



Immigration Issues

ATTORNEY GENERAL ISSUES INTERIM RULE GOVERNING APPLICATIONS FOR "LATE LEGALIZATION" UNDER THE LIFE ACT – The attorney general has issued interim regulations that establish the procedure for the filing and adjudication of "late legalization" applications under the Legal Immigration Family Equity (LIFE) Act and the LIFE Act Amendments. The Immigration and Naturalization Service estimates that 440,000 individuals may be eligible for LIFE legalization. The regulations also establish procedures for certain family members of LIFE Act beneficiaries to apply for Family Unity status under the act. The regulations took effect on June 1, 2001.

Eligibility for LIFE legalization. Under the LIFE Act, in order to be eligible for legalization, individuals must have filed a written claim for class membership prior to Oct. 1, 2000, in one of three lawsuits that challenged the INS implementation of the 1986 legalization program. The three lawsuits are *Catholic Social Services, Inc. v. Meese*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (CSS); *League of United Latin American Citizens v. INS*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (LULAC); and *Zambrano v. INS*, vacated, 509 U.S. 918 (1993) (Zambrano). Individuals who applied for class membership and had their applications denied by the INS nevertheless may apply for LIFE legalization.

To be eligible for LIFE legalization, applicants must also:

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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.

- have entered the U.S. prior to Jan. 1, 1982;
- have resided continuously in the U.S. in an unlawful status since that date through May 4, 1988;
- have been physically present in the U.S. during the period from Nov. 6, 1986, through May 4, 1988;
- be admissible to the U.S.;
- have no conviction for a felony or for three or more misdemeanors committed in the U.S.; and
- demonstrate basic citizenship skills or be pursuing a recognized course of study to obtain basic citizenship skills.

Applicants need not be currently residing in the U.S., and eligible individuals residing outside the U.S. may apply for LIFE legalization.

Application procedures. The interim regulations provide that applicants must apply for legalization under LIFE during the one-year period beginning June 1, 2001, and ending on May 31, 2002. To apply, applicants must submit Form I-485 (Application to Register Permanent Residence or Adjust Status), with all required documentation, a \$330 filing fee, and a \$25 fingerprinting fee, unless the applicant is exempt from the fingerprinting requirement because he or she is under 14 or over 75 years of age. The INS has decided to impose a \$330 fee rather than the regular \$220 fee for the I-485 because the agency has determined that the increased fee represents the actual current cost of adjudicating the I-485.

There is a special instruction sheet, Supplement D, LIFE Legalization Supplement to Form I-485, that addresses the requirements of the LIFE legalization application. The application must be accompanied by proof of identity, a report of medical examination, two photographs, evidence that the applicant filed a written claim for class membership in the *CSS*, *LULAC*, or *Zambrano* lawsuit, evidence to prove continuous residence in an unlawful status since prior to Jan. 1, 1982, and through May 4, 1988, evidence to prove continuous physical presence in the U.S. between Nov. 6, 1986, and May 4, 1988, evidence to establish the applicant's citizenship skills, and, unless the applicant is under 14 or over 79 years of age, a completed Form G-325A (Biographic Information Sheet).

Eligible individuals, whether currently living in the U.S. or outside the U.S., must apply for LIFE legalization by mailing their applications to the following post office box:

U.S. Immigration and Naturalization Service
P.O. Box 7219
Chicago, IL 60607-7219

The INS is adopting a special "postmark rule" for purposes of determining whether a LIFE legalization application has been timely filed (i.e., filed by May 31, 2002). Any application that is postmarked by the U.S. Post Office on or before May 31, 2002, will be considered timely filed, regardless of when it is actually received. Any application for which the postmark is illegible or missing will be considered timely filed if it is received by June 3, 2002, if it was mailed from within the U.S., or by June 14, 2002, if mailed from outside the U.S.

Only the INS has jurisdiction to adjudicate LIFE legalization

applications, and the regulations provide that all such applications are under the jurisdiction of the Missouri Service Center, apparently a new office. Eligible immigrants who have pending exclusion, deportation, or removal proceedings may request that the proceedings be administratively closed to allow them to pursue LIFE legalization applications with the INS. Similarly, individuals who have motions to reopen or reconsider pending with the Board of Immigration Appeals or the immigration court may request that the motion be indefinitely continued. According to the interim rule, individuals requesting administrative closure or indefinite continuance of a motion must present, in support of their requests, documents demonstrating *prima facie* eligibility for LIFE legalization and proof that a LIFE legalization application was properly filed with the INS. The regulations provide that, where the applicant appears eligible, the immigration court or the BIA "shall administratively close the proceeding or continue the motion indefinitely."

According to the regulations, eligible immigrants who have final orders of deportation, exclusion, or removal may apply to the INS for LIFE legalization, and the filing of the application automatically stays the order. This stay remains in effect until there is a final decision on the LIFE legalization application, unless the district director (of the district where the INS seeks to execute the order) makes a formal determination that the applicant is not *prima facie* eligible for LIFE legalization because of criminal grounds or the applicant's having engaged in persecution. In such case the district director must serve the applicant with a written decision explaining the reason for the determination. This stay determination cannot be appealed.

All applicants for LIFE legalization must be interviewed, except for children under 14 years of age or individuals for whom the INS determines interviews are impractical because of the health or advanced age of the applicant. The director of the Missouri Service Center may forward cases to INS district offices for purposes of conducting interviews.

Evidentiary requirements. The regulations discuss the kinds of evidence that should be submitted with the application. Evidence of identity includes a passport, birth certificate, any national identity document from the applicant's country of origin that bears a photo and fingerprint, a driver's license or ID card issued by a state if it contains a photo, or a baptismal record/marriage certificate.

Evidence of written application for class membership in *CSS*, *LULAC*, or *Zambrano* before Oct. 1, 2000, may include: (1) an employment authorization document (EAD) or other employment document issued by the INS pursuant to one of these cases; (2) an INS document addressed to the applicant or to his or her representative granting or denying class membership and including a date and the individual's name and A-number; (3) the questionnaire for class member applicants under *CSS*, *LULAC*, or *Zambrano*, including the date, full name and date of birth; and (4) an INS document addressed to the applicant or to his or her representative discussing matters related to the individual's class membership application and including the date, the alien's name, and A-number. Such documents include Form I 512 (Parole Au-

thorization), or denial of such; Form I-221 (Order to Show Cause); Form I 862 (Notice to Appear); final order of removal or deportation; a request for evidence letter (RFE); Form I-687 submitted with the class membership application; or any other relevant document.

The regulations also discuss the requirement of showing continuous residence in an unlawful status since prior to Jan. 1, 1982, through May 4, 1988. Existing regulations provide for a wide range of evidence that may be used to establish that the applicant has resided continuously in the U.S. 8 CFR § 245a.2(d)(3). The interim rule lists documents that may be used to show that such residence was unlawful, whether as a result of overstaying a nonimmigrant visa, violating a condition of a nonimmigrant visa, or entering the U.S. without inspection prior to Jan. 1, 1982. Nonimmigrants may establish that their unlawful status was known to the government by showing that documentation existing in one or more federal agencies' files, taken as a whole, would warrant a finding that the individual's status was unlawful. However, the regulations provide that the absence of an alien registration report does not warrant a finding that an individual's unlawful status was known to the government. Individuals who were granted voluntary departure, voluntary return, extended voluntary departure, or who were placed in deferred action category prior to Jan. 1, 1982, are considered to be in unlawful status. Also, for purposes of the LIFE Act, Cuban and Haitian entrants are considered to be in unlawful status.

An applicant will not be considered to have maintained continuous residence if he or she has a single absence of more than 45 days, or aggregate absences totaling over 180 days between Jan. 1, 1982, and May 4, 1988, unless he or she can establish that "due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed," the alien was maintaining residence in the U.S., and the departure was not based on an order of deportation.

For purposes of establishing continuous physical presence from Nov. 6, 1986, through May 4, 1988, the applicant must establish that any absence from the U.S. during this period was "brief, casual, and innocent." A single absence of more than 30 days, or aggregate absences exceeding 90 days, will be considered to break continuous physical presence unless the applicant establishes that "due to emergent reasons, his or her return to the United States could not be accomplished within the time period(s) allowed." However, an absence pursuant to a grant of advance parole will not be considered to interrupt continuous physical presence.

Applicants also must establish that they have a minimal understanding of ordinary English and a knowledge and understanding of the history and government of the U.S. These requirements do not apply to applicants who are unable to demonstrate that they meet the requirements because of a medically determinable physical or mental impairment that has or is expected to last for at least 12 months. The regulations incorporate the same standards for this exception as are set forth in 8 CFR sections 312.1(b)(3) and 312.2(b), which govern the similar requirements for naturalization applicants. The LIFE legalization En-

glish and civics requirements can also be waived for applicants who are 65 years old or older, and for applicants who are developmentally disabled.

Applicants can meet these requirements by satisfying the English and civics naturalization requirements of 8 CFR sections 312.1 and 312.2. Alternately, applicants may satisfy these requirements by submitting a general educational development (GED) diploma from a school in the U.S. (if the GED was gained in a language other than English, the applicant must also have passed a GED English proficiency test). The applicant may submit a high school diploma or GED either at the time of filing the application, subsequent to the filing, or at the time of the interview. As a third alternative, applicants may show that they have attended, or are attending, a state-recognized, accredited learning institution in the U.S., with a course of study for a period of one academic year or equivalent, and a curriculum that includes at least 40 hours of instruction in English and U.S. history and government. An applicant may submit certification on a letterhead stationery from the institution either at the time of filing, subsequent thereto, or at the time of the interview. Applicants who fail to pass the English literacy and/or U.S. history and government tests at the time of their interview will be given a second interview six months later, or earlier should they so request.

Inapplicable grounds of inadmissibility and waivers. The grounds of inadmissibility for not having a labor certification and for not having valid travel documents do not apply to LIFE Act applicants. Most of the other noncriminal grounds of inadmissibility can be waived.

