



Immigration Issues

AG ISSUES INTERIM REGS REGARDING INA § 245(i) AS AMENDED BY LIFE ACT – The attorney general has issued interim regulations to implement section 245(i) of the Immigration and Nationality Act, as amended by the Legal Immigration Family Equity Act Amendments of 2000 (LIFE Act Amendments; see “Congress Passes ‘LIFE’ Bill, with 3-Year Update of 245(i) Petition Deadline, Temporary Visas for Some Family Visa Applicants, and Legalization for ‘Late Amnesty’ Class Members,” IMMIGRANTS’ RIGHTS UPDATE, Dec. 27, 2000, p. 1). The regulations generally conform to the guidelines that the Immigration and Naturalization Service previously issued in implementing the 1997 amendments to section 245(i).

Adjustment of status is a procedure that allows eligible immigrants who are in the United States to obtain lawful permanent resident status without having to leave the U.S. to attend an

interview at a consulate abroad. Generally, immigrants must have been inspected and admitted or paroled into the U.S. in order to qualify for adjustment. Section 245(i) is a special form of adjustment that since 1994 has allowed certain individuals eligible for immigrant visas who entered the U.S. without inspection or who otherwise fell out of status nonetheless to adjust without having to travel to a foreign consulate. Other immigrants who are barred from regular adjustment but who can qualify for adjustment under section 245(i) include persons who entered the U.S. under the Visa Waiver Pilot Program, persons who entered in transit without a visa, and foreign crewmen and women. In order to take advantage of this provision, individuals must pay a special fee of \$1,000 in addition to the normal fee for adjustment of status.

In 1997, Congress restricted eligibility for adjustment under section 245(i) to individuals who are beneficiaries of either a visa petition or a labor certification application that was filed on or before Jan. 14, 1998. Spouses and children who were included as

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FOUNDED IN 1979, THE NATIONAL IMMIGRATION LAW CENTER PROVIDES technical help to legal services programs, community-based non-profits, and pro bono attorneys throughout the United States. NILC also counsels impact litigation, conducts policy analysis and trainings,

and publishes legal reference materials. NILC’s staff specializes in immigration law and in immigrants’ employment and public benefits rights. In addition to this newsletter, NILC produces legal manuals, a referral directory, and other community education materials.

derivative beneficiaries of such petitions also remained eligible to adjust under section 245(i). The INS did not amend its regulations to implement the 1997 changes to section 245(i) but instead issued a series of guidelines for this purpose (see, e.g., "INS Issues Guidance on Accepting Adjustment Cases Under § 245(i)," IMMIGRANTS' RIGHTS UPDATE, May 28, 1999, p. 4).

The LIFE Act Amendments moved up the deadline by which a petition or application must have been filed on behalf of an individual in order for him or her to qualify for adjustment under section 245(i). The new deadline is Apr. 30, 2001. The amendments also added a new requirement for beneficiaries of petitions or applications filed after Jan. 14, 1998—the beneficiary must have been present in the U.S. on Dec. 21, 2000, the date when the amendments were enacted.

The interim regulations set out the requirements for individuals to be considered "grandfathered" and therefore eligible ultimately to adjust under section 245(i). In order to be "grandfathered," an individual must be the beneficiary of a visa petition or a labor certification application that (1) was "properly filed" on or before Apr. 30, 2001, and (2) was "approvable" at the time it was filed. In addition, beneficiaries whose petitions or applications were filed after Jan. 14, 1998, must also establish that they were present in the U.S. on Dec. 21, 2000. A dependent spouse or child who is accompanying or following to join a grandfathered principal beneficiary (i.e., a derivative beneficiary) is also considered grandfathered and is not required to have been present in the U.S. on Dec. 21, 2001.

To be considered "properly filed," a visa petition must either (1) be received by the INS prior to the close of business on Apr. 30, 2001, or (2) if mailed, be postmarked on or before Apr. 30, 2001. For purposes of "grandfathering," the INS will consider visa petitions properly filed even where they would normally not be considered complete, but at a minimum the petition must contain the names of the petitioner and the beneficiary, the proper fee, and the signature of the petitioner. If the minimal required information is included but the petition lacks information necessary for its adjudication, existing regulations provide for the INS to request additional evidence and give the petitioner a period of 12 weeks to submit the information.

A visa petition is considered "approvable when filed" if on the date that it was filed the petition was properly filed, meritorious in fact, and "non-frivolous," meaning not patently without substance. Once properly grandfathered, an individual remains grandfathered. Thus, if a visa petition was approvable when filed but was later withdrawn, denied, or revoked due to circumstances that arose after filing, the beneficiary continues to be grandfathered, and may subsequently apply for adjustment under section 245(i) if he or she becomes eligible for an immigrant visa on some other basis. However, if a petition is denied based on ineligibility at the time it was filed, it does not serve as a basis for grandfathering.

For example, grandfathering would allow a son or daughter of an LPR, who was the beneficiary of a family second-preference petition that was properly filed and approvable on Apr. 30, 2001, but who subsequently married and thereby revoked the petition,

to subsequently adjust when he or she is eligible to immigrate on some other basis. In this case, if the parent subsequently became a U.S. citizen, he or she could file a family third-preference petition for the immigrant, and could then use section 245(i) to adjust in the U.S. Or, if the immigrant later wins the diversity visa lottery or becomes eligible to immigrate through employment, he or she could use section 245(i) to adjust in the U.S.

An immigrant who is the beneficiary of an application for a labor certification that was properly filed by Apr. 30, 2001, and approvable when filed, remains grandfathered even if the employer subsequently replaces him or her with a new beneficiary. The new beneficiary will not be considered grandfathered. However, an immigrant who was replaced by a new beneficiary on or before Apr. 30, 2001, is not considered grandfathered.

The regulations clarify that only immigrant visa petitions and labor certification applications serve to grandfather immigrants for purposes of section 245(i). Thus, for example, asylum applications, diversity visa applications and lottery-winning letters do not qualify the applicant to adjust under section 245(i).

Applicants who are grandfathered because they are principal beneficiaries of petitions or applications that were filed after Jan. 14, 1998, must present evidence at the time they apply for adjustment to establish that they were physically present in the U.S. on Dec. 21, 2000. While a single document may establish presence on that date, the INS anticipates that most immigrants will need to submit more than one document. The regulations provide a lengthy list of examples of acceptable documents.

Acceptable documents include photocopies of INS or Executive Office for Immigration Review (EOIR) notices, applications, fee receipts, or other documents pertaining to the applicant. Such documents include Form I-94 (Arrival-Departure Record), Form I-862 (Notice to Appear), Form I-122 (Notice to Applicant for Admission Detained for Hearing), Form I-221 (Order to Show Cause), or any application or petition for a benefit filed by or on behalf of an applicant on or before Dec. 21, 2000. Applicants who have maintained ongoing correspondence with the INS may submit a list of the types and dates of such correspondence to establish their physical presence.

Any other document issued by a federal, state, or local government on or before Dec. 21, 2000, may also establish physical presence. If such documents normally are authenticated with a signature or seal, they must bear such a signature or seal. Examples of such documents include a state driver's license, state identification card, county hospital record, public college or school transcript, income tax records, or certified copies of other governmental records.

Applicants may also submit nongovernmental documentation, including school records, rental receipts, utility bill receipts, any other dated receipts, personal checks bearing a bank cancellation stamp, employment records or pay stubs, credit card statements showing dates of transactions, or certified copies of records maintained by organizations chartered by the federal or state government, such as public utilities, accredited private and religious schools, and banks. Applicants also may submit documents pertaining to other family members to help establish that they were

part of a family unit that was cohabiting in the U.S.

