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Reply to
WASHINGTON DC OFFICE

September 21, 2007

The Chief, Regulatory Management Division
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Department of Homeland Security
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**Re: *Application Process for Replacing Forms I-551
Without an Expiration Date,
DHS Docket No. USCIS-2005-0056***

Dear Sir or Madam:

The National Immigration Law Center (NILC) hereby submits the following comments in response to the proposed rule to establish a 120-day period for lawful permanent residents (“LPRs” or “permanent residents”) who have Form I-551 permanent resident cards (commonly called “green cards”) without an expiration date to apply to replace the cards with new ones bearing an expiration date.

The National Immigration Law Center is a nonprofit legal advocacy center that works to advance and promote the rights and opportunities of low-income immigrants and their family members. NILC staff specialize in areas of law of particular importance to low income immigrants, including immigration law and the employment and public benefits rights of immigrants. NILC conducts policy analysis and impact litigation and provides publications, technical advice, and trainings to a broad constituency of legal aid and other nonprofit agencies, labor and community groups, and other advocates for low income immigrants. Our past litigation included *Espindola, et al. v. INS, et al.*, No. CIV-S-92-1871 EJJ/GGH (E.D.Cal., filed Nov. 25, 1992), a nationwide class action challenge to the June 1992 green card replacement program of the former Immigration and Naturalization Service.¹

INTRODUCTION

We understand the reasons for which U.S. Citizenship and Immigration Services (USCIS) seeks to replace the original I-551 Forms issued without an expiration date with newer and more secure documents. However, the replacement program’s absurdly short application period completely ignores the practical difficulties that large numbers of permanent residents affected by the proposal will face in seeking to replace their documents.

It is notable that, with respect to the length of the application period, the only consideration addressed in the commentary to the proposed rule to support a four-month period concern the agency’s newly found ability to process a large volume of applications in a short period of time. 72 FR at 46924. We believe that the calculations that all of these applications can be processed in such a short time are based on unwarranted and unreasonably optimistic assumptions, particularly given the

¹ In *Espindola*, NILC served as lead counsel for a litigation team that included co-counsel from the American Civil Liberties Union (ACLU) Immigrants’ Rights Project, the Mexican American Legal Defense and Educational Fund (MALDEF), the American Immigration Law Foundation (AILF), California Rural Legal Assistance (CRLA), the Legal Aid Foundation of Los Angeles (LAFLA), and pro bono counsel Robert H. Gibbs.

fact that all of these cases concern old files that may require extra work even to locate. All of the cards being replaced were issued between 18 and 28 years ago.

Even without the proposed green card replacement program, applicants for immigration benefits – including applicants for replacement of lost or expired green cards – currently experience substantial delays in the processing of their applications. The commentary to the rule calls for “security checks to verify the identity of card recipients and continued eligibility for LPR status.” 72 FR 46924. Requiring applicants to re-prove their eligibility for permanent residence – if permissible as part of a replacement card program -- will compound the delays.

Even if USCIS’s calculations are correct with respect to the agency’s processing abilities, the rule erroneously assumes that everyone being required to replace their cards will learn of the requirement and apply within a short window of time. The rule wholly fails to consider a number of other factors supporting the need for a much longer application period, most notably the difficulties that affected permanent residents will encounter in learning of and then complying with the new requirement, including paying substantial fees for the replacements or gathering documents need to apply for a fee waiver.

USCIS has outlined in the commentary (but not required for itself in the rule) a meager program to notify permanent residents of the card replacement requirement. This program does not involve direct notification to LPRs, nor does it – in the brief time it will occur – use means that are likely to reach the affected population.

The brief application period and inadequate notice process are particularly egregious, in light of USCIS’s delay in issuing the proposed rule until 6 months after it was cleared by the Office of Management and Budget and only after USCIS’s substantial fee increases went into effect.

The termination of valid green cards will have a dire impact on permanent residents whose green cards have not been replaced. They will not be able to use their terminated green cards to obtain new employment or to enter the U.S., and not having a valid green card will be a barrier to them obtaining subsistence benefits. Moreover, as the commentary to the rule warns, they could be charged with a criminal offense for not carrying a valid green card.