The LIFE Act provides that the 3- and 10-year bars to admissibility for unlawful presence of INA section 212(a)(9)(B) do not apply to individuals eligible for LIFE legalization. Reinstatement of removal also does not apply to LIFE Act applicants. The statute also provides for a special waiver of the grounds of inadmissibility for having previously been deported or removed and for having entered the U.S. without inspection following a removal or a period of at least one year of unlawful presence (INA § 212(a)(9)(A) and (C)). To obtain this waiver, LIFE Act applicants must file Form I-690 (Application for Waiver of Grounds of Excludability Under Sections 245A or 210 of the INA) with the district director having jurisdiction over the applicant's case (if pending at a local office) or with the director of the Missouri Service Center.

The public charge ground of inadmissibility can be waived, but only for applicants who are aged, blind, or disabled. However, individuals who are determined to be inadmissible on public charge grounds may qualify for a "special rule" that allows them to be admitted. Under this special rule, applicants who have a consistent employment history of supporting themselves, albeit below the poverty level, are considered admissible. The employment history need not be uninterrupted, as long as the applicant has had an income over a substantial period and has "demonstrated the capacity to exist on his or her income without recourse to public cash assistance." Past receipt of public cash assistance does not disqualify an applicant but constitutes a significant factor in making the public charge determination. As

with the regular public charge determination, the special rule is a prospective test, under which the INS is to determine whether, based on the applicant's employment history, he or she is likely to become a public charge. The regulations require that the applicant cooperate fully in verifying that he or she has not been the recipient of public cash assistance and has not had a criminal record.

Employment and travel abroad. Under the regulations, LIFE legalization applicants who file their adjustment applications (Form I-485) may also apply for employment authorization by submitting Form I-765 (Application for an Employment Authorization Document), together with the fee for that form (currently \$100).

LIFE legalization applicants may also apply for advance parole by filing Form I-131 (Application for Travel Documents) in order to travel outside the U.S. and return. Applicants who are subject to a final order of removal, deportation, or exclusion must file and obtain approval of Form I-212 (Application for Permission to Reapply for Admission after Deportation or Removal) in addition to obtaining advance parole in order to leave the U.S. and subsequently return.

Family Unity. The LIFE Act establishes a Family Unity program for the spouses and minor children of immigrants who are eligible to legalize under the statute. This status allows beneficiaries to work in the U.S. and protects them from deportation or removal. The spouse or child must have entered the U.S. before Dec. 1, 1988, and resided in the U.S. on that date. The family relationship need not have existed on that date. However, under the interim rule, the family relationship must exist at the time that the application for Family Unity is adjudicated and thereafter. Thus, the INS may terminate Family Unity status for spouses who divorce and for children who marry or turn 21 years of age. The INS bases this interpretation of the statute on its use of the present tense in describing eligibility for Family Unity.

Individuals who have been convicted of a felony or of three or more misdemeanors are not eligible for LIFE Family Unity. Applicants also must not have been convicted of a particularly serious crime in the U.S. or committed a serious nonpolitical crime before coming to the U.S.

Spouses and children of individuals who are eligible for LIFE legalization may apply for Family Unity status before the relative has actually applied for legalization. However, Family Unity status may be denied (or terminated, if already granted) if the relative does not submit a LIFE legalization application by the May 31, 2002, deadline for such applications. The statute also allows individuals outside the U.S. who are spouses or children of individuals granted LIFE legalization and otherwise eligible for Family Unity to be paroled into the country to apply for the benefit. The INS will publish a separate regulation at some time in the future to establish a procedure for paroling Family Unity applicants.

To obtain LIFE Family Unity, applicants must submit Form I-817 (Application for Family Unity Benefits), which was recently revised to also constitute an application for an Employment Authorization Document (see related article in this issue). Appli-

cants for LIFE Family Unity must mail the form and accompanying documents to the Missouri Service Center. Individuals who are granted LIFE Family Unity will be provided an EAD that is valid for one year. The INS will separately publish a regulation to explain how LIFE Family Unity beneficiaries can apply to extend their status.

Applicants for LIFE Family Unity who depart the U.S. will be deemed to have abandoned their applications. Individuals who are granted Family Unity may apply for advance parole to depart from and return to the U.S. by submitting form I-131.

66 Fed. Reg. 29,661-82 (June 1, 2001).

INS ISSUES REVISED FORM FOR FAMILY UNITY APPLICATIONS – The Immigration and Naturalization Service has issued a revised version of the Form I-817 (Application for Family Unity). The new form is designed to be used both by applicants for Family Unity under section 301 of the Immigration Act of 1990 and by applicants for Family Unity under the Legal Immigration Family Equity (LIFE) Act Amendments. The new form constitutes both an application for Family Unity benefits and an application for an employment authorization document (EAD). The new form implements a requirement of the settlement agreement in *Hernandez v. Reno*, No. 9:93 CV 63 (E.D.Tex. Dec. 30, 1997), which requires the INS to consolidate the applications for Family Unity status and employment authorization. The fee for the combined application is \$120. The new form was issued on Apr. 26, 2001, and is available on the INS website: www.ins.gov.

INS INSTRUCTS ON WHAT CONSTITUTES TIMELY APPLICATION UNDER EXTENSION OF 245 (i) – The Immigration and Naturalization Service has issued a memo advising its field staff on what constitutes a valid and timely postmark for the purposes of establishing whether a visa petition or labor certification application was filed in time to qualify the beneficiary to adjust status under section 245(i) of the Immigration and Nationality Act. The memo also discusses procedures for collecting application fees, as well as how field offices should handle applications that do not fall within their jurisdictions. The Apr. 26, 2001, memo was signed by William Yates, the deputy executive associate commissioner for the INS Office of Field Operations.

INA section 245(i) allows immigrants who entered the United States without inspection or who overstayed their visas to adjust their status to lawful permanent residence without having to leave the U.S., provided they pay a \$1000 penalty and are beneficiaries of family- or employment-based visa petitions that were filed on or before a certain date. The 1997 "sunset" of 245(i) set that date at Jan. 14, 1998; the Legal Immigration Fairness Equity (LIFE) Act Amendments of 2000 moved the date up to Apr. 30, 2001, with the additional requirement that a principal beneficiary have been present in the U.S. on Dec. 21, 2000. The benefits of applying for adjustment under 245(i) are considerable. Ordinarily, undocumented applicants for immigrant visas are required to leave the U.S. and complete the immigration process through a consulate abroad. But persons who have resided unlawfully in the U.S. for six months or longer are barred from returning to the U.S. for from

three to ten years. The temporary reinstatement of section 245(i) provided a four-month window during which individuals could file the visa petitions or labor certification applications that could qualify their beneficiaries for adjustment under section 245(i). (For an update on the possibility that section 245(i) will be extended further, see "President Asks Congress for 245(i) Extension," this page.) Though the Apr. 30, 2001, deadline has passed, the information in the INS memo may help immigration practitioners determine whether the postmark issue and the other issues the memo addresses are of concern to their clients.

The postmark issue. The memo states that an immigrant visa petition that was physically received by the INS on or before Apr. 30, 2001, is timely filed for purposes of qualifying to adjust under section 245(i). Immigrant visa petitions postmarked on or before Apr. 30, 2001, are also considered to be timely filed. The term "postmark" means a stamp or other mark of cancellation placed on an envelope by the U.S. Postal Service (USPS).

According to the memo, INS field offices and service centers must retain evidence of the dates on which immigrant visa petitions or adjustment of status applications were mailed as part of the record of proceedings for all such petitions and applications they received from May 1, 2001, through May 3, 2001. The record of proceedings must include the original postmarked envelope or a copy of it, a private mail service invoice, or a metered envelope. All applications considered filed on or before the Apr. 30, 2001, sunset date that are received on or after May 1, 2001, must bear a stamp stating "Filed Prior to 245(i) Sunset."

All applications and petitions postmarked by the USPS that bear an Apr. 30, 2001, or earlier postmark date, regardless of the date the application or petition was received, must be considered filed on the postmark date. An application mailed to the INS in an envelope with an illegible or missing postmark must be considered postmarked on the sunset date, provided it is physically received by the INS either (1) on or before Apr. 30, 2001, or (2) during that same period of time that the INS continues to receive applications that bear an Apr. 30, 2001, postmark. The memo anticipates that period of time to extend three days beyond Apr. 30, 2001—i.e., to the close of business on May 3, 2001. Applications delivered by private mail service such as Federal Express will be treated the same as applications that have an illegible or missing postmark.

Applications and petitions received in envelopes with metered postage will be considered timely received if (1) they bear a USPS postmark of Apr. 30, 2001, or earlier, or (2) they do not bear a USPS postmark but the metered date is Apr. 30, 2001, or earlier and the envelope is received on or before May 3, 2001.

Out-of-jurisdiction filings. The memo instructs that all properly filed immigrant visa petitions and applications for adjustment of status must be accepted, without regard to jurisdiction. Applications filed in person should have been accepted through the close of business on Apr. 30, 2001; applications filed by mail should have been accepted through the close of business on May 3, 2001. Any accepted applications that are not adjudicated locally should be forwarded to the appropriate INS service center.

All INS field offices should have accepted the following filings:

- all applications/petitions that local offices normally accept locally that were filed by mail or in person;
- Form I-485 filed, by mail or in person, with an I-130, I-140, or I-360 petition;
- Forms I-130, I-140, or I-360 filed by mail or in person (including skeletal applications), as well as the Form I-485 application package without the fingerprint fee (the fee will be requested of the applicant).

The memo instructs field offices not to accept

- applications for labor certification;
- applications with "improper" application fees (except applications that are missing fingerprint fees);
- late legalization applications for adjustment of status; and
- applications for adjustment of status that do not comply with 8 CFR section 245.2(a)(2).

Fees. According to the memo, if an applicant submitted a single check to cover the fees for multiple applications and/or petitions, and the amount the check was written for was incorrect (i.e., it did not fully cover the cost of the fees), all of the applications must be returned to the applicant and a receipt should not be issued.