The regulations provide that the adjudicator should evaluate all evidence on a case-by-case basis, but "will not accept a personal affidavit attesting to physical presence on December 21, 2000, without requiring an interview or additional evidence to validate the affidavit." In resolving doubts or conflicts as to documentation, precedence is to be given to INS and EOIR records over those of other agencies.

In order to apply for adjustment under section 245(i), applicants must file Form I-485 (Application to Register Permanent Residence or Adjust Status) with the filing fee (currently \$220 plus a \$25 fingerprint fee) and in addition submit Supplement A and an additional fee of \$1,000. Individuals who applied for regular adjustment and were denied as ineligible, but who now are eligible to adjust under section 245(i), may file a new adjustment application with Supplement A and the additional fee.

The interim regulations took effect on Mar. 26, 2001. Comments from the public must be submitted by May 25, 2001, to be considered in the development of final regulations.

66 Fed. Reg. 16383-90 (Mar. 26, 2001).

STATE DEPT. INFORMS, ISSUES REGULATIONS REGARDING NEW V AND K VISAS

The U.S. State Dept. has published interim regulations regarding V and K visas, two new categories of visa that were created by last year's Legal Immigration Family Equity Act (LIFE). In addition, the Justice Dept. has provided other information regarding the V visa via a news release, while the State Dept. has issued an announcement regarding the V visa application form and a notification that it will be mailing letters to potential applicants for V visas.

The V visa allows certain spouses and minor children of lawful permanent residents to live and work in the U.S. and to travel from and to this country while they wait for their immigrant visa number to become available so that they can obtain lawful permanent resident status. K visas are available to persons seeking to immigrate as spouses of U.S. citizens and on whose behalf the U.S. citizens have filed visa petitions. Congress passed the legislation to provide relief to families who face long waits for family members' immigrant visa applications to be processed.

THE NEWS RELEASE ON V VISAS

On Mar. 30, 2001, the Dept. of Justice issued a news release on the new V visa. The news release states that to be eligible for the V visa, applicants must:

- be the spouse or unmarried child (under 21 years of age) of a lawful permanent resident;
- have a Form I-130 (Petition for Alien Relative) filed with the Immigration and Naturalization Service on his or her behalf by the lawful permanent resident spouse or parent on or before Dec. 21, 2000; and
- have been waiting for at least three years after the Form I-130 was filed for their immigrant visa number (priority date) to become available; or
- be the unmarried child (under 21 years of age) of a person who

meets the above three requirements.

The news release cautions that, for individuals who have been living in the U.S. without legal status for more than 180 days, departing the U.S. will make them subject to the grounds of inadmissibility related to unlawful presence. Although these bars to admission to the U.S. do not prevent eligible persons from obtaining V visa status or from being readmitted to the U.S. in V visa status after traveling abroad, the inadmissibility grounds do prevent such persons from adjusting status to lawful permanent resident status unless they obtain a waiver.

In addition, the release states that individuals who have been issued a V visa abroad and have been admitted to the U.S. may apply for work authorization by completing Form I-765 and mailing it along with their V visa application form to: U.S. INS, P.O. Box 7216, Chicago, Illinois 60607-7216.

Finally, the news release states that eligible applicants living in the U.S. must wait until after the INS publishes its V visa regulations to apply for the visa.

THE NEW V VISA FORM

On Mar. 12, 2001, the Secretary of State announced the introduction of a new form, Nonimmigrant V-visa Application (DS-3052). Effective immediately, visa applicants must use this form as a supplement to the OF-156 nonimmigrant visa application form. The DS-3052 will soon be available to the general public on the State Dept.'s Internet web site (www.state.gov).

Although the DS-3052 form instructs V visa applicants to use it in conjunction "with Form DS-156," the latter form—which will be a complete redesign of the nonimmigrant visa application form—is not yet available. Until it becomes available, applicants should use the current form, OF-156.

MAILING NOTICE

On Mar. 12, 2001, the Secretary of State issued a telegram providing notice that the National Visa Center will be mailing letters to approximately 300,000 potential applicants for V visas. Letters will be sent to individuals who have immigrant visa petitions on file and may be eligible for the V visa. The State Dept. is providing this mailing solely as a courtesy.

The letter tells recipients about the availability of the new V visa and provides information on how they may apply for it. The letter states that it is not an invitation to a specific interview. Recipients are directed to the State Dept.'s web site for additional information: www.state.gov/v-visa.html.

THE INTERIM RULE

The State Dept. published interim rules on V and K visas with a request for comments. The interim rule is effective on Apr. 1, 2001. Comments are due on June 1, 2001.

The interim rule adds a new section at 22 C.F.R. 41.86 and discusses eligibility for the V visa.

According to the statute, to obtain a V visa, an individual's application for a permanent resident visa must remain pending. However, the LIFE Act does not specifically define what it means by this. According to the interim rule, an application for an immi-

grant visa remains pending if the application has been filed and the immigrant visa has neither been issued nor refused.

According to the interim rule, an individual is eligible for a V visa if:

- the Dept. of State or the Dept. of Justice has notified the consular officer who has jurisdiction that, on or before Dec. 21, 2000, a lawful permanent resident petitioner filed an immigrant visa petition on behalf of the individual, who is a spouse or child of the petitioner (or is a child who qualifies as a derivative beneficiary of such a petition); and
- three or more years have elapsed since the petition was filed and either the petition has not been approved, or, if it has been approved, either no immigrant visa is immediately available for the individual or his or her application for adjustment of status or for an immigrant visa remains pending.

The interim rule also states that, if practicable, the consular officer must determine an applicant's eligibility for a V visa.

The preamble to the interim rule states that the processing of applications for V visas will differ from that of applications for routine nonimmigrant visas (i.e., student or tourist visas). Because applicants for V visas are intending immigrants who will remain in the U.S. indefinitely, the State Dept. has decided to apply a high evidentiary standard in issuing these visas. The standard will be similar to that used in processing applications for fiancé(e) visas. Thus, to be granted a V visa, an applicant may not be inadmissible under any of the grounds listed in section 212 of the Immigration and Nationality Act.

In addition, the interim rule states that consular officers must also determine the eligibility of individuals who were previously granted a V visa in the U.S. and wish to return to the U.S. According to the interim rule, such individuals will be exempt from the vaccination requirement, the labor certification requirement, and INA section 212's "unlawful presence in the U.S." ground of inadmissibility.

Finally, the interim rule designates the place where V visa applicants living abroad must file their petitions. Unless they obtain permission under existing State Dept. procedures that would allow them to apply at some other post, V visa applicants must apply at the consular post having jurisdiction over the underlying visa petition.

INTERIM RULE ON K VISA

The interim rule revises 22 C.F.R. 41.86 and states that an individual may be classified as a nonimmigrant fiancé(e) for purposes of applying for a K visa if:

- the consular officer is satisfied that the individual is qualified for a K visa, the consular officer has received a U.S. citizen's petition to confer nonimmigrant status as a fiancé(e) on the individual, and the INS has approved the petition or has notified the consular post of such approval;
- the consular officer has received the individual's sworn statement of ability and intent to marry the petitioner within 90 days of arrival in the U.S.; and
- the individual has met all other qualifications necessary to receive a nonimmigrant visa and also qualifies for an immigrant

visa.

The rule states that the consular officer must, insofar as is practicable, determine the individual's eligibility for a nonimmigrant visa, except that the individual is exempt from the vaccination and labor certification requirements under INA section 212.

Rules pertaining to the spouse. An individual is classifiable as a nonimmigrant spouse when all of the following requirements are met:

The consular officer is satisfied that the individual is qualified for a K visa and the consular officer has received INS approval for the petition that was filed in the U.S. by the U.S. citizen spouse of the immigrant; and the INS has approved the petition pursuant to INA section 214(p)(1).