USCIS is required by statute to provide permanent residents with proof of their lawful immigration status. 8 U.S.C. § 1304(d). The agency has proposed a replacement program characterized by arbitrary deadlines and insufficient notice to the affected population. This flawed green card replacement program deprives longtime permanent residents of their right to due process of law guaranteed by the U.S. Constitution and the Administrative Procedure Act.

**AS MADE CLEAR BY THE PRIOR REPLACEMENT PROGRAM,
SUBSTANTIALLY MORE TIME IS REQUIRED IN ORDER FOR
IMMIGRANTS TO APPLY FOR AND OBTAIN NEW GREEN CARDS.**

The experiences under the 1992-96 green card replacement program are instructive. In June 1992 the former INS issued notice that it was requiring permanent residents holding Forms I-151 or any of the other forms issued as evidence of permanent

resident status prior to the I-551 to apply to replace their cards. The INS estimated that 1.5 million permanent residents were affected by the notice, and the agency established a one-year period, from July 31, 1992 through August 2, 1993, for these residents to apply for new cards. On the last day of the application period, the cards subject to the requirement would no longer be considered valid. The notice was issued five weeks in advance of the opening of the application period. 57 FR 28700 (June 26, 1992).

In November 1992, NILC filed the *Espindola* lawsuit to challenge the replacement program. On March 2, 1993, the INS announced the lifting of the August 2, 1993 deadline, and the agency's intention to follow the notice and comment requirements of the Administrative Procedure Act in establishing a replacement program. INS Cable CO 264.1-P (Mar. 2, 1993), reprinted at 70 Interpreter Releases 283 (Mar. 8, 1993). However, the most noteworthy fact for purposes of evaluating the appropriate length of an application period for this kind of program is that in the more than seven months during which the replacement requirement was in effect only 334,000 permanent residents out of the 1.5 million who were affected by the rule applied to replace their cards.²

In May 1993 the INS published a proposed rule for the replacement program, and in September 1993 a final rule was published. 58 FR 48775-80 (Sept. 20, 1993). Under the rule, permanent resident cards issued prior to Form I-551 were to become invalid on September 20, 1994. *Id.* at 48775. Ultimately, the INS extended the deadline for permanent residents to apply for replacement cards to March 20, 1995, and the deadline for the old cards to become invalid – the real deadline for replacement – was extended to March 20, 1996. 60 FR 14353 (Mar. 17, 1995). Thus, the final deadline for replacement was just four months short of 4 years after the opening of the application period.

Among the principal reasons for the extension of the application period were the difficulties experienced by permanent residents subject to the requirement in learning of the need to replace their cards and in submitting Form I-90 applications. The replacement program was widely publicized from the outset, but nonetheless many affected permanent residents did not learn of it. Indeed, even years after the final deadline, cases came to our attention of permanent residents who did not know that their cards – which bear no expiration date – had in fact expired. Many other permanent residents who did learn of the requirement were delayed in applying due to their need for assistance in applying, the limited nonprofit assistance that was available, and the costs associated with applying.

MANY IMMIGRANTS WILL BE UNABLE TO APPLY FOR A GREEN CARD REPLACEMENT IN TIME.

All of these factors are at least equally applicable to the proposed replacement program. As with the 1992-96 replacement program, the affected immigrants are all long-term permanent residents. Their permanent resident cards were issued between 1979 and 1989, meaning that they have held permanent residence for at least 18 to 28 years. By far the most common reason that such residents have not yet naturalized is

² Declaration of Lawrence J. Weinig, Assistant Commissioner for Adjudications and Acting Associate Commissioner, Examinations for the INS, filed in the *Espindola* case on June 1, 1993.

their inability to meet the English language and civics requirements. This means that they are likely to need assistance to complete the application form.