If an applicant submitted multiple checks for multiple applications and paid an incorrect fee for any of the applications, the applications with the incorrect fee payments must be returned. Receipts must be issued for those applications that *are* accompanied by the correct fee payments.

If an applicant submitted multiple checks for multiple applications and one or more of the applications depend on a principal application, field offices should "fee in" the principal application first, then "fee in" any applications that "ride" on the principal one. If the principal application must be returned because of a problem with the fee, all riding applications must also be returned.

PRESIDENT ASKS CONGRESS FOR 245 (i) EXTENSION – Calling himself a proponent of government policies that "recognize the importance of families and that help to strengthen them," on May 1, 2001, President George W. Bush sent a letter to leaders of the U.S. Senate and House of Representatives stating his support for legislation that would extend the benefits of Immigration and Nationality Act section 245(i). Section 245(i) allows immigrants who entered the United States without inspection or who overstayed their visas to adjust their status to lawful permanent residence without having to leave the U.S., provided they pay a \$1000 penalty and are beneficiaries of family- or employment-based visa petitions that were filed on or before a certain date. (For more about the benefits of section 245(i), see "INS Instructs on What Constitutes Timely Application under Extension of 245(i)," p. 4.)

The president's letter notes that while there may be 500,000 undocumented immigrants in the U.S. who, due to family relationships, are eligible to become lawful permanent residents, an estimated 200,000 missed the latest deadline—Apr. 30, 2001—by which family-based visa petitions must have been filed in order for their beneficiaries to qualify to adjust under section 245(i).

According to the letter, preliminary reports suggest that many applicants were unable to complete their paperwork in time because the INS took too long to issue regulations.

On May 21, 2001, the House voted 336-43 to move up another four months the "sunset" date for qualifying for section 245(i) adjustment. The legislation that passed in the House retains the provision requiring that, to be eligible for 245(i) adjustment, visa petition beneficiaries must have been physically present in the U.S. as of Dec. 21, 2000. It also requires would-be beneficiaries of 245(i) adjustment to demonstrate that the family or employment relationship upon which their visa petition is based existed prior to Apr. 30, 2001.

If passed with the new House restrictions, the legislation would require new implementing regulations. It seems unlikely that the INS would draft such regulations and publish them in time to give would-be applicants sufficient opportunity to submit quality applications before the new deadline.

Meanwhile, Senator Hagel (D-Nebraska) has introduced SB 778. The bill calls for a one-year extension of 245(i) and does not require that the employment or family relationship upon which the visa petition is based have existed prior to Apr. 30, 2001. The Senate Judiciary Committee will take up the bill when it resumes work after June 6, 2001.

INS ISSUES GUIDANCE IDENTIFYING SITUATIONS WHERE AFFIDAVITS OF SUPPORT ARE NOT REQUIRED – Two new policy memos issued by Michael Cronin, the INS acting executive associate commissioner, clarify that the enforceable affidavit of support (Form I-864) is not required for immigrants who have already acquired "forty quarters" of work credit and for immigrants who upon obtaining lawful permanent residence status will automatically become U.S. citizens under the Child Citizenship Act of 2000.

The enforceable affidavit of support is required for family-based immigrants, who apply for an immigrant visa or adjustment of status on or after Dec. 19, 1997. The I-864 form is also required in employment-based cases where a relative of the immigrant either filed the employment-based immigrant petition or has a significant ownership interest in the entity that filed the petition. The enforceable affidavit of support is a contract that requires a sponsor to maintain the immigrant at 125 percent of the federal poverty level. The income maintenance requirement continues until the sponsor dies, the immigrant becomes a citizen, or the immigrant obtains credit for forty qualifying quarters.

Forty qualifying quarters. The first of the two Cronin policy memos, both of which were issued May 17, 2001, states that if at the time an immigrant seeks lawful permanent resident status he or she can be credited with forty qualifying quarters of coverage, the immigrant is not required to file an affidavit of support. Since the obligations of the enforceable affidavit of support terminate when the immigrant has credit for forty quarters, no purpose would be served by requiring the form for immigrants who already meet this requirement.

A qualifying quarter is a unit of wages. Individuals who earn more than a minimum amount in a calendar year (the amount varies depending on the year) are credited with four quarters. Indi-

viduals also receive credit for quarters in which a spouse worked. The memo notes that an immigrant can receive this credit only if the spouse was married to the immigrant at the time the work was performed. To qualify for the spouse's forty quarters, the immigrant must remain married to the person who worked the qualifying quarters or show that the person who worked the quarters has died. An immigrant also receives credit for quarters in which a parent worked, if the immigrant was under 18 years of age at the time the work was performed. The statute does not require that the parent-child relationship exist when the parent works the qualifying quarters. Thus an immigrant who is adopted can claim quarters that the parent worked even before the child's birth or adoption.

The memo also notes that for quarters earned by a spouse or parent after Dec. 31, 1996, to be credited to the sponsored immigrant, neither the sponsored immigrant, the spouse, or parent could have received federal means-tested public benefits during that time period.

The Child Citizenship Act. Under the Child Citizenship Act of 2000 (CCA), foreign-born children of U.S. citizens, including adopted children and children of a parent who naturalizes, automatically acquire U.S. citizenship on the date they are admitted to the U.S. as lawful permanent residents. The second Cronin memo states that an affidavit of support is not required if, at the time an immigrant child seeks permanent residence through admission or adjustment of status, the immigrant can show that his or her admission will automatically confer citizenship under the CCA. Since the obligations of the affidavit of support terminate upon the immigrant's acquisition of citizenship, no purpose would be served by requiring the form for immigrants who will immediately and automatically become U.S. citizens.

The CCA provides that a child born outside the U.S. automatically becomes a citizen of the U.S. when all of the following conditions are fulfilled: (1) at least one parent of the child is a citizen of the U.S. whether by birth or naturalization; (2) the child is under 18 years of age; and (3) the child is residing in the U.S. in the legal and physical custody of the U.S. citizen parent pursuant to a lawful admission for permanent residence. The INS takes the position that the CCA applies only to individuals who meet each of the three requirements on or after Feb. 27, 2001, the effective date of the statute.

An immigrant orphan may be adopted either before or after the child's admission for permanent residence. If an orphan is adopted before he or she immigrates, the orphan will be in the legal and physical custody of the U.S. citizen parent at the time of admission. Since the admission will satisfy the last requirement of the CCA, the orphan will become a citizen when admitted and no affidavit of support will be required.

If the citizen parent is bringing the immigrant orphan to the U.S. to be adopted, the legal parent-child relationship will not exist at the time of admission. The orphan will not acquire citizenship until adoption establishes the legal parent-child relationship. Thus, the memo directs that an affidavit of support be filed in that case.

The new policy also applies to children adopted abroad who

are not orphans as defined in INA section 101(b)(1)(F) but who meet the definition of "child" in INA section 101(b)(1)(E) and are in the physical and legal custody of the adoptive parents. (INA section 101(b)(1)(F) refers to a child under the age of sixteen who is an orphan because of the death, disappearance, abandonment, separation, or loss from both parents or because the child's sole surviving parent is incapable of providing proper care and irrevocably released the child in writing for emigration and adoption by a U.S. citizen; section 101(b)(1)(E) refers to a child adopted while under the age of sixteen if the child has been in legal custody of and has resided with the adopting parent for at least two years.) If such a child's family is returning to live in the U.S. and the child is admitted as a lawful permanent resident, the child will automatically acquire U.S. citizenship upon admission. Therefore, adopted children as defined in INA section 101 (b)(1)(E) immigrating to the U.S. who otherwise fulfill the requirements of the CCA will also not be required to submit an I-864.

According to the memo, even if the immigrant will acquire U.S. citizenship under the CCA, an immigrant child seeking admission or adjustment of status as a lawful permanent resident must still show that he or she is not likely at any time to become a public charge. The memo states that the likely acquisition of citizenship must be weighed along with the traditional factors such as age, health, skills, and finances. In most cases, the public charge test will be easily overcome in light of the likely acquisition of citizenship in the near future.

INS Memos HQPGM 70/21 (40 quarters) and
HQPGM 50/10 (CCA) (May 17, 2001).

STATE DEPT. REMOVES FEE FOR CITIZENSHIP DETERMINATIONS – In a final rule effective Mar. 30, 2001, the U.S. Department of State rescinded the \$100 fee it had previously imposed for determining whether a person born abroad who has no previously issued U.S. government documentary proof of U.S. citizenship is indeed a U.S. citizen. Such a determination is required when a U.S. citizen born abroad applies for a U.S. passport and cannot present a previous passport, a consular report of birth abroad, a certificate of nationality, or a certificate of citizenship.

According to the State Dept., because the amount of time required for making citizenship determinations varies greatly, the fee does not reflect the actual costs involved in providing the service. Generally, the longer a person waits to seek to establish his or her U.S. citizenship, the more time-consuming the process. In some instances, however, citizenship determinations take very little time and the \$100 fee is excessive. The State Dept. has decided to revisit the fee schedule and impose no fee pending an inquiry into how much such services actually cost.

Since it anticipates an increase in citizenship determination requests as a result of the Child Citizenship Act (CCA), the State Dept. wanted to issue a rule as close as possible to the CCA's February 27, 2001, effective date. Under the CCA, most foreign-born children adopted by U.S. citizens will automatically acquire U.S. citizenship on the date they immigrate to the U.S.

66 Fed. Reg. 17,360 (Mar. 31, 2001).

BIA ISSUES DECISIONS INTERPETING HARDSHIP STANDARDS IN SUSPENSION AND CANCELLATION CASES – In two decisions issued the same day in different cases, the Board of Immigration Appeals highlighted the differences between the types and degrees of hardship that applicants for suspension of deportation, on the one hand, and cancellation of removal, on the other, must show in order to be granted relief. In the first case, the BIA granted the respondents' application for suspension of deportation but, in the second, denied the respondent's appeal of the immigration judge's order denying cancellation of removal.