If the individual married the U.S. citizen outside the U.S., the individual must apply in the country where the marriage took place. If there is no consular post in that country, the individual may apply at a consular post designated by the deputy assistant secretary of state for visa services.

If the marriage took place in the U.S., the individual must apply in the country where the individual resided prior to entering the U.S.

The individual must meet all applicable requirements in order to receive a nonimmigrant visa. The consular officer, insofar as practicable, must determine the eligibility of an individual to receive a nonimmigrant visa. This means that, with the exception of the vaccination and labor certification requirements, the individual is subject to the INA section 212 grounds of inadmissibility.

Rules pertaining to the child. An individual may be classified for a K visa if the consular officer is satisfied that the individual is the minor child of an immigrant classified for the K visa and is accompanying or following to join the principal immigrant.

As with a spousal petition, except for the vaccination and labor certification requirements, the child is also subject to inadmissibility grounds of INA section 212.

66 Fed. Reg. 19,390-94 (Apr. 16, 2001).

HONDURAN AND NICARAGUAN TPS EXTENDED 12 MONTHS – The Immigration and Naturalization Service has decided to extend for another 12 months the designation of Honduras and Nicaragua as countries whose nationals and residents currently in the U.S. qualify for temporary protected status. The designation, which had been due to expire on July 5, 2001, will be in effect until July 5, 2002.

TPS is granted to persons from countries that are designated by the AG as experiencing ongoing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. The INS first made the current TPS designation for Honduras and Nicaragua more than two years ago in the wake of the devastation wrought by Hurricane Mitch. In an agency statement announcing the extension, Acting INS Commissioner Kevin Rooney noted, "While Honduras and Nicaragua continue to make progress in recovering from the devastation . . . both countries remain unable to

handle adequately the return of its nationals.”

To register for the one-year extension, nationals of Honduras and Nicaragua (and individuals with no nationality who last habitually resided in those countries) previously granted TPS must apply for it during the reregistration period that began May 8, 2001, and ends Aug. 6, 2001. Such persons need only file Form I-821 *without* the fee and also submit Form I-765, Application for Employment Authorization. Those who seek work authorization under the extension must submit the \$100 fee with the I-765 form. Applicants who already have work authorization or who do not seek it still must file the I-765 but need not pay the fee. In addition, applicants for reregistration must include two 1½" x 1½" photos of themselves.

Late initial registration is also available under the extension. In order to apply, an applicant must

- be a national of Honduras or Nicaragua (or a person with no nationality who last habitually resided in either of those two countries);
- have been continuously physically present in the U.S. since Jan. 5, 1999;
- have continuously resided in the U.S. since Dec. 30, 1998; and
- be admissible as an immigrant, except as otherwise provided under Immigration and Nationality Act section 244(c)(2)(A), and not ineligible under INA section 244(c)(2)(B).

Applicants for late initial registration must also be able to show that during the registration period beginning Jan. 5, 1999, and ending July 5, 2000, he or she

- was a nonimmigrant or had been granted voluntary departure status or any relief from removal;
- had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal pending or subject to further review or appeal;
- was a parolee or had a request for reparole pending; or
- was the spouse or child of an individual currently eligible to be a TPS registrant.

The AG estimates that there are 105,000 Hondurans and 5,300 Nicaraguans who have already registered for the status and are eligible for reregistration. At least 60 days prior to July 5, 2002, he will review the designations for Honduras and Nicaragua and determine whether conditions for designation continue to be met.

Fed. Reg. 23,269–71 (Honduras) and 23,271–73 (Nicaragua) (May 8, 2001).

TPS FOR ANGOLA EXTENDED AND REDESIGNATED – The attorney general has issued a notice extending Angola’s designation as a country whose nationals and residents currently in the United States are eligible for temporary protected status (TPS). The designation for Angola first took effect on Mar. 29, 2000, and was due to expire Mar. 29, 2002. The AG’s notice both extends the designation for another 12-month period and redesignates Angola for the TPS program. Under the redesignation, eligibility for the relief has been expanded to include Angolan nationals and residents who have been “continuously physically present” and have “continuously resided” in the U.S. since Apr. 5, 2001.

TPS is granted to persons from countries that are designated

by the AG as experiencing ongoing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. In consultation with the State Dept., and after reviewing current country conditions, the AG has determined that the conflict between Angolan rebels and the nation’s government forces is ongoing. A recent State Dept. memo reported that the armed conflict is expected to continue “well into next year” and that the situation remains unsafe for the repatriation of Angolan nationals.

To register for the one-year extension, nationals of Angola (and individuals with no nationality who last habitually resided there) previously granted TPS must apply for it during the reregistration period that began Apr. 5, 2001, and ends May 7, 2001. Such persons need only file Form I-821 *without* the fee and also submit Form I-765, Application for Employment Authorization. Those who seek work authorization under the extension must submit the \$100 fee with the I-765 form. Applicants who already have work authorization or who do not seek it still must file the I-765 but need not pay the fee. In addition, applicants for reregistration must include two 1½" x 1½" photos of themselves.

Applicants not currently registered for TPS may register under the redesignation by following the procedures described above for reregistrants under the extension. In addition, these individuals must submit the \$50 filing fee along with Form I-821 or a request for a fee waiver, as well as supporting evidence as described in 8 C.F.R. 244.9. Applicants 14 years of age or older must also submit the \$25 fingerprinting fee. Completed forms and applicable fees must be submitted to the Immigration and Naturalization Service district office having jurisdiction over the applicant’s place of residence during the registration period beginning Apr. 5, 2001, and ending Mar. 29, 2002. As noted above, applicants for Angolan TPS under the redesignation must have been continuously physically present and have continuously resided in the U.S. since Apr. 5, 2001.

The AG estimates that there are approximately 3,372 nationals of Angola who have been granted TPS and are eligible for reregistration under the extension. And he estimates that there are no more than 3,300 Angolan nationals eligible for TPS under the redesignation. At least 60 days prior to Mar. 29, 2002, the AG will review conditions in Angola and determine whether requirements for TPS designation continue to be met.

INS ESTABLISHES PROCEDURES FOR WORK AUTHORIZATION RENEWALS FOR CSS CLASS MEMBERS

– The Immigration and Naturalization Service has begun accepting applications for work authorization renewals from individuals who have previously been granted work authorization in the *Catholic Social Services, Inc. v. Ashcroft* (CSS) case. These procedures are part of a settlement agreement between the CSS class and the INS.

Who is eligible? Any individual previously designated with a CS-1 classification is covered under the agreement. The agreement does not affect anyone who was not previously granted work authorization based on this designation.

How does one obtain work authorization? Eligible individuals

must file an application for work authorization (Form I-765) with the INS office or service center that has jurisdiction over their place of residence. Work authorization application forms may be obtained from INS offices or downloaded from the INS web site at www.ins.usdoj.gov. Applicants may also call the INS National Customer Service Center at 1-800-375-5283 to request that a form be sent to them. There is no fee for renewing work authorization under this program.

Where should the I-765 forms be filed? Forms must be filed in one of the following locations that have jurisdiction over the applicant's place of residence.

- **Applicants with emergency needs.** Individuals who must have their work authorization issued rapidly may file at the local INS office that has jurisdiction over their place of residence. For example, persons who need rapid work authorization and who are under the jurisdiction of the Los Angeles District Office would file at the INS East Los Angeles Office located at 1241 S. Soto Street in Los Angeles.

