOOD STAMP CUTOFF AS VIOLATION OF DUE PROCESS – Permanent residents facing a cutoff of their food stamps as a result of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) have filed a lawsuit in federal district court in Chicago.

Unlike other suits that have been filed concerning the SSI and food stamp cut-offs based on equal protection grounds (see "District Court Denies New York Challenge to Federal Cutoff of SSI and Food Stamps," p. U-2), this suit does not challenge the new eligibility requirements established by the PRWORA. Rather, the plaintiffs are individuals who are eligible for U.S. citizenship and have filed naturalization applications, but who have not been able to naturalize because of the lengthy backlog in the naturalization process. The plaintiffs contend that it violates due process for the government to impose a new eligibility requirement and not give recipients the opportunity to demonstrate that they meet the new requirement. They are seeking to have their benefits continued for as long as it takes the Immigration and Naturalization Service to process their naturalization applications.

The plaintiffs moved for certification of a nationwide class and for a preliminary injunction. However, on Aug. 28, 1997, the court certified a class of food stamp recipients with pending naturalization applications residing in the jurisdiction of the Seventh Circuit Court of Appeals. Furthermore, the district court denied injunctive relief and entered judgment for the defendants. In rejecting the plaintiffs' claims that they should be able to continue receiving food stamps pending the outcome of their naturalization applications, the court relied in part on a distinction between other welfare benefits that are received on a continuing basis and food stamps, for which eligibility must be redetermined periodically.

The plaintiffs are represented by the Poverty Law Center, the SSI Coalition for a Responsible Safety Net, the National Senior Citizens Law Center, and NILC.

Shvartsman v. Callahan, No. 97-C-5229 (N.D.Ill., filed July 24, 1997).

CALIFORNIA APPELLATE COURT OVERTURNS INJUNCTION OF PRENATAL CARE CUTOFF – The California Court of Appeal for the First Appellate District in San Francisco has reversed a trial court's preliminary injunction of emergency regulations that were enacted last November to cut off prenatal care to pregnant immigrant women who do not meet the definition of "qualified alien" under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The plaintiffs contended, and the trial court found, that the PRWORA's passage did not constitute an "emergency" sufficient to justify bypassing the notice-and-comment requirements for the issuance of regulations. However, the appellate court overturned that decision, finding that the state acted within its discretion in issuing emergency regulations in order to comply with the federal law.

Two other lawsuits currently are pending regarding California's continuing efforts to cut off prenatal care for non-qualified immigrants (see "New Lawsuits Challenge Provisions in PRWORA & IIRIRA," IMMIGRANTS & WELFARE UPDATE, July 23, 1997, p. U-4). In addition, California has now formally promulgated regulations to cut off prenatal care for unqualified new applicants as of Nov. 1, 1997, and for current recipients as of Dec. 1, 1997. *Carmen Doe v. Wilson*, No. A076721 (1st Dist. Ct. App. Aug. 25, 1997).

State Implementation

CALIFORNIA & NEW YORK ENACT FOOD STAMP PROGRAMS; N.J. GOVERNOR ANNOUNCES NUTRITION PROGRAM – California and New York, which together account for over half of the nation's immigrant population, were among the last states to complete budgets for the fiscal year. Compromises reached in the final hours of both states' budget negotiations included limited nutrition programs and other services for immigrants rendered ineligible for federal benefits. Most recently, New Jersey announced the creation of a state-funded food stamp program for immigrant children, seniors, and people with disabilities. To date, at least eleven states have allocated funds for nutrition assistance to fill in some of the gaps resulting from the federal government having cut immigrants' access to the federal Food Stamp Program.

CALIFORNIA

California governor Pete Wilson approved the state's budget on August 18. Although legislative committees recommended that the state fully replace federal food stamps and other benefits for immigrants, the final budget included only a fraction of these programs. The governor further restricted these services by vetoing several budget items affecting immigrants.

Nevertheless, under a new program called "CalWORKS," immigrants in California will be eligible for Temporary Assistance to Needy Families (TANF)–funded services regardless of when they enter the United States. Seniors and people with disabilities who cannot qualify for Supplemental Security Income (SSI) will continue to be eligible for county-funded General Assistance, with benefits ranging from $212 to $345 per month. Although the governor vetoed the $5 million that the legislature allocated for naturalization assistance, he redirected $3 million in federal funds to provide these services. Finally, children under 18 and seniors age 65 and over who were lawfully residing in the U.S. on Aug. 22, 1996, will have access to state-funded food stamps. The state estimates that the program will serve 36,000 children and 4,500 seniors at a cost of $34.6 million. In addition, the legislature allocated $2 million to a food voucher program serving migrant seasonal farm-workers.

NEW YORK

New York governor George Pataki signed his state's budget on August 20. All low-income immigrants who do not qualify for federal TANF services or SSI will have access to the new Safety Net Assistance program, which provides a maximum of $352 per month for a single person and $577 for a family of three. Immigrants who enter New York after Aug. 20, 1997, however, will be barred from Safety Net assistance for one year.