Prior to 1996, individuals who had been continuously physically present in the United States for seven years, had good moral character, and could show that they, or a parent, spouse, or child would experience extreme hardship if they were returned to their country of origin qualified for suspension of deportation. With the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress replaced suspension of deportation with a new form of relief called cancellation of removal. The requirements that an applicant must meet in order to qualify for cancellation of removal are more stringent than those for suspension of deportation. They include ten years of continuous physical presence in the U.S., good moral character, and a showing that the applicant's U.S. citizen or lawful permanent resident spouse, children, or parents would suffer "exceptional and extremely unusual hardship" if the applicant were returned to his or her country of origin. Thus, whereas prior law allowed applicants to make a case that they themselves would suffer hardship, the post-1996 law takes into account only hardship to the individual's qualifying relative.

The respondents in the suspension of deportation case were a Taiwanese husband and wife with almost 20 years of continuous residence in the U.S. and five U.S. citizen children. During the hearing before the IJ, the parents testified that if they returned to Taiwan their family's standard of living would decline and, because their children do not speak Chinese, the children's education would suffer. The IJ found that the respondents failed to show that their deportation would result in extreme hardship. Upon review, however, an en banc BIA majority held that uprooting the couple's oldest child, a 15-year-old girl, and requiring her to live in Taiwan would be a significant disruption that would constitute extreme hardship to her. For the BIA, this was enough; it deemed it unnecessary to review the hardship that deporting the parents would cause to the other children.

In the case of the respondent who was denied cancellation of removal, the BIA found that he had failed to show that his removal from the U.S. would cause exceptional and extremely unusual hardship to his three U.S. citizen children or his lawful permanent resident parents. The respondent is a 34-year-old Mexican national who had resided continuously in the U.S. since the age of 14.

The BIA's analysis notes that, in the context of eligibility for relief from deportation, the phrase "exceptional and extremely unusual hardship" first appeared in the Immigration and Nationality Act of 1952, as a standard for applicants for suspension of deportation. The legislative history of the 1952 provision shows

that, at the time, Congress intended that the standard for qualifying for relief be very high. According to the BIA's decision, the House Report for the 1952 legislation indicates that suspension of deportation under this standard "should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable." However, the BIA declined to adopt an "unconscionable" standard, finding that the nearly fifty-year-old legislative history of a statutory provision arising in a different context provides little guidance for interpreting the cancellation of removal statute. In 1962, the suspension statute was amended to require only "extreme hardship," while the "exceptional and extremely unusual" standard was retained for applicants for suspension who were deportable because of criminal convictions or other misconduct. The BIA found little guidance from prior case law interpreting the meaning of the phrase "exceptional and extremely unusual," since these cases often depended on the hardship to the respondent, which is not a factor in the context of cancellation of removal. The BIA concluded that this language requires a showing of hardship beyond what has historically been required in suspension of deportation cases. The BIA held that the hardship shown must be substantially beyond the ordinary hardship that would be expected when a close family member is forced to leave the U.S. and goes to live in his or her country of origin.

The BIA reviewed the factors to be considered in cancellation of removal cases. Among the factors that may be weighed are the age, health, and other circumstances of the respondent's U.S. citizen and lawful permanent resident spouse, children, and parents. The possibility that the respondent's standard of living will be lowered or that there are other adverse conditions in his or her country of origin are factors that may be considered only insofar as they may affect a U.S. citizen or LPR family member. Generally, however, the presence of factors such as these is insufficient in itself to support a finding that the relevant U.S. citizen or LPR family members face exceptional and extremely unusual hardship should the respondent be removed. However, the BIA's decision suggests that a respondent whose child is a U.S. citizen or LPR with serious health problems might have a strong cancellation of removal case, as might a respondent with elderly U.S. citizen or LPR parents who are heavily dependent on the respondent.

Describing this case as a good example of the difference between the standards for suspension and cancellation, the BIA found that the respondent's removal to Mexico after 20 years' residence in the U.S., from the age of 14, would result in hardships and fewer opportunities for his U.S. citizen children, but that he nevertheless failed to show that they would face the level of hardship that would qualify him for cancellation. The BIA found that, because the respondent's U.S. citizen children can speak, read, and write both Spanish and English, they are likely to be able to adjust to life in Mexico. It found nothing out of the ordinary in the case that would justify a grant of cancellation of removal.

In re Francisco Javier Monreal, 23 I. & N. Dec. 56 (BIA 2001) (cancellation); *In re Bing Chih Kao*, *In re Mei Tsui Lin*, 23 I. & N. Dec. 45 (BIA 2001) (suspension).

BIA: ARIZONA AGGRAVATED DUI NOT A CRIME OF MORAL TURPITUDE

In an *en banc* decision, the Board of Immigration Appeals has ruled that an Arizona conviction for aggravated driving under the influence ("DUI"), where the conviction qualifies as "aggravated" under state law because of two or more prior DUI convictions, is not a crime involving moral turpitude. In reaching this decision, the BIA distinguished *Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999), which found that an aggravated DUI conviction after the defendant's license was suspended or revoked does constitute a crime of moral turpitude.

This case came to the BIA on appeal from an immigration judge's decision granting the respondent adjustment of status. Ruling on the appeal, the BIA first noted that the sole issue on appeal was whether the respondent is inadmissible for a crime of moral turpitude. Although under BIA precedent the crime would be considered an aggravated felony as a crime of violence, that is irrelevant in this context, since there is no ground of inadmissibility for aggravated felony convictions.

Noting that "neither the seriousness of a criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude," the BIA examined the specific language of the statute to determine whether a violation must necessarily involve moral turpitude, "without consideration of the circumstances under which the crime was, in fact, committed." The BIA found that under Arizona Revised Statute 28-697(A)(2), a violation occurs if the defendant commits a third or subsequent DUI offense. There is no knowledge requirement for a violation of this provision, unlike section 28-697(A)(1), which was at issue in *Lopez-Meza*. The fact that the conviction in *Lopez-Meza* required a showing that the defendant knew at the time of committing the offense that he was not permitted to drive at all was the "aggravating factor" that rendered the conviction a crime of moral turpitude. Since no such showing is required for a conviction under the statute at issue in this case, the BIA concluded that it does not constitute a crime of moral turpitude.

BIA member Lory Rosenberg wrote a concurring opinion to explain the interpretive principles that the BIA uses in determining whether statutes involve moral turpitude. Members Michael Heilman and Patricia Cole wrote dissenting opinions, with the latter joined by members Scialabba, Jones, and Grant.

Matter of Torres-Varela, 23 I. & N. Dec. 78 (BIA 2001).

BIA: IJs HAVE JURISDICTION OVER ARRIVING ALIENS' APPLICATIONS FOR ADJUSTMENT UNDER CUBAN ADJUSTMENT ACT

The Board of Immigration Appeals has ruled that immigration judges have jurisdiction to adjudicate applications filed by "arriving aliens" seeking adjustment of status under the Cuban Adjustment Act. The BIA concluded that, although generally only the Immigration and Naturalization Service has jurisdiction to adjudicate adjustment applications of arriving aliens, the Cuban Adjustment Act provides an exception to this rule.

The BIA's ruling turns on the meaning of the regulations issued by the attorney general in 1997 to establish "removal proceedings," as required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Historically, immi-

gration judges had jurisdiction over adjustment applications filed by immigrants in deportation proceedings. IJs generally did not have jurisdiction over adjustment applications filed by individuals in exclusion proceedings; such applications had to be adjudicated by the INS. There was an exception to this rule, for individuals who had previously filed adjustment applications, left the U.S. with advance parole, and on their return to the U.S. were paroled and placed in exclusion proceedings.

The IIRIRA replaced deportation and exclusion proceedings with a single form of proceeding: "removal proceedings." However, with respect to the availability of adjustment, the regulations implementing IIRIRA retain a key distinction between persons who under the old statute would have been put in deportation proceedings and those who would have been put in exclusion proceedings. The regulations define an "arriving alien" as an applicant for admission seeking to enter the U.S. at a port of entry; before IIRIRA, such individuals would have been placed in exclusion proceedings. And the regulations provide that an arriving alien in removal proceedings is ineligible to apply for adjustment "under section 245" of the INA. 8 CFR § 245.1(c).

However, the Cuban Adjustment Act is not encompassed within INA section 245, and the regulations do not expressly address the eligibility of arriving aliens in removal proceedings for adjustment under this act. The BIA decided that by limiting the eligibility of arriving aliens in removal proceedings to apply for adjustment "under section 245," the attorney general did not intend to bar their adjustment under the Cuban Adjustment Act. The BIA concluded that IJs have jurisdiction in removal proceedings to adjudicate applications filed by arriving aliens seeking adjustment under the Cuban Adjustment Act.

Matter of Artigas, 23 I. & N. Dec. 99 (BIA 2001).

BIA: RESPONDENT SUBJECT TO MANDATORY DETENTION EVEN WHERE INS DID NOT TAKE CUSTODY AT TIME OF RELEASE FROM CRIMINAL INCARCERATION

— In a sharply divided *en banc* decision, the Board of Immigration Appeals has ruled that the mandatory detention provision of section 236(c) of the Immigration and Nationality Act applies even where the Immigration and Naturalization Service did not take the respondent into custody at the time that he was released from criminal incarceration. In order for mandatory detention to apply, an immigrant must have been released from incarceration after Oct. 8, 1998, since individuals released on or before that date are subject to the Transitional Period Custody Rules (TPCR) rather than section 236(c) (see, e.g., "BIA: Mandatory Detention Not Applicable to Respondent Released Prior to TPCR's Expiration, Despite Later Conviction and Sentence of Probation," IMMIGRANTS' RIGHTS UPDATE, Nov. 28, 2000, p. 4). However, under this decision, as long as the release took place after that date, mandatory detention applies whenever the INS takes custody of the respondent.