- **Regular requests.** For applicants who do not have an emergent need for work authorization and who reside in Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virginia, West Virginia or the U.S. Virgin Islands, applications should be mailed to:

Vermont Service Center
Attn: C22 I-765
75 Lower Welden Street
St. Albans, VT 05479

For residents of Arizona, California, Guam, Hawaii or Nevada, applications should be mailed to:

California Service Center
Attn: C22 I-765
P.O. Box 10765
Laguna Niguel, CA 92607-0765

For residents in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee or Texas, applications should be mailed to:

Texas Service Center
P.O. Box 851041
Mesquite, TX 75185-1041

All others not covered by the service centers listed above must mail applications to:

Nebraska Service Center
P.O. Box 87698
Lincoln, NE 68501-7698

BIA: STATE CONVICTION FOR UNLAWFUL SEXUAL INTERCOURSE WITH A MINOR THAT HAS BEEN REDUCED TO A MISDEMEANOR IS NOT AN "AGGRAVATED FELONY" – In an *en banc* decision, the Board of Immigration Appeals has ruled that a conviction must meet the

federal definition of a "felony" in order to be considered an "aggravated felony" under section 101(a)(43)(A) of the Immigration and Nationality Act. That section applies to convictions for "murder, rape, or sexual abuse of a minor." Federal law defines a "felony" as an offense for which the maximum term of imprisonment is greater than one year. 18 U.S.C. § 3559(a)(5) (1994). The decision comes on a motion to reopen removal proceedings based on evidence submitted by the respondent to show that his felony conviction had been reduced to a misdemeanor by a California court. The opinion rejects a recent decision to the contrary of the U.S. Court of Appeals for the Seventh Circuit (see "7th Circuit Rules Misdemeanor Conviction for Sexual Abuse of a Minor Is an 'Aggravated Felony,'" p. 9).

The respondent in this case, a national of Belize, entered the U.S. as a lawful permanent resident in 1988. In March 1998, he was convicted of two crimes: residential burglary under California Penal Code section 459, for which he was sentenced to 210 days in jail and 3 years of probation, and unlawful sexual intercourse in violation of Cal. P.C. section 261.5(c), for which he was sentenced to 90 days in jail, and 3 years of probation. Removal proceedings were initiated, and in November 1999, the BIA ruled that the conviction for unlawful sexual intercourse constituted an "aggravated felony" under INA section 101(a)(43)(A), rendering him ineligible for certain relief from removal. The respondent then filed a motion to reopen, submitting evidence to show that in October 1999 the Ventura County Superior Court reduced his offense to a misdemeanor.

Examining the issue of whether INA section 101(a)(43)(A) encompasses nonfelony convictions, a majority of the BIA found the plain language of the provision to be ambiguous. The statute refers to crimes of "murder, rape, or sexual abuse of a minor," "whether in violation of Federal or State law," without specifying whether only felonies are included. The majority also found the legislative history and consideration of other provisions of the INA to be inconclusive. However, the majority concluded that limiting section 101(a)(43)(A) to felony convictions is supported by the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). The BIA rejected the Seventh Circuit's contrary decision in *Guerrero-Perez v. INS*, ___ F.3d ___, 2001 WL 210186 (7th Cir. 2001), noting that the court had had to address the issue without guidance from the BIA because the BIA decision that was reviewed in that case had not addressed it.

The majority concluded that INA section 101(a)(43)(A) encompasses only crimes that meet the definition of a "felony" in 18 U.S.C. section 3559(a)(5) (1994). The respondent in this case was convicted of a crime that was divisible, punishable either by imprisonment for less than one year in the county jail, or in the state prison for more than a year. The reduction of his sentence reduced his conviction to a misdemeanor, and the BIA concluded that it therefore could not be considered an aggravated felony under section 101(a)(43)(A).

In a concurring opinion, BIA Member Filppu advanced an alternative interpretation of INA section 101(a)(43), contending

that the statutory context of the original (1988) enactment of the "aggravated felony" definition establishes that at that time Congress intended to limit it to felony convictions. While subsequent amendments and additions have broadened the definition, they should be considered to include misdemeanors only in those subsections where the statute so indicates, and that is not the case with subsection 101(a)(43)(A). BIA Member Rosenberg, joined by BIA Member Miller, filed a separate concurring opinion, criticizing the reluctance of the majority opinion to find in the plain language and overall statutory scheme a clear indication of congressional intent to limit section 101(a)(43)(A) to felony convictions.

BIA Member Grant, joined by BIA Members Dunne, Scialabba, Heilman, Hurwitz, Cole, Mathon, Jones, and Ohlson, submitted a dissenting opinion. In essence, the dissent contends that the statute's definition of "aggravated felony" is a "term of art" that is inconsistent with the federal definition of "felony" and that includes misdemeanors except where they are expressly excluded.

Matter of Crammond, 23 I. & N. Dec. 9 (BIA 2001).

INS ISSUES RULE REDUCING FEES FOR BORDER CROSSING CARDS FOR MEXICAN CHILDREN

– The Immigration and Naturalization Service has published a final regulation authorizing consular offices to collect reduced fees for border crossing cards issued to Mexicans aged 15 or younger. The new rule applies to applicants for border crossing cards who submit their applications in Mexico. The applicant must have at least one parent or guardian who has a visa or who is applying for a machine-readable combined border crossing card and nonimmigrant visa.

The rule, which was published on Apr. 2, 2001, is necessitated by a change in the law authorizing a reduction in fees. The fee is to be set by the Department of State and will cover only the cost of manufacturing the cards. The combined card will be valid for 10 years or until the child reaches the age of 15. As the rule provides for a reduction in fees, the INS considers it a benefit and has published it as a final rule. The INS will not solicit comments on the rule.

66 Fed. Reg. 17510–11 (Apr. 2, 2001).

ABA ANNOUNCES INS DETENTION STANDARDS IMPLEMENTATION INITIATIVE

– The American Bar Association has announced a new project it calls the INS Detention Standards Implementation Initiative, through which it is offering advocates assistance in their efforts to hold the Immigration and Naturalization Service to the agency's new detention standards. The project encourages advocates who become aware of specific problems related to legal access, detainee treatment, and detention conditions to contact the new project's director, Chris Nugent. His email address is nugentc@staff.abanet.org.

The ABA was instrumental in prompting the INS to issue detention standards. In January 2001, after protracted negotiations over the new standards, they took effect at 18 INS service processing centers, as well as at contract detention facilities operated by the Corrections Corporation of America and Wackenhut.

Over the next year, the standards will be phased in at other non-INS-operated facilities.

The ABA project has published a new resource for lawyers who work with immigrant detainees: *INS Detention Standards Implementation Initiative: A Training Manual for Advocates*. The manual provides background information on the INS's new standards, including in-depth fact sheets on the following: rights to legal access; standards regarding medical treatment; rights to religious practice; descriptions of the complaint process; strategies for success in seeking redress under the standards; an advocate complaint form; sample complaints; advocate and detainee questionnaires regarding access and detention conditions issues; detainee legal questionnaires in English and Spanish; and other remedies under administrative and federal law. The manual, as well as a copy of the new detention standards, may be ordered by contacting the ABA at: Immigration Pro Bono Development and Bar Activation Project, American Bar Association, 740 15th Street N.W., 9th Floor, Washington, DC 20005-1022.

Litigation

9TH CIRCUIT GRANTS WITHHOLDING TO WOMAN WHO WAS ABUSED BY FATHER

– The Ninth Circuit Court of Appeals has held that a young Mexican woman who as a child was severely physically abused by her father is eligible for asylum and entitled to withholding of removal. Key to the court's decision was its conclusion that the petitioner's immediate family constitutes a "particular social group" and that the petitioner was persecuted on account of her membership in that social group. The court further concluded that the petitioner has a well-founded fear of future persecution should she be forced to return to Mexico and that Mexico is unable or unwilling to interfere in that persecution.