As with the prior replacement program, many affected individuals are elderly or incapacitated, either in nursing homes or home-bound, and would not be able to appear in person at an Application Support Center for biometrics to be taken. While the commentary to the proposed rule properly recognizes the need to accommodate these situations by permitting the submission of “passport-style photographs, police clearance letters, and other appropriate evidence,” the four-month application period wholly fails to take into account the burden imposed by these requirements for these individuals. During the 1992-96 replacement program, the INS agreed to accommodate such individuals by waiving the photograph and in-person filing requirement, and in some cases by having outreach personnel assist them to file I-90 applications at or near their homes. 58 FR 48775, 48777 (Sept. 20, 1993). In contrast, the agency now is not willing to waive biometric requirements, nor to provide outreach assistance to nursing home and home-bound residents.

The only justification offered to support the 120-day application is the agency’s claimed “capability to process a large influx of Forms I-90 over a short period of time.” 72 FR at 46924. The merits of this claim are dubious. But even if true, selection of a 120-day application period is arbitrary, capricious and an abuse of discretion when considered from the perspective of the ability of permanent residents to learn of the requirement and apply during that period and the consequences to them if they cannot comply.

THE HIGH COSTS OF THE PROGRAM WILL PREVENT MANY IMMIGRANTS FROM APPLYING IN TIME

The high cost of the application is also an impediment that will delay many permanent residents from quickly applying to replace their documents, and this factor is now much greater than before. At the time of the 1992 replacement program, the filing fee for the I-90 application was \$70, whereas the cost today is \$370, including the \$290 filing fee and a further \$80 biometric service fee. Thus, while increases in the cost of living between 1992 and 2007 would make \$70 in 1992 the equivalent of \$103.93 today (an increase of 149 percent, as measured by the average Consumer Price Index of the Department of Labor Bureau of Labor Standards), the cost of the I-90 filing fee actually has increased by 314 percent, without even taking into consideration the additional cost of the biometric fee.

Permanent residents may apply for a waiver of the filing fee, but no waiver of the biometrics fee is available. Applicants for a fee waiver must present documentary evidence to establish their eligibility for it. Many who most need a waiver – such as the elderly or incapacitated – may have little ability to gather this documentation during such a short period and little access to assistance to do so.

USCIS’S PROGRAM TO NOTIFY IMMIGRANTS OF THE GREEN CARD REPLACEMENT PROGRAM IS MEAGER AND INADEQUATE.

USCIS reported in the commentary to the proposed rule that it will conduct “an extensive outreach program” to advise LPRs of the program, including “issuing press releases, posting program announcements and question-and-answer (Q&A) documents

to the USCIS website, distributing fliers and pamphlets at USCIS field offices, and conducting informational sessions with community-based organizations (CBOs).” 72 FR at 46924. But the rule itself does not require even these steps. Moreover, such measures are entirely inadequate to inform the affected population of the program.

The 4-month application period begins October 22 – just a month after comments are even due regarding the rule. The bulk of the “extensive outreach” would therefore take place during the already too-short application period.

Neither the commentary nor the rule require individualized notice to LPRs though that is surely possible. In addition, the mechanisms chosen by USCIS are unlikely to accomplish their aim. Permanent residents have no need to visit a USCIS field office and therefore are unlikely to see fliers and pamphlets there. Posting notices on the USCIS website presumes that the affected immigrants have access to computers and cause to visit the website. While notifying CBOs of the new requirements is useful, USCIS cannot shift to them its own obligation to notify immigrants of a program that has such dramatic effects.

By statute, permanent residents are entitled to be provided with proof of their immigration status. Therefore, any replacement card program that results in deprivation of that proof must be accompanied by adequate notice of the program and how to comply. The proposed (but not required) notice mechanisms do not comply with due process requirements.

The brief application period, substantial fees, and inadequate notice process are particularly egregious, in light of USCIS’s delay in issuing the proposed rule. Because the proposed rule was an “economically significant rule,” under Executive Order 12866 USCIS was required to submit the proposed rule to the Office of Management and Budget (OMB) for review. The OMB website indicates that OMB received the rule on November 3, 2006 and cleared it on February 1, 2007.³ Yet USCIS did not publish its notice of proposed rulemaking until August 22, 2007, more than 6 months later, and only after it had put into effect substantial fee immigration increases. USCIS has chosen a schedule for the replacement program that is advantageous to the agency but harmful to permanent residents.