In this case, the respondent was deportable both for having a controlled substance conviction and for having an aggravated felony conviction. He was released from incarceration after Oct. 8, 1998, but not immediately taken into INS custody. Section 236(c)(1) of the INA requires that the attorney general take an

alien into custody, if he or she is inadmissible or deportable because of specified criminal offenses, "when the alien is released." Section 236(c)(2) strictly limits the situation in which the attorney general may release "an alien described in paragraph (1)." In *Matter of Adeniji*, Int. Dec. 3417 (BIA 1999), the BIA held that section 236(c) applies only if the respondent was released from criminal custody after Oct. 8, 1998. However, the BIA in that opinion expressly left open the question of whether section 236(c) applies to an alien who was released after the expiration of the TPCR, but who was not promptly taken into INS custody. In this case the BIA addressed that issue.

The majority opinion, written by BIA Member Filppu, finds that the language of section 236(c) is ambiguous as to whether the mandatory detention requirement of paragraph 2 is limited by the phrase "when the alien is released" in paragraph 1. According to the majority, paragraph 2 could be read as prohibiting release either for anyone encompassed within paragraph 1's four categories of aliens with specified criminal convictions or for anyone with the specified convictions who also was taken into custody at the time of release from incarceration. The majority concludes that the first interpretation is correct, and as long as an immigrant has one of the specified criminal convictions, he or she is subject to mandatory detention regardless of when the INS takes him or her into custody.

In reaching this conclusion, the majority relies on several arguments. It finds that under a "natural reading" of the statute, the "when released" clause is not meant as a description of which aliens are subject to mandatory detention but rather is a directive to the INS to take such aliens into custody at the time they are released. The majority also finds that this reading of the statute best comports with the overall context of the INA, which does not generally distinguish between aliens on the basis of when they are taken into custody by the INS. In addition, the majority finds that this interpretation is most consistent with the statutory scheme of mandatory detention for aggravated felons under the pre-1996 INA. Finally, the majority also suggests that the alternative interpretation presents practical problems, in determining whether a lapse of one day, or one hour, or even one minute between release from criminal incarceration and the imposition of INS custody matters as to whether mandatory detention applies.

BIA Member Moscato wrote a concurring and dissenting opinion, joined by Member Villageliu. They argue that the "when released" clause simply modifies the list of specified criminal convictions. In other words, the alien must be considered convicted for one of the specified crimes at the time of his or her release, and the alien must in fact be released from criminal incarceration. Thus, they read the statute as mandating the attorney general to take aliens into custody who have the specified criminal convictions and who have been released from incarceration. But both the duty of the INS to take custody of the alien and the mandatory detention provision of paragraph 2 do not depend upon whether the alien is taken into custody at the time of release.

BIA Member Rosenberg wrote a dissent, joined by Members Schmidt, Guendelsberger, Miller, Brennan, Espenosa, and Osuna. They contend that the statute is unambiguous and that "when

released" is an integral part of the definition of which aliens are encompassed within the mandatory detention provision. They would remand the case for a bond hearing to determine whether the respondent should be released from custody.

Matter of Rojas, 23 I. & N. Dec. 117 (BIA 2001).

INS ESTABLISHES "PREMIUM PROCESSING SERVICE" FOR CERTAIN EMPLOYMENT-BASED APPLICATIONS AND PETITIONS – The Immigration and Naturalization Service has issued an interim rule establishing a "Premium Processing Service" under which businesses can obtain expedited processing of their applications and petitions by paying a special fee of \$1,000. The interim rule implements section 286(u) of the Immigration and Nationality Act, which was enacted on Dec. 21, 2000, as part of the District of Columbia Appropriations Act of 2001.

Under the interim rule, the INS is designating certain nonimmigrant employment visas for which adjudication will be expedited upon payment of the Premium Processing Service fee. Upon filing Form I-907 (Request for Premium Processing Service) and payment of the \$1,000 fee, the INS will act to adjudicate the application or petition within fifteen calendar days, either by issuing an approval notice, a notice of intent to deny, a request for evidence, or notice of an investigation for fraud or misrepresentation. If the INS fails to act within the 15-day deadline, it will refund the fee.

As of June 1, 2001, the INS is designating the following classifications within the Form I-129 Petition for Nonimmigrant Worker as eligible for expedited treatment under the rule: E-1 Treaty Trader, E-2 Treaty Investor, H-2A Agricultural Worker, H-2B Temporary Worker, H-3 Trainee, L-1 Intracompany Transferree, O-1 and O-2 Aliens of Extraordinary Ability or Achievement, P-1, P-2 and P-3 Athletes and Entertainers, and Q-1 International Cultural Exchange Aliens. Effective July 30, 2001, expedited processing will also be available for the additional classifications of H-1B Temporary Worker with Specialty Occupation, R-1 Temporary Worker in Religious Occupations, and TN NAFTA Professional.

66 Fed. Reg. 29,682–86 (June 1, 2001).

NILC MONITORING PUBLIC CHARGE ISSUES – The National Immigration Law Center is spearheading a project to monitor and document problems immigrants experience with public charge. Public charge is a term used in immigration law to describe persons who cannot support themselves and who are primarily dependent on the government for their subsistence. If the Immigration and Naturalization Service or the U.S. State Dept. consular offices abroad determine that a person is likely to become a public charge in the future, they can deny the person's application to immigrate to the U.S. or deny the person's reentry to the U.S. after a long stay abroad.

In May 1999, the INS issued a guidance clarifying that receipt of health care and other noncash benefits will not jeopardize the immigration status of immigrants and their families by putting them at risk of being considered a public charge. Nevertheless,

abuses persist and rumors abound that INS officers and immigration judges continue to ask questions about public benefits and deny immigration relief because immigrants have received benefits. NILC is attempting to document such incidences. To that end, it is producing a monitoring form that may be filled out with information about incidents in which immigrants encountered public charge-related problems. *The information will be held confidential unless the individual it concerns otherwise consents to its disclosure.*

Watch for the monitoring form to be posted on NILC's website at www.NILC.org, or contact Sara Campos to obtain a copy: (email) campos@nilc.org; (address) NILC, 1212 Broadway, Suite 1400, Oakland, CA 94612; phone 510-663-8282 x. 304; fax 510-663-2028. If you currently have information about an incident involving a public charge problem, please contact Sara to share the information.

Litigation

SUPREME COURT UPHOLDS HABEAS JURISDICTION AND FINDS 212(c) RELIEF STILL AVAILABLE TO CERTAIN IMMIGRANTS IN REMOVAL PROCEEDINGS

– As this issue of IMMIGRANTS' RIGHTS UPDATE goes to print, the United States Supreme Court has just issued a closely-divided decision finding that habeas corpus jurisdiction is still available to immigrants who have been ordered removed from the U.S. The Court rejected the contention of the Immigration and Naturalization Service that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) eliminated this basis of jurisdiction. The Court also ruled that the provisions of the AEDPA and the IIRIRA that make relief from removal unavailable to individuals who have been convicted of an "aggravated felony" offense do not bar relief for individuals who would have been eligible for a 212(c) waiver of deportation at the time they pled guilty to the offense.

The Supreme Court's decisions in this case, *Immigration and Naturalization Service v. St. Cyr*, and a closely related case, *Calcano-Martinez v. Immigration and Naturalization Service* (in which the Court affirmed the finding by the Second Circuit Court of Appeals that Congress, via the AEDPA and the IIRIRA, had removed ordinary judicial appellate review of removal decisions made by the government), are available at the Supreme Court's web site:

www.supremecourtus.gov/opinions/00slipopinion.html

Transcripts of the oral arguments in the two cases are available at:

www.supremecourtus.gov/oral_arguments/argument_transcripts.html

The next issue of IMMIGRANTS' RIGHTS UPDATE will feature a full story on the *St. Cyr* decision.

INS v. St. Cyr, ___ U.S. ___, No. 00-767 (Jun. 25, 2001);

Calcano-Martinez v. INS, ___ U.S. ___, No. 00-1011 (Jun. 25, 2001).

SUPREME COURT UPHOLDS CONSTITUTIONALITY OF CITIZENSHIP

STATUTE – By a narrow majority, the United States Supreme Court has upheld the constitutionality of section 309 of the Immigration and Nationality Act, which governs the acquisition of U.S. citizenship by persons born abroad to one U.S. citizen parent and one noncitizen parent when the parents are unmarried. The statute imposes different requirements for a child's acquisition of U.S. citizenship depending upon whether the citizen parent is the mother or the father. The Court concluded that this distinction does not violate the equal protection guarantee of the Due Process Clause of the Fifth Amendment. The 5-4 ruling upholds a prior ruling of the Fifth Circuit Court of Appeals and reverses rulings of the Second and Ninth Circuits (*see* "2d Circuit Strikes Down Citizenship Law on Equal Protection Grounds; Supreme Court Grants Cert in Contrary 5th Circuit Case," IMMIGRANTS' RIGHTS UPDATE, Oct. 19, 2000, p. 9).

Section 309 provides that a child born out of wedlock to a U.S. citizen mother and noncitizen father acquires U.S. citizenship at birth, provided that the mother previously resided in the U.S. for a period of one year. A child born out of wedlock to a U.S. citizen father and a noncitizen mother, in order to acquire U.S. citizenship, must meet some additional requirements. There must be clear and convincing evidence of a blood relationship between the child and the father. In addition, before the child reaches 18 years of age, one of the following events must take place: (1) the child must have been legitimated under the law of his or her residence or domicile; (2) the father must acknowledge paternity of the child in writing under oath; or (3) the paternity of the child must be established by adjudication in a competent court. (The statute contains an additional requirement that the father, unless deceased, have agreed in writing to provide financial support for the child until he or she reaches 18 years of age; however, this requirement did not apply in this particular case and was not addressed by the Court.)

The petitioner in this case, a Mr. Nguyen, was born to unmarried parents in Vietnam in 1969. His father was a U.S. citizen employed by a corporation, and his mother was a Vietnamese citizen. Nguyen came to the U.S. at the age of six, became a lawful permanent resident, and was raised by his U.S. citizen father. In 1992, at the age of 22, Nguyen pled guilty to two counts of sexual assault on a child. The Immigration and Naturalization Service subsequently initiated deportation proceedings against him based on those convictions. At his deportation hearing, Nguyen testified that he was a citizen of Vietnam, and he was found deportable.