The petitioner, Rosalba Aguirre-Cervantes, currently is nineteen years old. From the age of three until she ran away from home at the age of sixteen and applied for asylum in the United States, she was severely abused by her father. She testified that he beat her with a horse whip, with tree branches, a hose, and his fists. She suffered a dislocated elbow, lost consciousness as a result of some of the abuse, and still bears various scars on her forehead, hand, arm, and leg. Her father would not allow her to get medical attention for any of the injuries she suffered, nor would her mother allow her to report the beatings to the police. She testified that when she would try to defend her mother against similar abuse, the father beat both of them and once threatened to kill them. When the petitioner would run away to seek shelter with her grandfather, her father would come after her and force her to return home with him.

Finding the petitioner's testimony "credible and consistent and detailed," the immigration judge ruled that she was a member of a particular social group consisting of "victims of domestic violence" or "the family which is a victim of domestic violence." The IJ granted her application for asylum but denied her request for withholding of removal. The Board of Immigration Appeals

agreed with the IJ's determination that the petitioner had suffered severe abuse at the hands of her father and that the abuse constituted persecution. However, the BIA characterized the particular social group to which the petitioner belonged as "Mexican children who are victims of domestic violence" and determined, according to the Ninth Circuit's summary, "that such a group had not adequately been shown to be a particular social group for asylum purposes." The BIA reversed the IJ's decision, whereupon the petitioner appealed.

To be eligible for asylum, applicants must prove that they were persecuted or fear that they will be persecuted in their country of origin due to one of any of five grounds: their race, religion, national origin, political opinion, or membership in a particular social group. Citing its own decisions in *Sanchez-Trujillo*, 801 F.2d 1571, 1576 (9th Cir. 1986), and *Hernandez-Montiel*, 225 F.3d 1084, 1091 (9th Cir. 2000), as well as decisions in the First and Seventh Circuits (*Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1994), and *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997)), in addition to BIA precedent, the court held that a family may constitute a "particular social group" within the meaning of the asylum statute. The specific factors that led the court to conclude that the petitioner's family qualifies as a "particular social group" are, according to the court, "that the petitioner's family members are part of an immediate, as opposed to an extended, family unit; they now live or have lived together and are otherwise readily identifiable as a discrete unit; and they share the common experience of all having suffered persecution at the hands of the petitioner's father."

The court further found that the petitioner had suffered persecution *on account of* her membership in the particular social group constituted by her immediate family. According to the court, "It was established by abundant evidence—and undisputed—that it was the petitioner's status as a member of [her] family that prompted her beatings." Obviously, according to the court, the goal of the petitioner's father was to control and dominate the members of his family to whom he had access.

When the persecution upon which an applicant is basing an asylum claim was inflicted by a nongovernmental entity, the applicant must show that the government of the applicant's country of origin was unable or unwilling to control the persecutor. The IJ had found the fact to be established that the Mexican government was unable or unwilling to prevent the petitioner's father from persecuting her. According to the Ninth Circuit, the case record contains documentary evidence establishing that "domestic violence is widely condoned in Mexico and that law enforcement authorities [there] are unwilling to intervene in such matters." The court concluded that "any reasonable fact finder considering the evidence in this case would conclude that the Mexican government is unable or unwilling to control Mr. Aguirre's abusive behavior directed toward his immediate family."

Having established that she had been persecuted in the past, the petitioner had to show that she had a well-founded fear of future persecution should she be forced to return to Mexico. A finding that an asylum applicant has been persecuted in the past

creates a rebuttable presumption that he or she has a well-founded fear of future persecution. In examining this issue, the court analyzed a new Immigration and Naturalization Service regulation that allows the INS to rebut the presumption that an asylum applicant will suffer future persecution. The regulation requires the INS to show by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in his or her home country. The INS may also show that the applicant could avoid future persecution by relocating within her country of origin.

However, the court noted that it has repeatedly "made clear that on remand the BIA may not look beyond the existing record to determine whether changed country conditions rebut the presumption of a well-founded fear of future persecution." As a general rule, according to the court, "a petitioner who was eligible for asylum when the BIA considered his case does not lose that eligibility as a result of the agency's failure to recognize it." The court's review of the existing record yielded a determination that the INS had not rebutted the presumption that the petitioner would suffer future persecution should she be returned to Mexico. The court therefore found that the petitioner is entitled to withholding of removal and eligible for asylum. It remanded the case to the attorney general "to exercise his discretion and determine whether to grant asylum."

Aguirre-Cervantes v. INS, No. 99-70861 (9th Cir. Mar. 21, 2001).

9TH CIRCUIT HOLDS MARIJUANA CONVICTION IS NOT "AGGRAVATED FELONY" – In an important en banc ruling, the Ninth Circuit Court of Appeals has held that a conviction under a California anti-marijuana statute does not constitute conviction of an aggravated felony for the purposes of sentencing pursuant to United States Sentencing Guidelines (U.S.S.G.) section 2L1.2(b)(1)(A). Under that guideline, a district court that finds a person guilty under 8 U.S.C. section 1326 of illegally reentering the U.S. after having been deported must increase the defendant's "base offense level" by 16 levels if the defendant was deported after having been convicted of an aggravated felony.

The petitioner in the case, Javier Rivera-Sanchez, was arrested for entering the U.S. without inspection on Sept. 13, 1998, and he subsequently pled guilty to having reentered the U.S. illegally after having been deported. Rivera-Sanchez had a number of convictions on his record, the most critical of which was a 1986 conviction under California Health and Safety Code section 11360(a) (the anti-marijuana law), for which he had been sentenced to 3 years' probation and 36 days in jail. The district court treated this conviction as an aggravated felony pursuant to sentencing guideline 2L1.2(b)(1)(A) and increased Rivera-Sanchez's base offense level by 16. As a result, the district court sentenced him to 84 months in prison, followed by 3 years of supervised release. Rivera-Sanchez appealed the sentence.

Under 8 U.S.C. section 1101(a)(43)(B), an "aggravated felony" includes "illicit trafficking in [a] controlled substance," which includes any felony punishable under the Controlled Substances

Act (21 U.S.C. § 801 et seq.). The term "aggravated felony" applies to violations of both federal and state law.

The California law under which Rivera-Sanchez was convicted in 1986 provides: "Every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years." California Health and Safety Code § 11360(a).

In determining whether Rivera-Sanchez's 1986 conviction should be considered an aggravated felony for federal sentencing purposes, the Ninth Circuit used the analytical model laid out by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990). According to the Ninth Circuit's decision, "Under *Taylor*, courts do not examine the conduct underlying the prior offense, but 'look only to the fact of conviction and the statutory definition of the prior offense.'" However, in a narrow range of cases, *Taylor* permits courts to take into account more than the mere fact that the defendant was convicted. When the statute under which the defendant was convicted allows for the punishment of both conduct that would constitute a crime of violence and conduct that would not, the Ninth Circuit has held that documentation or judicially noticeable facts may be taken into account if they can help to clearly establish that the defendant's sentence should or should not be enhanced based on the conviction. If the statute and the judicially noticeable facts would allow the defendant to be convicted of an offense that is not defined as a qualifying offense by the sentencing guidelines, the conviction does not qualify as one on which an enhanced sentence can be based.