USCIS HAS UNDERESTIMATED THE NUMBER OF PEOPLE WHO MAY NEED TO APPLY FOR REPLACEMENT CARDS

Notably, USCIS acknowledges that approximately 400,000 more permanent residents are affected by this notice than was the case with the prior replacement program – 1.9 million, compared to 1.5 million. CIS notes that some permanent residents will apply for naturalization rather than replacing their permanent resident cards, and that others may not apply because they are subject to removal. These are of course issues that attorneys and nonprofit agencies assisting residents subject to the replacement program must review with them. However, the agency’s calculation that 750,000 residents will apply to replace their cards based on the experience of the prior replacement program is fundamentally flawed – the percentage who apply during a 4-month application period is likely to be far less than the percentage who were able to

³ <http://www.reginfo.gov/public/do/eoHistReviewSearch>

apply during the 1992-96 program. While we do not know the total number of permanent residents who applied under the 1992-96 replacement program, the commentary to the rule states that CIS bases its 750,000 estimate on the experience of the prior replacement program. If in fact 39.5 percent of eligible residents applied under the prior replacement program, that would mean that nearly 600,000 residents applied under the 1992-96 program. Since only 334,000 applied in the first seven months of that program, this would mean that approximately 266,000 only applied later. Given these numbers, the four-month application period is ridiculously inadequate.

USCIS'S CAPACITY TO PROVIDE REPLACEMENT GREEN CARDS IN A REASONABLE PERIOD OF TIME IS QUESTIONABLE.

As mentioned previously, the only explanation USCIS offers for the brief application period is that it believes it can process a large number of I-90's within a short time. But USCIS has a dismal track record in efficiently processing immigration applications, including applications for replacement green cards, and has been the defendant in numerous lawsuits filed just to compel the agency to make decisions on such applications. The "large influx" of I-90s that USCIS anticipates will cause processing delays on top of ordinary processing delays.

Under the proposed rule, after the 120-day period expires, USCIS will announce a termination date in the Federal Register for the old green cards. According to the commentary, "USCIS will only be able to set timelines based upon the actual volume of applications received." 72 FR 16311. But the volume of applications received during the application period is not the only issue. According to USCIS the replacement program will also be used to conduct "security checks to verify the identity of card recipients of card recipients and continued eligibility for LPR status." 72 FR at 26924.

USCIS's authority to use the replacement program to make permanent residents reprove their eligibility for green cards is questionable. This issue and USCIS's failure to provide replacement applicants with proof of permanent residence is currently being litigated. *Pantoja-Castillo et al. v. Sanchez et al.*, CA M-07-204 (S.D. TX). In any event, these security checks will inevitably cause significant additional processing delays that must be taken into account in setting a termination date.

Under the proposed rule, it is possible that permanent residents who apply past the 120-day application period won't be issued a new card before the termination date of old cards. The fact that USCIS seeks to establish an unreasonably short application period strongly indicates that the agency plans to set an early termination date, without taking into account the number of residents who will not learn of the replacement program, not timely submit replacement applications, or not receive new replacement cards by the termination date.

Such a termination date will deprive permanent residents of the proof of their status that they are entitled to by law. It would also be arbitrary, capricious and an abuse of discretion

CONCLUSION

In sum, we strongly oppose USCIS's proposed regulation and request that USCIS carry out a green card replacement program that takes into account the interests of immigrants and more rationally and fairly accomplishes the purposes of the program. Any replacement program should provide adequate notice to permanent residents, allow at least 2 years for them to apply for replacement cards, and allow at least 2 years more for old cards to remain valid. Issuance of a replacement card should not be conditioned upon re-proving eligibility for permanent residence.

Sincerely,



Linton Joaquin
Executive Director



Joan Friedland
Immigration Policy Director