While Nguyen's case was on appeal to the Board of Immigration Appeals, his father obtained an order of parentage from a state court based on DNA testing. By that time Nguyen was 28 years old. He asserted U.S. citizenship based on his parentage in his appeal to the BIA. The BIA rejected this claim, finding that Nguyen had failed to meet the requirements of section 309. Nguyen then sought review of the BIA's decision in the Fifth Circuit Court of Appeals, claiming that section 309 violates the doctrine of equal protection under the laws. The court upheld the constitutionality of the statute, and this appeal to the Su-

preme Court followed.

Justice Kennedy, writing for the majority, concluded that the additional requirements imposed by the statute for children of U.S. citizen fathers are justified by two important governmental objectives. The first is the interest in assuring that a biological parent-child relationship exists. Stating that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood," the majority found this a permissible basis for Congress to have imposed distinct requirements.

The second interest that the majority found to justify the statute is "to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop" a "real" rather than just a "formal" relationship. The Court found that for a mother such an opportunity "inheres in the very event of birth" but that for a father it does not. The majority was particularly concerned by statistics showing that, just in 1999, Americans made 59 million trips to other countries, often of short duration, creating a "realistic possibility" that some of them could father children without even knowing of the conception.

The majority also found that the statute is substantially related to the achievement of these important government interests. The Court found that the statute's additional requirements for fathers to pass on their citizenship are not burdensome, as they can be met simply by making a written acknowledgement of paternity under oath, or by legitimating the child, or by obtaining a court order of paternity. While the majority found it "unfortunate" and "even tragic" that the citizen father in this case who raised the child "did not pursue, or perhaps did not know of, these simple steps and alternatives," that omission does not invalidate the statute.

Justice O'Connor wrote a strong dissent that was joined by Justices Souter, Ginsburg, and Breyer. She contended that the majority, although it acknowledged that classifications based on sex must be examined with heightened scrutiny, failed to apply that principle in this case. She concluded that the majority's decision "represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of these precedents will ensure that today's error remains an aberration."

Tuan Anh Nguyen v. INS, ___ U.S. ___, No. 99-2071
(June 11, 2001).

IMMIGRANT FRAUD VICTIMS SUE INS TO HALT THEIR DEPORTATIONS

– In an attempt to halt their deportations, 19 plaintiffs who attempted to file family-based petitions and applications for adjustment of status under section 245(i) of the Immigration and Nationality Act and fell prey to immigration consultants filed suit in federal court against the Chicago District of the Immigration and Naturalization Service, as well as the attorney general and the acting INS commissioner. The suit charges that the INS should have rejected the adjustment applications as not "properly filed" rather than accepting the applications, denying them, and initiating removal proceedings. The suit also seeks the return of the plaintiffs' fees paid to the INS.

Congress enacted section 245(i) in August 1994 to allow certain immigrants eligible to immigrate who entered the U.S. without inspection or otherwise fell out of status to adjust to permanent residence in the U.S. without having to return to their countries of origin for consular processing, provided that they pay a special fee. The provision was enacted only for a three-year period, and in 1997 Congress allowed it to "sunset," or terminate. However, Congress did extend the provision in a limited manner, by allowing immigrants who are beneficiaries of visa petitions or labor certification applications to continue to adjust under section 245(i), provided that their petitions or applications were filed on or before Jan. 14, 1998. In the Legal Immigration and Family Equity (LIFE) Act Amendments, Congress enacted a further limited extension by allowing beneficiaries of petitions and applications filed on or before Apr. 30, 2001, to adjust under section 245(i). (For more information on 245(i) see "INS Instructs on What Constitutes Timely Application under Extension of 245(i)," p. 4).

With each 245(i) deadline there has been a flurry of activity within the immigrant community, as immigrants scramble to file petitions and applications on time. Unable to obtain services from attorneys, many immigrants seek assistance from unlicensed immigration consultants. Such consultants have been particularly active in the Chicago area and work as tax preparers, travel agents, beauticians, and notaries. Many immigration consultants misrepresent their credentials and pass themselves off as lawyers. While some immigration consultants perform adequately, many are grossly incompetent and others commit outright fraud.

In January 1998, before the previous 245(i) deadline, many immigrants who sought the services of immigration consultants and thought they were on their way to lawful permanent residence in the U.S. actually ended up in removal proceedings. Cesar Garcia, one of the 19 plaintiffs, was one of these hapless persons. Garcia and his wife are both citizens of Mexico. They entered the U.S. without inspection in 1995. The couple has a one-year-old U.S. citizen child as well as two Mexican-born children.

In January 1998, Garcia's wife's brother, who is a U.S. citizen, filed a visa petition on behalf of Garcia and his wife. The couple paid \$2,100 to an immigration consultant who then filed adjustment of status applications with the Chicago INS office. At that time, there was no visa immediately available to any of them. The waiting period for individuals in their category (4th Family preference for siblings of U.S. citizens) was twelve years. The INS Chicago District Office denied the couple's adjustment applications, kept the \$790 in processing fees, and placed them both in removal proceedings.

Garcia and other plaintiffs then filed a lawsuit, claiming that the INS should have rejected the adjustment applications as improperly filed. 8 CFR section 245.2(a)(2)(1) provides that in order to be retained for processing, an adjustment application must be "properly filed." The regulations further provide that if an immediate relative petition is submitted simultaneously with an adjustment application, the adjustment application shall be retained for processing *only if* approval of the visa petition would make a visa immediately available at the time of filing. Thus, proper filing

requires the existence of an immediately available visa. The INS Operating Instructions direct the INS to review applications to see if they have been properly filed. Those instructions also require the INS to reject and return fees to applicants who have not shown prima facie eligibility.

Finally, since the INS learned about the removability of these individuals only as a result of the agency's improperly accepting the adjustment applications, the suit asks the court to enjoin the removal proceedings for the plaintiffs. The lawsuit was filed by the Legal Assistance Foundation of Metropolitan Chicago and the Midwest Immigrant and Human Rights Center of Heartland Alliance.

Employment Issues

COURT GRANTS BROADER PROTECTIONS TO TEMPORARY EMPLOYEES

– The Fourth Circuit Court of Appeals has granted a petition filed by the National Labor Relations Board (NLRB) asking that its order against Labor Ready, a temporary employment agency with nationwide operations, be enforced. The court determined that certain workers whom the agency had treated as "nonemployees" were indeed employees of the agency and that Labor Ready's policy of prohibiting workers from engaging in any form of solicitation or from distributing literature on its premises is invalid because it interferes with employees' right to engage in concerted activities under the National Labor Relations Act (NLRA).

The court found that Labor Ready classifies workers as either new job applicants or "nonemployees." The latter are workers who have a job application already on file with the agency and who go there whenever they are seeking work. The complaint that resulted in this litigation was precipitated after a Labor Ready office in West Virginia began requiring workers to report to the agency early in the morning for job assignments. Four workers, one of whom was also an employee of the Affiliated Construction Trades Foundation, began circulating a petition at Labor Ready's offices requesting that the agency resume its former practice of giving assignments by telephone rather than requiring workers to appear in person. Labor Ready's management attempted to prohibit the workers from circulating the petition, but the workers asserted that their activities were protected by the NLRA. Over the next two months, Labor Ready installed a surveillance camera that recorded these workers' activities, and ultimately the agency blacklisted the worker it considered to be the leader of the effort, permanently barring him from all of Labor Ready's offices across the country as well.

Labor Ready argued that its express contract states workers are "deemed to have quit" each evening and that the employment relationship between the agency and the worker is not renewed until the worker receives another job assignment. However, the court held that under the NLRA an individual's status as an "employee" can continue between job assignments, even where there is no formal obligation of the employer or employee to continue in that relationship. Second, the court stated that another factor that determines workers' "employee" status is if they are "cus-

tomarily continued in their employment with recognition of their preferential claims to their jobs." Although most job assignments through Labor Ready are too brief to allow workers to have preferential rights to a job, the court found other evidence of "employee" status, including the fact that these workers often perform a particular job for several consecutive days and are allowed to keep the equipment they use beyond the duration of their job assignment, as was the case with the complainant in this case.

Finally, the court held that because Labor Ready required workers to be physically present in order to receive job assignments, such control over the workers was evidence that an employment relationship did exist between the agency and the workers. Affirming the NLRB's order finding that these workers were employees and therefore protected by the NLRA, the court also affirmed the remedies ordered, which include a nationwide prohibition against Labor Ready's practice of restricting employees' rights to engage in solicitation, a prohibition against video surveillance of employees, reinstatement of the main complainant with back pay, and a requirement that the agency post an announcement informing its workers about their rights under the order.

NLRB v. Labor Ready, Inc., No. 00-2064,
2001 U.S. App. LEXIS 11377 (4th Cir. June 1, 2001).

FOREIGN NATIONALS NOT PROTECTED AGAINST AGE DISCRIMINATION OUTSIDE U.S.

– In a decision with great ramifications for "guest workers" and other nonimmigrant employees in the United States, the Fourth Circuit Court of Appeals has held that the Age Discrimination in Employment Act of 1967 (ADEA) does not protect non-U.S. citizens who are discriminated against in a foreign country by a U.S. employer. The ADEA protects workers who are over 40 years old from age discrimination in the workplace.

There is no dispute that when the petitioner in the case before the Fourth Circuit, a Mexican national named Reyes-Gaona, applied to perform agricultural work in North Carolina under the H-2A program he was told that the North Carolina Growers' Association (NCGA) does not hire individuals over 40 unless they have previously worked for the NCGA. However, the federal district court dismissed Reyes-Gaona's complaint because he was not authorized to work in the U.S. at the time he applied for the job with the NCGA. In affirming the lower court's decision, the Fourth Circuit first noted that the ADEA requires that plaintiffs show they are qualified for the job they applied for, and in order to be a "qualified" job applicant under Fourth Circuit precedent an applicant must be authorized to work in the U.S. (The court cited *Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184, 187 (4th Cir. 1998), *en banc* (per curiam), *cert. denied*, 525 U.S. 1142 (1999) (unauthorized workers are not protected by Title VII against employment discrimination in the hiring stage).)