Upon examining the California statute upon which the enhancement of Rivera-Sanchez's sentence was based, the Ninth Circuit noted that it is extremely broad and concluded that its basic thrust is to criminalize solicitation of the acts it enumerates. The Ninth Circuit has held previously that solicitation offenses are not aggravated felonies. Moreover, the Controlled Substances Act does not list solicitation as an act punishable under its provisions. In *Coronado-Durazo v. INS*, 123 F.3d 1322, 1325-26 (9th Cir. 1997), the court held that where a statute lists some generic offenses but omits others, the statute covers only the offenses expressly listed. Because California Health and Safety Code section 11360(a) criminalizes solicitation, "the full range of conduct encompassed by the statute does not constitute an aggravated felony under 8 U.S.C. § 1101(a)(43)(B)," according to the court. "Therefore, Rivera-Sanchez's 1986 conviction facially does not qualify as an aggravated felony."

Since Rivera-Sanchez's 1986 conviction "does not qualify facially" as an offense upon which a sentence enhancement can be based, the next step under *Taylor* requires an analysis of whether other judicially noticeable facts in the record would prove that the conviction does qualify as such an offense. The court declined to conduct such an analysis and chose to vacate the sentence and remand it for further evaluation by the district court.

U.S. v. Rivera-Sanchez, No. 99-10275 (9th Cir. April 18, 2001).

7TH CIRCUIT RULES MISDEMEANOR CONVICTION FOR SEXUAL ABUSE OF A MINOR IS AN "AGGRAVATED FELONY"

– The U.S. Court of Appeals for the Seventh Circuit has ruled that an Illinois misdemeanor conviction for sexual abuse of a minor constitutes an "aggravated felony" for purposes of immigration law. The decision was issued on the appeal of a removal order issued by the Board of Immigration Appeals. Because the BIA did not address the issue of whether a misdemeanor offense could constitute an aggravated felony under section 101(a)(43)(A) of the Immigration and Nationality Act, the court was required to determine this issue without the assistance of any agency interpretation of the statute. However, subsequent to this decision, the BIA issued a decision to the contrary, rejecting the Seventh Circuit's analysis (see "BIA: State Conviction for Unlawful Sexual Intercourse with a Minor That Has Been Reduced to a Misdemeanor Is Not an 'Aggravated Felony,'" p. 6).

Guerrero-Perez v. INS, 242 F.3d 727 (7th Cir. 2001).

9TH CIRCUIT HOLDS THAT INVOLUNTARY MANSLAUGHTER CONSTITUTES "CRIME OF VIOLENCE"

– In a case involving a Korean minister whose involvement in a religious ceremony to exorcise demons resulted in the beating death of a young woman, the Ninth Circuit Court of Appeals has held that involuntary manslaughter constitutes a "crime of violence." A crime of violence committed by a noncitizen for which a prison sentence of at least one year is imposed constitutes an "aggravated felony" that subjects the noncitizen to removal from the United States.

Eun Kyung Park is a native and citizen of South Korea. She entered the U.S. with a student visa. While in the U.S., she attended a seminary, obtained a bachelor's and master's degree, and was ordained as a minister. In 1996 Park pled guilty to and was convicted for her involvement in the beating death of a 25-year-old woman during a religious ceremony to exorcise demons. Park received a sentence of three years in state prison.

In August 1996, a month prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), while Park was still in custody, the Immigration and Naturalization Service issued an Order to Show Cause (OSC) alleging that Park was deportable. The INS later amended the OSC to reflect the statutory changes made by the IIRIRA. Park's counsel did not mount a defense to her deportability, and the immigration judge ordered her deported on the basis of the charges in the OSC.

Park pursued two avenues for relief: she filed a writ of habeas corpus with the federal district court and filed an appeal before the Board of Immigration Appeals. Both the court and the BIA dismissed her claims. The BIA found that her conviction record established by clear, unequivocal, and convincing evidence that she was deportable as charged. Park subsequently filed an appeal before the Ninth Circuit.

The Ninth Circuit first decided the threshold issue of whether it had jurisdiction to hear Park's appeal. Because Park's deportation proceedings were initiated prior to the IIRIRA's general effective date but her final order was issued (by the BIA) after the

effective date, Park's case is governed by the transitional rules of the IIRIRA. Under those rules, courts of appeal lack jurisdiction to hear the appeals of persons who are deportable because they have been convicted of an aggravated felony. However, the Ninth Circuit retains jurisdiction to determine its jurisdiction and to review whether the crime a petitioner was convicted of constitutes an aggravated felony. The court reviewed de novo the question of whether a conviction for involuntary manslaughter constitutes conviction of an aggravated felony.

At issue in Park's case was whether her conviction for involuntary manslaughter constitutes conviction of a "crime of violence." If it does, the crime constitutes an aggravated felony and Park is deportable. The statute that defines what is an aggravated felony does not include involuntary manslaughter in its definition. However, involuntary manslaughter may be encompassed within a crime of violence. The IIRIRA amended the definition of "crime of violence" to include crimes in which the prison term to which the perpetrator is sentenced is at least one year. Under prior law, a crime was not a "crime of violence" unless the perpetrator was sentenced to at least five years in prison.

In *U.S. v. Springfield*, 829 F.2d 860 (9th Cir. 1987), the Ninth Circuit held that involuntary manslaughter is a crime of violence. Both the involuntary manslaughter and crime of violence statutes at issue in *Springfield* were nearly identical to the California statute under which Park was convicted. Following its own precedent, the Ninth Circuit held that Park's conviction for involuntary manslaughter constitutes a crime of violence.

The Ninth Circuit considered Park's additional arguments. Park argued that the California involuntary manslaughter statute is divisible and must be analyzed with respect to the specific circumstances of her crime. However, the Ninth Circuit takes a categorical approach to such a determination, looking only to the statutory definition of the offense. The only exception occurs when a statute reaches both conduct that would constitute a crime of violence and conduct that would not. The court concluded that involuntary manslaughter is by its nature a crime of violence such that the exception is inapplicable. Park also argued that for a crime to constitute a crime of violence, the perpetrator must have had specific intent to commit the crime. Reviewing the statute's legislative history, the court concluded otherwise.

Finally, Park argued that the IIRIRA's definition of "aggravated felony" should not be applied to her retroactively. The IIRIRA specifies that the amended definition of "aggravated felony" applies only to "actions taken on or after the date of the enactment of IIRIRA." Because the INS initiated proceedings against Park in August 1996, prior to the enactment of the IIRIRA, Park argued that the statute should not apply to her. Her argument failed because the Ninth Circuit has interpreted "actions taken" to include actions taken by the BIA. As the BIA had issued its final order in Park's appeal in November 1997, the amended definition applies to her.

The court therefore found that, because Park is deportable as an aggravated felon, it lacked jurisdiction to hear her appeal of the decision finding her to be deportable, and it dismissed her petition. *Park v. INS*, No. 97-71373 (9th Cir. Mar. 6, 2001).

Employment Issues

ASYLEES TO RECEIVE UNRESTRICTED SOCIAL SECURITY CARDS – A change in the Social Security Administration's (SSA's) policy will result in asylees being able to get jobs faster and to participate fully in the Office of Refugee Resettlement's (ORR's) programs, since they will now be eligible for an unrestricted Social Security card without the notation "Valid For Work Only With INS Authorization." The new SSA policy comes as a result of the Immigration and Naturalization Service clarifying that individuals granted asylum have permanent work authorization by virtue of their asylee status and that the SSA should treat them as permanent residents for purposes of issuing Social Security numbers (SSNs). Asylees will no longer need to apply for an employment authorization document (EAD) before applying for their Social Security card and will therefore not be affected by the INS's delays in issuing work permits.