Immigrants permanently residing in the U.S. under color of law will receive state-funded medical services if they were living in residential health care facilities on Aug. 4, 1997. Prenatal care services will continue to be available regardless of citizenship status.

Nutrition assistance will be provided to immigrant children under age 18, seniors 60 and over, and people with disabilities who, as of Aug. 22, 1996, resided in the social services district where they apply for benefits. Immigrants who are eligible to naturalize must apply for citizenship within 30 days after applying for food stamps. Immigrants who enter the country after Aug. 22, 1996, will not be eligible. Although the program is optional (for social services districts), nine out of the eleven counties with the highest immigrant populations already have chosen to participate. Counties are responsible for 50 percent of the nonfederal operating costs. Advocates estimate that the program will serve 67,000 persons, with a seven-month cost of $33 million.

Finally, New York allocated $2.5 million for community organizations and counties to assist immigrants in naturalizing and $5 million for English-as-a-second-language classes. New York City allocated an additional $10 million for naturalization activities.

NUTRITION PROGRAMS IN OTHER STATES

After Congress restored SSI benefits for many immigrant seniors and people with disabilities, states turned their attention to the families who were scheduled to lose federal food stamps, as well as the individuals who had already been denied benefits. States that had allocated funds to assist seniors and persons with disabilities could now dedicate these funds to a nutrition program.

On August 26, New Jersey governor Christine Todd Whitman announced the creation of a state-funded food stamp program for immigrant children, seniors, and people with disabilities. According to the governor's press release, to be eligible for the program immigrants will be required to apply for U.S. citizenship within 60 days of meeting the residency requirements for citizenship, and they will receive food stamps until their citizenship application is processed. The governor estimates that this program will serve 10,000 households at a cost of $15 million. These funds, which were included in the Work First New Jersey program budget (to serve immigrants originally expected to lose SSI benefits), will be available upon approval of a legislative committee. The governor's executive order directs the commissioner of the Department of Human Services to implement the program.

New Jersey, California, and New York join at least six other states that have enacted food stamp replacement programs:

- Maryland will provide benefits to children under age 18 at the federal food stamp level.
- Massachusetts allocated $5 million for immigrants who are ineligible for federal food stamps (benefit levels will likely be reduced to about $24 per month).
- Minnesota will provide nutrition assistance to immigrant families receiving TANF services, at 60 percent of the federal benefit level, but this amount may be increased. Recipients must be Minnesota residents by July 1, 1997.
- Nebraska will fully replace federal food stamp benefits for immigrants.
- Rhode Island will replace federal food stamp benefits for immigrants who were lawfully admitted to the U.S. before Aug. 22, 1996, and residing in Rhode Island before that date.
- Washington will fully replace federal food stamp benefits for immigrants.

Other states have allocated funds for nutrition programs—for example:

- Colorado has allocated $2 million in emergency funds, granting counties the option to provide nutrition assistance to immigrants with these funds.
- Florida allocated $23 million for SSI and food stamp recipients over age 65 who were Florida residents prior to Feb. 1, 1997. Benefits were set at 50 percent of the federal levels, and priority was given to people with disabilities and those losing permanent housing or rent-assisted housing. Funds for this program have not been released yet. A budget bill requiring the release of these funds is pending, and litigation has also been filed on behalf of seniors losing food stamps.

The imminent termination of federal food stamps increases the pressure in other states with high immigrant populations. Advocates across the country report that nutrition proposals will be considered in special legislative sessions or in the next round of budget negotiations. As states feel the effects of the federal legislation and attempt to meet immigrants' immediate needs, they can also play a role in advocating for the full restoration of federal benefits in the upcoming congressional session.

Abbreviations

• AG - U.S. attorney general • BIA - Board of Immigration Appeals • DOJ - Department of Justice • EAD - employment authorization document • HHS - U.S. Department of Health and Human Services • IIRIRA - Illegal Immigration Reform and Immigrant Responsibility Act of 1996 • INA - Immigration and Nationality Act • INS - Immigration and Naturalization Service • IRCA - Immigration Reform and Control Act of 1986 • OMB - Office of Management and Budget • PRWORA - Personal Responsibility and Work Opportunity Act of 1996 • SSA - Social Security Administration • SSI - Supplemental Security Income • TANF - Temporary Assistance for Needy Families • TPCR - Transition Period Custody Rules • TPS - temporary protected status • UNHCR - United Nations High Commissioner for Refugees •

TRAININGS *sponsored by the California Immigrant Welfare Collaborative (for info & registration)*

"Impact of Welfare Reform on Immigrants" – Los Angeles (Sept. 19) (Call CHIRLA at 213-353-1333)
Fresno (Sept. 29) (Call California Latino Civil Rights Network at 209-498-7002)
San Francisco (Oct. 2) (Call NCCIR at 415-243-8215 x. 354)

"Immigrants and Workers' Rights" – Los Angeles (Sept. 18) (Call CHIRLA at 213-353-1333)

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