While the Fourth Circuit affirmed the dismissal of Reyes-Gaona's complaint, it did so on other grounds. It based its decision on the presumption that a U.S. law protects only individuals residing in the U.S. or one of its territories unless Congress clearly indicates that the law is to have "extraterritorial" application. The court found that prior to 1984 the ADEA "had a purely domestic

focus" and did not even cover U.S. citizens working for U.S. companies overseas. However, in 1984 Congress amended the ADEA to expressly extend its protections to U.S. citizens working abroad for U.S. businesses. Under the ADEA, the post-1984 definition of "employee" includes "any individual who is a citizen of the United States employed by [a U.S.] employer in a workplace in a foreign country." The Fourth Circuit found that because Congress specifically limited the application of that amendment to U.S. citizens in foreign countries and did not to include non-U.S. citizens residing abroad, Reyes-Gaona does not have a claim under the ADEA.

Reyes-Gaona and the Equal Employment Opportunity Commission, which, as the agency responsible for enforcing the ADEA, appeared as *amicus curiae*, argued that this case does not involve the extraterritorial application of the ADEA, since the petitioner was applying for a job within the U.S., not in a foreign country. They asserted that, in determining whether or not the ADEA applies to a specific instance of discrimination, courts look to the actual or proposed place of employment rather than to where the discriminatory decision was made. However, the court dismissed these arguments, stating that simply submitting a résumé or application abroad does not afford an individual the right to file a claim under the ADEA.

In a concurring opinion, Judge Motz emphasized that the majority's opinion does not undermine the rights of foreign nationals who are "legally employed" in the U.S. to be protected by the ADEA and other employment discrimination statutes. Reyes-Gaona was represented by the AARP Foundation Litigation, the Farmworker Justice Fund, Inc., and the Law Firm of Distefano & Erca.

Reyes-Gaona v. North Carolina Growers' Assn., et al., No. 00-1963, 2001 U.S. App. LEXIS 10524, (4th Cir. May 22, 2001).

COURT CERTIFIES LOW-WAGE DELIVERY WORKERS' CLASS ACTION

– In a lawsuit brought by immigrant delivery workers who worked long hours for subminimum wages, a federal district court in New York has granted the plaintiffs' motion that their state law-based claims be certified as a class action. The plaintiffs are low-skilled immigrants who worked 60 to 84 hours (six or seven days) per week delivering supermarket and drugstore merchandise to retail customers and were paid only one to two dollars per hour without overtime compensation. The group of approximately 1,000 workers, which includes many who are undocumented, filed a complaint on Jan. 13, 2000, pursuant to the Fair Labor Standards Act of 1938 (FLSA) and the New York Minimum Wage Act alleging that the defendants failed to pay them the required minimum wage or overtime when the defendants misclassified the workers as independent contractors.

Because the FLSA requires that each plaintiff in a lawsuit brought under it provide the court with a signed consent form agreeing to be part of a collective action, the plaintiffs brought their motion for class certification only for their claims under state law. The court found that the plaintiffs had met their burden of satisfying the four criteria set forth in Rule 23 of the Federal Rules of Civil Procedure for class certification: numerosity of plaintiffs,

commonality of issues, typicality of parties, and adequacy of representation.

In finding the proposed class was "numerous" enough, the court noted that the class's members, all of whom are low-wage workers, would not be likely to file individual suits against their employers because they lack the financial resources or access to lawyers necessary to do so and because they are afraid of retaliation, "especially in relation to the immigrant status of many" of them. Second, the court held that the central common issues to be decided for each worker in the proposed class were whether the worker was an employee or an independent contractor and whether the worker's rights under the wage and hour laws had been violated. Moreover, the court stated that any differences between class members regarding the number of hours they worked, the precise work they did, and the amount of pay they received has more to do with the amount of damages each worker might be entitled to rather than whether the defendants are liable.

The court also found that the plaintiffs proposed as the class representatives have claims and defenses that are typical of the rest of the members of the class in that they experienced the same working conditions. Finally, in concluding that the representative plaintiffs could "fairly and adequately protect the interests of the class," the court rejected the defendants' argument that the immigration status of the various named plaintiffs would affect their credibility and ability to represent the class.

The court also ruled in favor of the plaintiffs in holding that it would retain jurisdiction over the state claims alleged. The National Employment Law Project and Outten & Golden LLP represented the plaintiffs.

Ansoumana, et al. v. Gristede's Operating Corp. et al., No. 00 Civ. 253 (AKH), 2001 U.S. Dist. LEXIS 6717 (S.D. NY May 24, 2001).

PERDUE FARMS SETTLES OVERTIME LAWSUIT – After three years of litigation, over 100 chicken catchers in Maryland will receive the overtime wages long owed them by Perdue Farms, Inc. As part of the agreement that settles the chicken catchers' lawsuit against Perdue, the company agreed to pay the workers double their estimated overtime wages. The settlement agreement also resolves claims brought by two individual part-time workers that Perdue fired them in retaliation for their joining the lawsuit against the company.

The complaint, *Heath, et al. v. Perdue Farms, Inc.*, was initially filed in the U.S. District Court for the District of Maryland in September 1998. The plaintiffs sued to recover overtime wages they claimed Perdue owed them, and they sought other statutory damages available under the federal Fair Labor Standards Act of 1938 (FLSA) and Maryland wage law. The plaintiffs alleged that an average nine-member crew of chicken catchers caught between 30,000 and 50,000 chickens each shift and regularly worked approximately twelve hours per shift for at least a five-day week, yet they never received any overtime pay for the hours worked over forty hours per week.

Perdue argued that it was neither the sole nor "joint" employer of the chicken catchers and that the plaintiffs were instead employees of the independent contractor crew leaders who recruited

them. Perdue also argued that the plaintiffs are "agricultural laborers" and that, since the overtime provisions of the FLSA do not apply to such workers, the plaintiffs were not entitled to overtime pay.

In February 2000, the federal court ruled against Perdue, finding that the chicken catchers were indeed its employees. Moreover, the court gave deference to the position of the U.S. Dept. of Labor, which has consistently, since at least the early 1980s, taken the position that "live-haul" workers in the poultry industry are not agricultural workers and are entitled, under the FLSA, to overtime pay. The court found Perdue was in "willful" violation of the FLSA because it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."

As part of the settlement agreement, Perdue also recognized the chicken catchers as its "employees," which also gives them an opportunity to participate in the company's health and retirement plans, in addition to providing them with broader protection under state and federal employment and labor laws.

OSHA CITES FACTORY FOR HEALTH AND SAFETY VIOLATIONS – In response to a complaint filed by a Latino worker, the Occupational Safety and Health Administration (OSHA) of the U.S. Dept. of Labor has found that Superflex, Ltd., a manufacturer of plastic hoses in Brooklyn, NY, engaged in multiple violations of its workers' health and safety rights. The report, issued by OSHA almost three months after the worker filed the complaint on Feb. 9, 2001, states that the violations included a failure by Superflex to properly warn its employees of the severe hazards posed by the toxic chemicals the workers were exposed to, lack of training in the safe handling of such chemicals, and failure to provide the workers with the proper protective gear to carry out their work. OSHA fined the employer several thousand dollars and ordered it to remedy the dangerous conditions by June 13, 2001.

The complainant, Antonio López, alleged that throughout the two years he worked at Superflex his supervisor patrolled the factory carrying a pistol and forced López to work 12-hour shifts without a break. Because he had to eat his meals while working at the machines he operated without proper gear to protect him from the chemicals the machines used, López believes he ingested substances that severely and permanently damaged his kidneys. After López began twice-a-week kidney dialysis treatments, Superflex fired him. With the assistance of Make The Road By Walking, a community organization, he has also filed a claim pursuant to the Americans with Disabilities Act of 1990 with the Equal Employment Opportunity Commission.

COURT UPHOLDS WRONGFUL TERMINATION VERDICT IN FAVOR OF WORKERS WHO REPORTED EMPLOYER TO INS – A California court of appeals has affirmed a lower court's judgment and jury verdict awarding close to \$500,000 to two former garment workers who were wrongfully terminated by their employers after the workers told the Immigration and Naturalization Service that the employers were knowingly employing undocumented workers.

The two garment workers, a married Chinese couple, had worked for the employers, a garment manufacturing company

and a marketing company with which the manufacturer was closely affiliated, after they immigrated from China in 1992. According to the facts of the case as laid out in the appellate court's decision, when they first began working for the employers, the two workers lacked work authorization and did not know they needed it in order to be legally employed in the U.S. However, the employers obtained "work documents" for the two workers, documents that the workers later discovered were false. Eventually, the couple obtained legitimate work authorization.

While working for the garment manufacturing and marketing companies, the couple became aware that the companies were employing other undocumented workers. The husband complained about this to the employers and, at one point, threatened to report it to the INS. In March 1997, the husband made good on his threat, arranging to have the couple's 15-year-old daughter call the INS to report that the companies were employing workers they knew to be undocumented. In May 1997, the INS raided the companies and detained over 40 percent of their work force. Less than three months later, the couple were the only employees laid off when the employers claimed they were experiencing a slowdown in business. However, despite the claimed slowdown, the employers continued to hire new workers.

The couple sued the two companies, arguing that they had been wrongfully terminated. Specifically, they argued that the defendant companies fired them to retaliate against them for having reported a violation of state or federal laws against employing undocumented immigrants. Such retaliation, they argued, amounts to being fired for performing an act that established public policy would encourage. Under California law, employees who are fired for performing an act that public policy would encourage have the right to sue the employer that fired them—to sue for wrongful termination. The evidence the plaintiff workers presented convinced the jury that they had been wrongfully terminated, and the jury ordered both companies to pay the plaintiffs a total of nearly \$500,000 in compensatory and punitive damages.

In their appeal, the defendants argued that the California law upon which the plaintiffs based their claim that they had been wrongfully terminated is preempted by federal law—i.e., by the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 (IRCA). Since IRCA provides no private right of action such as the one the plaintiffs brought in this case, the defendants argued, the judgment in favor of the plaintiffs must be reversed. The court rejected this argument.