To apply for an unrestricted Social Security card, an asylee must fill out an application (SSA Form SS-5) for an original or replacement card and provide proof of his or her asylee status. An asylee can present any of the following documents: (1) an I-94, which may or may not bear the annotation "Employment Authorized"; (2) an EAD (either Form I-688B showing "274A.12(a)(5)" on the face of the card under the heading "Provision of Law" or Form I-766 showing "A5" on the face of the card under the heading "Category"); or (3) an order from an immigration judge granting the individual asylum. The SSA should accept an order granting asylum if the INS has waived its right to appeal the order. However, if the order states that the INS has reserved its appeal rights but more than 30 days have passed since the person was granted asylum, the INS must accept the order as proof of asylee status and should call the Executive Office for Immigration Review to confirm that the INS did not appeal.

The policy also instructs SSA employees to use the INS's SAVE (immigration status verification) system to verify with the INS that an individual applying for an SSN has indeed been granted asylum. If the immigration document is the only documentation the asylee has, the SSA should accept this and not request further identification even if this is the only evidence of the person's age. If, however, the asylee does have another document in addition to the immigration document he or she presented, the SSA must request that he or she submit it. The ORR encourages those asylees who do not have any other forms of identification in the U.S. to apply for an EAD, although now this does not need to be done prior to applying for an SSN.

Asylees who currently have a restricted Social Security card can go into a local SSA office to apply for a replacement card without the restriction. The ORR recommends that asylees bring a copy of the new SSA policy instruction with them when applying for an unrestricted SSN. This new policy applies only to individuals already granted asylum, not to those applying for asylum or awaiting a decision. The new policy went into effect Apr. 4, 2001.

LAS VEGAS CASINO AGREES TO SETTLE DOCUMENT ABUSE CASE – The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) has announced a settlement it reached with the Excalibur Hotel and Casino in Las Vegas—which is owned by the Mandalay Resort Group—under which the company agreed to pay over \$50,000 in civil penalties and back pay. As part of the settlement agreement, Excalibur will pay a \$20,000 civil fine and over \$30,000 in back pay to 22 workers it fired or suspended under a policy the OSC found to be discriminatory. Some of the 22 employees have already been reinstated, while others found jobs elsewhere.

The OSC, an agency within the U.S. Dept. of Justice's Civil Rights Division responsible for enforcing the antidiscrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), began its investigation of Excalibur after a Bosnian refugee filed a charge alleging that he was fired for not producing a new work authorization card issued by the Immigration and Naturalization Service. This employee had produced an I-94 with a stamp indicating he was work-authorized. The I-94 is the departure/arrival record issued to most individuals upon entering the United States, and it is one of the legally acceptable documents that employees can present to satisfy the employment eligibility verification process.

During its investigation, the OSC found that after Excalibur hired employees, it would reverify the continued employment authorization of those workers who initially presented a document with an expiration date as the employer is required to do under IRCA's employment eligibility verification requirements. However, Excalibur refused to accept documents that employees presented if they were not new INS-issued cards, even when employees presented another of the acceptable documents listed on the I-9 employment eligibility verification form. The OSC found that this policy violated IRCA's antidiscrimination provisions because the employer was requiring specific documents and refusing to accept documents that are legally acceptable, a policy that resulted in the termination of 22 employees.

The OSC reports that the changing demographics in states with a fast-growing immigrant work force, such as Nevada, Iowa, and Georgia, are resulting in increased discrimination against these new workers.

IMMIGRANT EMPLOYEES OF 99¢ STORE CHAIN OBTAIN A \$100,000 SETTLEMENT – In a relatively quick resolution of their complaint for unpaid wages and overtime, 11 immigrants who worked as shipment and stock handlers in the warehouse and retail stores of a regional chain of 99¢ stores won a \$100,000 settlement on Apr. 4, 2001.

With the assistance of the American Civil Liberties Union of New Jersey and the American Friends Service Committee's Immigrant Rights Program in New Jersey, the group of Latino workers filed a complaint in the U.S. District Court for the District of New Jersey in January 2001 against American Dreams, Inc., which is a company based in Jersey City, N.J., operating over forty 99¢ and dollar stores throughout the tri-state area. The workers claimed

that they were not paid wages owed to them, in violation of state and federal wage and hour laws. They also alleged that they had been subjected to abusive working conditions, including racial harassment and being locked into stores overnight by supervisors.

While the complaint was filed as a class action lawsuit, the court had not yet certified the class. In addition to paying \$100,000 to the 11 workers, the company agreed to post a notice in Spanish and English informing workers of their rights on the job, including the right to minimum wage and overtime.

EEOC REACHES HISTORIC SETTLEMENT IN AN ENGLISH-ONLY LAWSUIT – A \$2.44 million settlement for 18 Latino workers who had been employed as housekeepers by the University of Incarnate Word (UIW) was announced today by the U.S. Equal Employment Opportunity Commission (EEOC). This is the largest known monetary settlement in an "English-only" lawsuit.

The EEOC filed the class action lawsuit on Sept. 30, 1999, in the U.S. District Court for the Western District of Texas alleging that UIW, a private university in San Antonio, Texas, engaged in national origin discrimination when it implemented an unlawful English-only rule and harassed its Latino workers for over 10 years in violation of Title VII of the Civil Rights Act of 1964. The workers were prohibited from speaking Spanish and were required to speak English at all times, including during lunch and breaks. Many of the workers complained that they had difficulty complying with the English-only rule because they were monolingual Spanish-speakers or spoke English with difficulty, while the bilingual employees complained that they unconsciously switched to talking Spanish when speaking to their Spanish-speaking peers. Those employees who were unable to comply with the English-only policy were subjected to repeated verbal and physical abuse, including ethnic slurs.

The terms of the settlement include a payment of \$1 million in damages to be distributed among the 18 Latino former employees, as well as \$1.44 million in tuition waivers that can be used by the 18 class members or one of their close relatives. The tuition waivers will pay for eight full-time semesters at UIW. In addition, UIW agreed to adopt a comprehensive antidiscrimination policy and complaint procedure in Spanish and English, and to conduct ongoing training for its managers and supervisors on national origin discrimination and other unlawful employment practices. Finally, the consent decree approved by the court includes a three-year injunction prohibiting UIW from implementing another English-only rule and from discriminating against its employees on the basis of their national origin.

Immigrants & Welfare Update

SUPREME COURT LIMITS INDIVIDUALS FROM SUING UNDER TITLE VI – In a decision written by Justice Scalia that is unfortunate for the immigrant community and language rights advocates, the nation's highest court has held, by a 5-4 majority, that there is no private

right of action for individuals to file a lawsuit for disparate impact discrimination pursuant to Title VI of the Civil Rights Act of 1964 (Title VI).

Title VI prohibits discrimination based on race, color, or national origin (a category that includes language) by entities that receive federal funding. The Court's decision was the result of a class action lawsuit brought against Alabama's Dept. of Public Safety, which decided to administer the driver's license exam only in English after Alabama amended its constitution in 1990 to declare English to be its official language. Prior to 1990, Alabama administered the exam in multiple languages. The litigation challenged the Dept. of Public Safety's new English-only policy, alleging that it had a discriminatory impact on non-English-speakers based on their national origin. Both the Federal District Court for the Middle District of Alabama and the Court of Appeals for the Eleventh Circuit agreed that Alabama's policy did violate Title VI's prohibition against discrimination.

In its decision, the Supreme Court did not address whether the lower courts correctly held that Alabama's English-only policy had the effect of discriminating against individuals because of their national origin. Instead, the Court focused only on whether private individuals have a cause of action to enforce the U.S. Dept. of Justice-issued regulations that implement the statute. In reaching its decision, the justices held that private individuals may file a lawsuit pursuant to section 601 of Title VI and obtain injunctive relief and other damages, but that prior case law makes it clear that section 601 only prohibits intentional discrimination. The prohibition against disparate impact discrimination lies in section 602 of Title VI, which provides governmental agencies with the authority to promulgate rules or regulations to enforce Title VI. However, the Court concluded that this provision does not confer a private right of action to individuals. Yet had the plaintiff alleged intentional discrimination, her lawsuit would have survived, since section 601 allows individuals a private cause of action.