First, the court found that IRCA's prohibition against hiring unauthorized workers is clearly a public policy "involv[ing] a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer." It is a policy that is "fundamental" and "substantial," and that was "well established" at the time the plaintiffs were fired. Furthermore, it is a public policy that was established by a specific statute, so that "a violation of the statute is also a violation of public policy, and if an employer fires an employee who complains to the authorities about such violation, then the termination is a termination in violation of public policy. And such termination, being in contravention of a fundamental public policy, is hence actionable as the

tort of wrongful termination in violation of public policy."

Second, the court found that, since there is no conflict between IRCA and the California law that allows workers to sue for wrongful termination if they were fired for reporting that their employer was employing unauthorized workers, the federal law does not preempt the state law. "If anything," according to the court, "such actions help to enforce IRCA by providing some form of redress for persons willing to risk their jobs by reporting illegal activity." Moreover, the court found that Congress did not intend IRCA to preempt all state laws, since those types of state laws that Congress did intend IRCA to preempt are explicitly described within the statute. For example, IRCA prohibits state or local laws that impose sanctions on employers who knowingly hire undocumented workers.

The defendants also argued that the judgment against them should be reversed since the plaintiffs did not exhaust their administrative remedies under IRCA through the process provided under the statute's antidiscrimination provisions. However, the court found that those administrative remedies are not applicable to workers in the plaintiffs' situation: workers who are fired in retaliation for reporting that their employers are knowingly employing undocumented workers.

The defendants also contended that the evidence did not support the judgments against them, particularly those against the marketer, whom the defendants claimed was not the plaintiffs' employer. However, the court found sufficient evidence in the record to hold that both the manufacturer and marketer were employers of the plaintiffs, since the two entities were owned, controlled, and run by the same people; were run out of the same building; and had the same employees.

Luo Yu Jie, et al v. Liang Tai Knitwear Co., Ltd., et al., No. B135141, 2001 Cal. App. LEXIS 407 (Cal. Ct. App. June 3, 2001).

Immigrants & Welfare Update

N. Y. LAW RESTRICTING IMMIGRANTS' ELIGIBILITY FOR STATE MEDICAL AID FOUND UNCONSTITUTIONAL

– New York's highest court has ruled that the state violated the U.S. and state constitutions when it denied state-funded Medicaid to certain immigrants who lost eligibility for Medicaid under the 1996 welfare reform law. The New York Court of Appeals in *Aliessa, et. al. v. Novello* held unanimously that a New York statute limiting immigrants' eligibility for the state's medical assistance program ran afoul of the equal protection clauses of the New York and U.S. constitutions, as well as the New York constitution's requirement that the state and its subdivisions provide for the aid, care, and support of the needy.

The statute in question, Social Services Law section 122, restricts immigrants' eligibility for New York's state medical assistance program by banning qualified immigrants who entered the United States on or after Aug. 22, 1996, from receiving program benefits for five years and limiting coverage for those permanently residing in the U.S. under color of law (PRUCOL) to persons who were diagnosed with AIDS or residing in certain resi-

dential care facilities on the date it was enacted. Prior to Section 122's 1997 passage, the New York medical assistance program provided benefits to all lawful permanent residents and persons who were PRUCOL who met the program's financial eligibility requirements.

The state adopted Section 122 in response to the 1996 federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Title IV of the PRWORA made persons who are PRUCOL ineligible for Medicaid and imposed a five-year bar on the receipt of Medicaid benefits by most qualified immigrants who arrived in the U.S. on or after Aug. 22, 1996. However, the PRWORA also allowed states to provide state-funded benefits to persons whose immigration status made them ineligible for federal benefits, including people who are PRUCOL and qualified immigrants subject to the five-year bar.

The court considered several claims, first concluding that Section 122 violated the New York constitution's requirement that the state and its subdivisions provide for the "aid, care and support of the needy" and rejecting the argument that the provision of emergency Medicaid met the state's obligation. The court found that ongoing medical care is a basic necessity of life, explaining, "To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the damage of a substantial and irrevocable deterioration in his health."

Next the court turned to the equal protection claims. The plaintiffs urged the court to apply strict scrutiny to its evaluation of Section 122 because the statute made distinctions between groups of people on the basis of immigration status. The state argued that Section 122 should be upheld if the state had a rational basis for its adoption, on the theory that its differential treatment of immigrants merely implemented federal immigration policy. The court concluded that the PRWORA's delegation to the states of the authority to distinguish between different classes of legal immigrants in administering their benefit programs violated Congress's constitutional obligation to establish a uniform, national system for regulating immigration. Since Congress had not acted with constitutional authority in delegating this power to the states, any immigration-based classification established pursuant to the delegation should be evaluated under the strict scrutiny standard generally applied to states' alienage classifications. The court applied the strict scrutiny standard and concluded that Section 122 violated the equal protection provisions of the state and U.S. constitutions.

Other states are not bound by a decision of a New York court. Nonetheless, they should take note of the court's conclusion that states violate the U.S. Constitution when they discriminate among classes of immigrants in the administration of their benefit programs. The *Aliessa* decision should prompt states to examine their benefit programs for immigration-based classifications, including programs that fail to draw down federal funds for immigrants after the five-year bar, and it may encourage more states to extend benefits to all lawfully present immigrants. The decision could also add momentum to efforts to make federal funding available to restore benefits to qualified immigrants subject to the

five-year bar. Two bills that would partially restore benefits are currently before Congress. The Immigrant Children's Health Improvement Act of 2001 (ICHIA), S. 582, H.R. 1143, would allow states to lift the five-year ban and provide health coverage to eligible, lawfully present pregnant women under Medicaid and to children under Medicaid and the State Children's Health Insurance Program. The Women Immigrants' Safe Harbor Act (WISH), H.R. 2258, would exempt battered immigrant women from the five-year bar and render them eligible for the major federal benefit programs.

Aliessa et al. v. Novello, __NY2d__, 2001 N.Y. LEXIS 140D (N.Y. Ct.App. June 5, 2001).

2D CIRCUIT RULES THAT STATES MAY DENY PRENATAL CARE TO "NOT QUALIFIED" IMMIGRANTS

The U.S. Court of Appeals for the Second Circuit has ruled that Congress acted constitutionally in banning states from using federal Medicaid to provide prenatal care to women who are not "qualified" immigrants as defined in the Personal Responsibility and Work Opportunity Act of 1996 (PRWORA). The decision reversed a U.S. district court's conclusion that denying prenatal care to "not qualified" immigrants under section 401(a) of the PRWORA violated their U.S.-born children's constitutional right to equal protection. See IMMIGRANTS' RIGHTS UPDATE, Feb. 11, 2000, p. 8. Nonetheless, the court of appeals clarified, U.S. citizen children born to "not qualified" immigrant mothers have an equal protection right to be automatically eligible for Medicaid on the same basis as children born to U.S. citizen mothers.

The court's ruling will have little practical effect on the availability of prenatal care for undocumented women. At the time the decision was announced, only New York was receiving federal Medicaid matching funds for prenatal care services to "not qualified" immigrants. Many states use other resources, including state or local funds, to provide prenatal care to these immigrants. These services, as well as labor and delivery services funded in all states by emergency Medicaid, were not affected by the court's decision. In New York, legislation that would make prenatal care available to all immigrants regardless of status is currently pending.

The *Lewis* litigation has spanned several generations of Medicaid eligibility standards since it was filed in 1979. The recent case was the latest in a series of challenges to a 1987 injunction that barred the New York Medicaid agency from denying Medicaid-funded prenatal care to women on the basis of their immigration status. The district court had found that the PRWORA required the denial of such care but concluded that withholding prenatal care from "not qualified" immigrant women violated the equal protection rights of their U.S.-born children.

The court of appeals declined to find a constitutional basis for providing prenatal care to undocumented women. The court first rebuffed the argument that the denial of prenatal care violated the women's constitutional rights. The judges reasoned that the denial was within the scope of Congress's broad power to regulate immigration and must therefore be evaluated under a highly deferential standard. The New York Medicaid agency argued

that Congress had three objectives in adopting PRWORA's immigration provisions: a desire to deter illegal immigration, to encourage self-sufficiency, and to save on costs. The court acknowledged that it had no evidence that a person considers the availability of prenatal care when deciding to immigrate without documents but concluded nonetheless that deterring illegal immigration provided a sufficient rational basis for denying prenatal care. The court declined to discuss the other two rationales presented, despite the evidence described in its opinion that providing prenatal care is more cost effective than treating the conditions that result from its absence.

The court also rejected the district court's finding that the denial of prenatal care violated the U.S. citizen children's right to equal protection. This claim, brought by the mothers on behalf of the newly born children, related to the physical and mental challenges the children were likely to experience after birth because their mothers were denied prenatal care. The court held that the claim was precluded by the U.S. Supreme Court's decision in *Roe v. Wade*. "If," the court explained, "as *Roe v. Wade* instructs, a fetus lacks constitutional protection to assure it an opportunity to be born, we see no basis for according it constitutional protec-

tion to assure it good prospects after birth."

The court ruled, however, that children born to "not qualified" immigrant mothers are automatically eligible for one year of Medicaid coverage on the same basis as children born to U.S. citizen mothers. Finding that requiring applications from such children after birth disadvantaged them (compared to children who receive immediate coverage under their mother's Medicaid number), the court concluded that this disadvantage represented a denial of equal protection. The court of appeals remanded the case to the district court with instructions to revise the injunction. Until this process is completed, prenatal care remains available to New York women regardless of immigration status.

The body of the opinion closes with the court's observation that the New York Medicaid agency would likely need to adopt a procedure permitting the "not qualified" immigrant mother, during her pregnancy, to apply for and obtain a Medicaid number that would become effective upon the birth of her child. This would present an opportunity for New York to issue emergency Medicaid cards that women could use for their labor and delivery.

Lewis v. Grinker, __ F.3d __ (2d Cir. 2001)
(decided May 22, 2001).

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