In the dissenting opinion, Justice Stevens criticized the majority for a "decision unfounded in our precedent and hostile to decades of settled expectations." The four dissenting justices agreed with the underlying decisions of the district and appellate courts, which found that the Supreme Court had already concluded that there exists a private right of action. *See Lau v. Nichols*, 414 U.S. 563 (1974). The dissent also cited numerous appellate court decisions holding that individuals do have a private cause of action to enforce all of the regulations issued pursuant to Title VI, including those prohibiting disparate impact discrimination.

Both the majority and dissenting opinions note that the plaintiffs in the lawsuit still have the option of filing disparate impact claims against state actors under section 1983 of the Civil Rights Act of 1871.

Alexander v. Sandoval, ___ U.S. ___,
69 U.S.L.W. 4250 (Apr. 24, 2001).

CLINTON ORDER IMPROVING LANGUAGE ACCESS THREATENED; ADVOCATES URGE PRESIDENT BUSH NOT TO RESCIND OR SCALE BACK ORDER

– Modest steps taken by the Clinton administration last year to improve limited English-proficient (LEP) persons' access to gov-

ernment-funded programs are now being threatened on a number of fronts. Signed by the former president during the closing days of his administration, Executive Order 13166 calls upon federal agencies to prepare plans to improve LEP individuals' access to programs and activities. The order also instructs agencies to issue guidances clarifying rules that recipients of federal funds must follow in providing services to LEP populations. If successful, the efforts to rescind the executive order or limit its reach could prove harmful for immigrants. Failure to provide meaningful language access is consistently cited by immigrants and their advocates as a key barrier to full and effective participation in government-funded services and activities.

Although English is the dominant language of the U.S., millions of Americans do not yet speak, read, or understand English well enough to communicate effectively in it. And while many LEP persons are eager to learn English, in most cities they face long waiting lists for language instruction. Even with proper instruction, mastery of a new language takes several years. Language barriers often prevent people who are not fully competent in English from obtaining or providing vital information about basic needs and services or from fully understanding their rights and obligations. In a medical setting, for example, the lack of appropriate translation and interpretive services can lead to misdiagnosis or the unnecessary administration of expensive tests. In other areas, such as education and job training, an English-only policy can deny new Americans the tools they need to fully participate and contribute to the nation and its future.

Though opponents of the order have mischaracterized its intent and scope, the executive order and resulting guidances serve only to publicize and clarify the longstanding requirements of Title VI of the Civil Rights Act of 1964. Based on the premise that public funds should not be spent in a manner that supports discriminatory practices, Title VI prohibits discrimination based on race, color, and national origin. For three decades, federal agencies have interpreted Title VI's ban on national origin discrimination to require entities receiving federal funds to provide meaningful access to services for LEP persons.

At the same time the executive order was promulgated, the Dept. of Justice outlined a framework for federal agencies to use in developing their own guidances in compliance with the order (see "DOJ Issues Policy Guidance on Discrimination against Persons with Limited English Proficiency," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2000, p. 12). Since then, the Depts. of Health and Human Services (HHS), Labor, Transportation, and Justice have published the required guidance. Guidances from several other federal agencies are pending but have not yet been published.

As noted above, opponents of Executive Order 13166 have mischaracterized its aim and requirements. They claim that the executive order and ensuing guidances require translations in more languages than are used in the United Nations, create a costly new federal mandate that will drive service providers out of business, and discourage people from learning English.

Contrary to these contentions, the executive order and guidances do not create any new federal mandates. They merely draw

attention to and clarify the meaning of Title VI for each agency and for recipients of federal funds. The clarifications were needed because the requirements of Title VI are not widely understood and compliance has, over the years, been inconsistent.

The agency guidances issued in compliance with the executive order are careful to point out that Title VI grants a great deal of flexibility to government-funded entities in determining how to ensure "meaningful access" to services. Compliance with Title VI's requirements is judged on a case-by-case basis and takes into account a number of factors such as the size and resources of the covered federal funds-recipient and whether the recipient provides service that is vital to life, safety, or well-being. The guidances specifically rule out any application of Title VI's requirements that would unduly burden the provider.

Despite this modest, common sense approach, opponents of the executive order have worked hard in recent months to derail it and the ensuing guidances. For example:

- On Mar. 8, 2001, Rep. Bob Stump (R-AZ) introduced H.R. 969, a bill that would repeal Executive Order 13166 and prohibit enforcement of any other executive order requiring agencies to provide services in languages other than English.
- English-only advocates have initiated a letter-writing and post-card campaign to congressional offices in favor of the Stump bill and in opposition to the executive order.
- Fifty-one medical and dental associations signed on to a letter to HHS Secretary Tommy Thompson, asking him to "impose an immediate moratorium on enforcement of the Office for Civil Rights Policy Guidance on Limited English Proficiency."
- The National Association of State Workforce Agencies has registered with the Department of Labor its opposition to the agency's guidance.

These threats to the executive order have prompted immigrants and their supporters to vigorously demonstrate their support for improved language access to government-funded services. In March 2001, advocates from across the country participated in a conference call to share information and to coordinate a response to pressures to repeal the executive order. Since then, more than 300 organizations have signed letters circulated by immigrants' rights advocates pressing President Bush to affirm his administration's support for the executive order. The congressional Hispanic Caucus has strongly urged President Bush and other members of Congress not to shelve, limit, or repeal the

executive order and the guidances. In addition, both the Asian and Hispanic Caucus circulated a "Dear colleague" letter to congressional Democrats asking them to sign a letter in support of the executive order.

It is not yet clear how the Bush administration will finally respond to the efforts to repeal or weaken Executive Order 13166. Advocates hope and expect that, ultimately, the administration will decide against rolling back more than three decades of civil rights protections for people who do not yet speak English.

Miscellaneous

POSITION AVAILABLE: OFFICE MANAGER, NILC'S OAKLAND OFFICE – The Oakland office of the National Immigration Law Center is seeking an office manager. NILC is a nonprofit organization that protects and promotes the rights of low-income immigrants and their families. (For more information about NILC's mission and work, visit our web site at www.nilc.org.) The office manager position will have responsibility for all of the administrative activities in the office, including:

- Manage office space, including technical support of the computer system
- Provide basic assistance to attorneys as needed
- Develop and maintain internal office systems and procedures
- Monitor office budget and maintain financial files
- Perform basic research, including web-based research

Qualifications

- **Required:** Office management administration experience; extensive computer knowledge and experience; extensive knowledge of word processing (preferably with Word) and experience with a spreadsheet program (preferably Excel).
- **Preferred:** Experience with Microsoft Access; experience with budget development/tracking; and experience in a nonprofit organization.

To Apply

By May 18, 2001, send cover letter, resume, and three references to: Oakland Office Manager Search, NILC, 3435 Wilshire Blvd, Suite 2850, Los Angeles, CA 90010. Fax: 213-639-3911; or e-mail: benoit@nilc.org.

The National Immigration Law Center . . .

. . . is a national public interest law firm whose mission is to protect and promote the rights of low-income immigrants. NILC staff specialize in the immigration, public benefits, and employment rights of immigrants. We serve an unusually diverse constituency of legal aid programs, pro bono attorneys, immigrants' rights coalitions, community groups, and other nonprofit agencies throughout the United States.

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